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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MS. FRIED: Good morning, everyone.

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

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

As with past meetings, today's meeting agenda was published in the Federal Register. The agenda has been subsequently modified and a revised agenda was posted on the website. Due to
technical difficulties with microphones and the sound system, the location of the meeting that was originally posted in the Federal Register has changed to a different floor and the staff has posted a sign at the prior location and on the website indicating the new meeting location.

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

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

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

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

The Judicial Proceedings Panel was created by the National Defense Authorization Act for Fiscal Year 2013, as amended. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the
most recent amendments to Article 120 of the UCMJ in 2012.

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

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

Thank you very much for joining us today. We're ready to begin the meeting. Ms. Saunders, would you please walk us through the deliberation outline for the JPP Report on Barriers to the Fair Administration of Military
Justice in Sexual Assault Cases?

MS. SAUNDERS: Yes, ma'am. Ms. Holtzman and Members of the Panel, good morning.

Just, first, I will orient you to your materials that are related to the Subcommittee report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases.

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

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

Also, at Tab 3 of your materials is the Subcommittee report for your reference. And
at Tab 4 is a Court of Appeals for the Armed Forces case of United States v. Boyce that relates to the topic of this report.

MS. FRIED: Can I interrupt real fast?

I would also note that the report gets forwarded to the Secretary of Defense.

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

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

MS. SAUNDERS: Thank you, Ms. Fried.

Ms. Holtzman, would you like me to walk through the report for you to kind of refresh everyone's recollection?

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

MS. SAUNDERS: Okay. As you recall, at the last JPP public meeting, several Members of the Subcommittee presented its report on Barriers to the Fair Administration of Military Justice.

And walking through that briefly, the report
itself is based on, number one, information obtained from counsel and others during military installation site visits that were conducted last summer. I would note --

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

MS. SAUNDERS: Not yet, ma'am.

CHAIR HOLTZMAN: Oh, not yet?

MS. SAUNDERS: Yes, we'll --

CHAIR HOLTZMAN: Okay, fine.

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

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Okay.

MS. FRIED: Which is at Tab 3.

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

CHAIR HOLTZMAN: But at Tab 2, there's
MS. SAUNDERS: Yes, we're going to --

CHAIR HOLTZMAN: -- part of --

MS. SAUNDERS: As soon as I summarize

this --

CHAIR HOLTZMAN: Yes, good.

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

CHAIR HOLTZMAN: Okay.

MS. SAUNDERS: -- and discuss each, so

that you can deliberate on each separately. But

I wanted to point out that during the -- the

information that was gained or gathered during

the site visits was from a lot of senior and

junior counsel. At every single location, there

were senior trial counsel, senior defense

counsel, as well as others from which this

information came from.

Also, testimony before the JPP at the

January 2017 public meeting, testimony before the

Subcommittee meeting from military service

prosecutors and ethics officials, court-martial
data from documents, from the Court-martial Data Report gathered and analyzed by Dr. Cassia Spohn.

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

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

Beginning with the Article 32 hearing, there were some major statutory changes made to Article 32 of the UCMJ in the FY14 National Defense Authorization Act. Some of the major provisions that changed are that the Article 32 scope is now limited to a determination of whether there is probable cause to go forward, the Article 32 hearing no longer serves as a
discovery mechanism for the defense, and victims can no longer be compelled to testify at Article 32 hearings.

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

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

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

Typically, what they said would happen prior to the changes would be that they would
send a case to the Article 32 hearing, the victim
would testify, and other evidence and perhaps
other witnesses would testify, and based on the
strength of the case, that would go to the
convening authority for a decision.

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

Moving on into disposition guidance,
Article 34 of the UCMJ requires that the staff
decide to the convening authority before charges can be
referred to a general court-martial. The rules
also state that this pretrial advice must be
provided to the defense, if charges are referred
to trial.
What we heard from counsel is that
often -- and we have seen in, actually, some of
the documents that were provided by the Services
for cases, is that often the pretrial advice from
the staff judge advocate to the convening
authority does not go at great length and talk
about the strengths or weaknesses of the case,
because they know that it will then be turned
over to the defense and they don't want to tip
their hand, so to speak.

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

And speaking in terms of sexual
assault cases, that they're using a standard of
the low -- a low standard of probable cause in
deciding whether a case should be referred to
court. And many counsel felt that this was too
low and that cases with weak evidence are being
referred to court, which is resulting in a very
high acquittal rate.

Counsel perceived that, if the victim
wants the case to go forward to court, the
convening authority will refer the case,
regardless of the strength of the evidence.
Prosecutors and defense counsel on site visits
also overwhelmingly perceived that there is a
great deal of pressure on convening authorities
to refer sexual assault cases to trial, pressure
from Congress, pressure from the public, pressure
from the media, because of the high profile that
these cases have taken in the last few years.

Several statutory provisions from the
Fiscal Year 2014 and 2015 NDAA's have provisions
that require elevated review of a convening
authority's decision not to refer a sexual
assault case to trial, that it will either have
to go up to the next higher level convening authority or to the Secretary of the Service, depending on the circumstances of that. So, many counsel perceive that cases are being forwarded because of this pressure.

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

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

Many of the counsel on the site visits
and who testified before the Subcommittee
advocated a higher standard than just probable
cause for referring a case. One counsel
suggested a standard of whether there is
reasonable probability of success at trial.

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

There was also complaints from several
counsel that military members are receiving an
excess of training from Sexual Assault Prevention
and Response personnel on intoxication and
consent that may be inaccurate and it's tainting
panels when it comes time for them to hear cases
regarding sexual assault. Commanders also
complained about the frequency of this training
and that it's causing training fatigue.
Commanders and counsel also expressed concern about the expedited transfer policy. Some were concerned that it's being abused in order to obtain transfers to more favorable locations.

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

There were nine recommendations that the Subcommittee made in relation to some of these topics. I will state up-front that most of the recommendations, the Subcommittee realized that they were running out of time and did not have time to take a deeper dive into some of these issues, so they are recommending for most of these -- in most of these recommendations, they are recommending that the JPP's follow-on Panel, the DAC-IPAD, take a closer look at these
and determine what, if any, solutions there might be to some of these problems.

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

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

Such a review should look at whether preliminary hearing officers in sexual assault
cases should be military judges or other senior
judge advocates with military justice experience
and whether a recommendation of the preliminary
hearing officer against referral based on lack of
probable cause should be binding on the convening
authority.

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

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

CHAIR HOLTZMAN: So, I think we should
take these recommendations in order. And I guess
our first order of business is whether or not we want to adopt this recommendation.

MS. SAUNDERS: Yes, ma'am.

CHAIR HOLTZMAN: Is there discussion?

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

CHAIR HOLTZMAN: Yes.

PROF. TAYLOR: -- to make.

CHAIR HOLTZMAN: Sure.

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

MS. SAUNDERS: Yes, sir.

PROF. TAYLOR: That's what I thought.

MS. SAUNDERS: Yes, sir.

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

MS. SAUNDERS: Yes, sir. What would happen if the Panel elects to adopt some or all
of the report and recommendations and forward
them, what I would then do would be to prepare a
short executive summary, similar to what happened
on the military investigations report.

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

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

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

CHAIR HOLTZMAN: Right. In other
words, this is not -- the recommendation is the recommendation that's --

MS. SAUNDERS: No --

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

MS. SAUNDERS: Right.

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

MR. STONE: So, these --

CHAIR HOLTZMAN: But it's not --

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

CHAIR HOLTZMAN: No, we're not --

MR. STONE: -- discussion points?

MS. SAUNDERS: No, not at all.

CHAIR HOLTZMAN: These are just --

MR. STONE: These are just discussion points?

MS. SAUNDERS: No.

CHAIR HOLTZMAN: -- help to guide the
discussion and help us to understand --

MS. SAUNDERS: Absolutely.

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

MS. SAUNDERS: Certainly.

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

MS. SAUNDERS: Right.

MS. FRIED: Yes, ma'am.

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

And then, we could look at the backup
material and see if there is any, if we adopt the
recommendation, if there is anything that needs to be changed in the backup material that we -- not these little bullet points, Mr. Stone, but the backup material that we got from the Subcommittee.

MS. FRIED: Right.

CHAIR HOLTZMAN: Because these bullet points are just guidance.

MR. STONE: Okay.

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

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

CHAIR HOLTZMAN: Okay.

MS. FRIED: -- itself --

CHAIR HOLTZMAN: All right.

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

CHAIR HOLTZMAN: Oh, okay.

MS. FRIED: -- modify what you think you --
CHAIR HOLTZMAN: I got it.

MS. FRIED: -- want to add.

CHAIR HOLTZMAN: All right. Fine.

Okay. So --

MS. SAUNDERS: And my proposal, Ms. Holtzman --

CHAIR HOLTZMAN: All right.

MS. SAUNDERS: -- and the Panel --

CHAIR HOLTZMAN: So, then you've --

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: -- enlightened me.

Thank you. So, basically, we vote on Recommendation 1 --

MS. SAUNDERS: Right.

CHAIR HOLTZMAN: -- we adopt that, it takes everything that the Subcommittee recommended with it. If we want to make any other points about that, we can.

MR. STONE: So, today, we should make points about the bullets? I was under the --

CHAIR HOLTZMAN: Which bullets?

MR. STONE: These. In other words, we
should talk about these bullets.

CHAIR HOLTZMAN: Well, we could --

MR. STONE: Yes.

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

MS. SAUNDERS: You could create bullets.

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

MS. SAUNDERS: Right.

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

MS. SAUNDERS: Exactly.

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

MS. SAUNDERS: Exactly.

CHAIR HOLTZMAN: Right.

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

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

MS. SAUNDERS: Yes, ma'am.

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

VADM TRACEY: So, if I may, I believe this is a topic that deserves further examination. So, that part of the recommendation, I agree with. It isn't clear to
me how the appointment of a judge is going to
make the outcome any different, if in fact there
is a procedure in place that really limits the
material that's coming before the Article 32.

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

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

So, that would be probable cause, and
what they're recommending is something higher
than that, which is likelihood of success at
trial. So, there are two different things, whereas, the Article 32 hearing itself is limited to a probable cause determination.

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

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

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

VADM TRACEY: Okay.

CHAIR HOLTZMAN: -- necessarily infer
that that's the case, but that could have been --

VADM TRACEY: But then there's an --

CHAIR HOLTZMAN: -- part of the thinking.

VADM TRACEY: -- underlying assumption that the recommendations are sound. But our whole theory is that the Article 32 isn't actually doing anything, so why do we think the recommendations make sense?

MS. SAUNDERS: Well, I think the thoughts of the Subcommittee on that were that the perceptions right now, it's still -- the changes for this took effect in December of 2014, that right now things are still in flux. So, I think their perceptions are that this no longer serves a purpose.

I think what -- but they did not look at the data, they did not pull Article 32 reports, they did not look at -- compare how often, for example, recommendations made by the investigating officers in the older 32s were followed versus how often recommendations for the
CHAIR HOLTZMAN: What's changed, right.

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

CHAIR HOLTZMAN: Right. But --

MS. SAUNDERS: -- to determine.

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

MS. SAUNDERS: Right.

CHAIR HOLTZMAN: Where the -- and so, I think, just to follow up on the point I'm making, maybe, Ms. Peters or Ms. Saunders, you remember better than I do about the thinking behind this, but I guess some of the thinking
behind it may have been simply that it would give
more weight to the recommendation against going
forward or the absence of probable cause, even on
this limited hearing, if you had more expert
hearing officer or more experienced hearing
officers.

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

   CHAIR HOLTZMAN: Is that --

   MS. SAUNDERS: That's exactly --

   CHAIR HOLTZMAN: -- right?

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

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

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

   MS. SAUNDERS: Okay.

   VADM TRACEY: -- what I'm challenging
   is the recommendation actually says, and you
   should look specifically at assigning this duty
   to a more experienced cadre of people. What
difference is that going to make?

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

MS. SAUNDERS: Or that it could.

VADM TRACEY: Yes.

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

VADM TRACEY: Or I would --

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

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

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

VADM TRACEY: Explain why that might
matter.

MS. SAUNDERS: Okay.

VADM TRACEY: Okay?
MS. SAUNDERS: Okay.

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

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

MS. SAUNDERS: Okay.

VADM TRACEY: -- we agree that there is not enough data, probably, yet, because of how
recent the change is and so, it's something
that's going to have to be looked at over time in
order to get to it. I think those are factors
that we certainly have in the write-up --

MS. SAUNDERS: Right.
VADM TRACEY: -- and might modify the
language of the recommendation somewhat.
MS. SAUNDERS: Okay.
CHAIR HOLTZMAN: Is there any further
discussion on this?
MR. STONE: Yes, I've got a couple
things.
CHAIR HOLTZMAN: Okay.
MR. STONE: It seems to me that the
first line of the first bullet emphasizes that
what --
CHAIR HOLTZMAN: Wait a minute --
MR. STONE: -- we are suggesting here
is that the next Committee should reexamine the
Article 32 statutory changes from Fiscal Year
2014 NDAA, is that correct?
MS. SAUNDERS: I think they are
recommending that the process itself be looked
at, not that the -- I'm not sure if I understood
your question, Mr. Stone.

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

MS. SAUNDERS: Right.

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

CHAIR HOLTZMAN: No.

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

MR. STONE: Well, that leads to my next
question. Do you agree with what Admiral Tracey
just said as characterizing what you're saying,
that the process appears not to be working as
expected? That's what she said. Because that --
is that the tenor of this?
MS. SAUNDERS: I don't think that's exactly right, Mr. Stone. I think what they're saying is that, it did change. One of the purposes that counsel pointed out for the old Article 32 hearing, and I mean before this NDAA change, was that it was often used as a tool to examine the strength of a case and convening authorities relied on the additional information that that provided to help, for them, to help make that decision. They feel that this is no longer as useful a tool for that, because, for example, victims are not testifying, often other witnesses do not testify, and simply paper evidence.

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

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

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

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

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

MR. STONE: Okay.
MS. SAUNDERS: -- in the legislation.

It was expected that this would no longer be a discovery tool --

MR. STONE: Okay.

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

MR. STONE: Okay.

MS. SAUNDERS: -- in the legislation.

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

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

MR. STONE: Right.

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

MR. STONE: Okay. But our bullets don't say, it's worked out as expected, but there are some, as we said before, inadvertent consequences. We haven't said that in any of the bullets. And --
CHAIR HOLTZMAN: Excuse me, Mr. Stone.

Just one point. I think, just to clarify your own thinking, these bullets are not the final bullets --

MS. SAUNDERS: Right.

CHAIR HOLTZMAN: -- okay?

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

CHAIR HOLTZMAN: But I --

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

CHAIR HOLTZMAN: But can we --

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

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

MR. STONE: Right.

CHAIR HOLTZMAN: And then, if we want to add or subtract ideas from the bullets as opposed to the words in the bullets --
MR. STONE: Okay.

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

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

CHAIR HOLTZMAN: So, let's start --

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

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

MS. SAUNDERS: Right.

MR. STONE: So, I thought -- and I don't see that mentioned in the bullets --
CHAIR HOLTZMAN: But this is --

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

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

CHAIR HOLTZMAN: Right. Plus, I think, to add to Admiral Tracey's point, you're focusing, Mr. Stone, on the issue of investigations and Ms. Saunders focused on that. But this recommendation doesn't focus only on that point, it focuses on such other points as
the status of the preliminary hearing officer.
The question is to whether the preliminary hearing officer's determinations should be binding.

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

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

VADM TRACEY: That is what I meant by process.

MR. STONE: Okay.

VADM TRACEY: Is the fact that you cannot -- that the practitioners believe that you
can't make a determination from the Article 32 process today as to whether the case is winnable or not and, therefore, things are going to trial that wouldn't otherwise have gone to trial? That's a process issue, that isn't the NDAA.

MR. STONE: Okay.

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

PROF. TAYLOR: That's the same point that I was about to make, and that is that, the way I think of it, you've got the statute and then you've got the implementation and then you've got how Services are actually operating. Once the rubber meets the road, how is it actually working? So, I think all of that is part of the process.
But to your point, Mr. Stone, about independent investigators, no one is backing away from that, because in the last paragraph and in the last sentence, we reiterate our previous recommendation regarding the need for the defense to have independent investigators.

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

PROF. TAYLOR: Okay.

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

MS. SAUNDERS: That's correct.

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

CHAIR HOLTZMAN: That's --

MR. STONE: The determination by --

CHAIR HOLTZMAN: No --
MS. SAUNDERS: No --

MR. STONE: -- the presiding officer --

CHAIR HOLTZMAN: No --

PROF. TAYLOR: I don't think --

MR. STONE: -- was on probable cause?

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

CHAIR HOLTZMAN: No.

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

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

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

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

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

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

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

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

I think what they were thinking is, these changes have happened, they were
intentional changes, as you pointed out, Mr. Stone, by Congress, but here are the effects that they've had and is there some way we can alleviate some of these effects? For example, the law says it's not a discovery mechanism for the defense. One way to potentially alleviate that would be to provide defense investigators.

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

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

For example, would it be helpful to have more senior attorneys serving as preliminary hearing officers? Would it be helpful to have a -- if the preliminary hearing officer finds that there's no probable cause for an offense, would be beneficial to the process to have that be a
binding decision? They're not saying yes or no to this, they're saying they don't know, they don't have all the evidence, but they think that this should be looked at.

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

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

MS. SAUNDERS: Yes. I mean --

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

MS. SAUNDERS: Right.

MS. PETERS: -- to something --

MS. SAUNDERS: But I think what they're recommending is that there be a holistic look at this process. And not just the Article 32 process, as you'll see with some of the other recommendations, but the whole pretrial hearing process to determine, is the convening authority getting the information that he or she needs to make a determination whether a charge should be referred to court?
MR. STONE: Last time, and I guess I'll say this, this goes to the language of the recommendation, but also to the two bullets on Page 2, because I stated this for the record, but they showed up again and I certainly wouldn't want these bullets in there.

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

We heard testimony last time that they were in fact convicted in, I think it was 47 of the other cases, of what would have to be related offenses or they wouldn't be able to be charged in the same proceeding. And we also -- there was a footnote in the report that in five of those 54 cases, the Subcommittee did not receive, was not able to find in the files whether or not there had been a recommendation to proceed forward.
And then, I made the additional point that as to the cases where there was an acquittal, the acquittal comes about on a completely different and much higher standard, meaning it just means the jury couldn't find proof beyond a reasonable doubt.

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

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

At a minimum, therefore, in the language of the recommendation, where the last
sentence of the first paragraph says, starts,
this review should evaluate data on how often,
and I would insert there, and the reasons why,
the recommendations of the preliminary hearing
officers regarding case disposition are followed
by convening authorities, comma, and then I would
add, irrespective of acquittals, because they
invoke the highest standard of proof, i.e., proof
beyond a reasonable doubt, comma, and determine
whether further changes to the process are
required.

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

CHAIR HOLTZMAN: Okay. Is there any
further discussion on this? Because if not, I'd
like to go, first, to Admiral Tracey's proposal
and then to Mr. Stone's proposal. Any further
discussion on Recommendation 1? Okay. Admiral Tracey, do you want to -- can you restate your proposal for us, please?

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

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

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

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

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

CHAIR HOLTZMAN: All right.

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

CHAIR HOLTZMAN: Okay.
VADM TRACEY: -- not what he wants the DAC-IPAD to do.

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

VADM TRACEY: That would work.

CHAIR HOLTZMAN: -- a fair summary?

VADM TRACEY: That would work. Yes, absolutely.

CHAIR HOLTZMAN: Okay. Everybody --

JUDGE JONES: Yes.

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

(Chorus of aye.)
CHAIR HOLTZMAN: Opposed?

(No audible response.)

CHAIR HOLTZMAN: It's carried.

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

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

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

VADM TRACEY: -- by some means?

MS. SAUNDERS: That is in one of the other recommendations regarding this new Article 33 guidance.
VADM TRACEY: But that's why we think -- that's the benefit we think there is to having a more senior --

MS. SAUNDERS: Okay.

VADM TRACEY: -- PHO, right?

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

VADM TRACEY: Yes.


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

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: Would you want that --

VADM TRACEY: Is there any --

MS. SAUNDERS: -- included in the recommendation, ma'am? Where we list some of these other things, like having a more senior counsel, would you want that language included,
and whether or not they should be able to make a
recommendation on the winnability? Or, I mean,
different language, but --

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

MS. SAUNDERS: Right.

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

CHAIR HOLTZMAN: Okay.

MS. SAUNDERS: Okay.

VADM TRACEY: -- right?

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

VADM TRACEY: Right.

CHAIR HOLTZMAN: -- reasonable

likelihood of success. Okay, so --

VADM TRACEY: And I personally don't
support a binding recommendation. So, I don't
know how to deal with that in the way that this
process works.

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

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

VADM TRACEY: Yes, it is.

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

PROF. TAYLOR: Well, I think it can go

in the discussion without touching the

recommendation. That's, at least, my thought.

MS. SAUNDERS: Certainly.

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

JUDGE JONES: I agree.

CHAIR HOLTZMAN: And so, if you just continue same old, same old, how is that going to counter? Now, this may not be a suggestion, having a binding recommendation by the preliminary hearing officer may not be a good solution to the problem, but I think it's important to try to understand what the thinking was behind that thought.
That doesn't mean you need to adopt it. And I think the language is pretty -- it just says, to consider whether that should be a result. But I think that that was the reasoning or thinking behind it.

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

CHAIR HOLTZMAN: Okay. So --

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

That that is potentially corrosive to the trust in the military justice system to the extent that that's believed to be true or it is actually true. And that, by itself, deserves
further work by the Secretary and a stand-alone recommendation to that effect might be --

CHAIR HOLTZMAN: So, for purposes --

VADM TRACEY: -- important.

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

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

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

MR. STONE: Oh, okay.

VADM TRACEY: -- recommendation.

MR. STONE: Okay.

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

MR. STONE: Experience?

VADM TRACEY: Yes, experience.
CHAIR HOLTZMAN: Where are you?

MR. STONE: Okay.

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

MR. STONE: Right, seventh line.

CHAIR HOLTZMAN: All right.

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

PROF. TAYLOR: Well, I can just try again on that. What I had in mind actually ties together those two thoughts. And that is that if you had a more senior judge advocate with military justice experience or a military judge who could develop a more complete record, then if
that happened, I would be more comfortable with
the recommendation of the preliminary hearing
officer against referral having more weight.

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

VADM TRACEY: I do, it does.

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

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

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

PROF. TAYLOR: Yes.

VADM TRACEY: Okay.

CHAIR HOLTZMAN: Or something like
that.

VADM TRACEY: Good.

CHAIR HOLTZMAN: I'm still going to
vote against it, but --

(Laughter.)

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

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

CHAIR HOLTZMAN: Excuse me, can we just --

MS. PETERS: Yes, ma'am?

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

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: -- so we don't forget
that and then we'll go back to your point?

MS. PETERS: Yes, ma'am.

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

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

CHAIR HOLTZMAN: Yes, that would be great.

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

VADM TRACEY: Yes.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: All in favor?

(Chorus of aye.)
CHAIR HOLTZMAN: Opposed? No. Okay, carried. Okay. Meghan, do you want to give us your concern that you just raised?

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

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

So, I would just -- want to make sure that the staff provides clear language that reflects the Panel's intent. Do we want the Secretary of Defense to undertake a review
regardless of what the DAC-IPAD does and we hope
the --

CHAIR HOLTZMAN: I think that was our
--

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

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Yes.

MS. SAUNDERS: Okay.

VADM TRACEY: That was my intent.

MS. SAUNDERS: Okay, great.

CHAIR HOLTZMAN: And I guess the
follow-up point though, which I hadn't thought
about and maybe you had thought about it,
Admiral, but I didn't, suppose the Secretary of
Defense decides to do nothing, do we want to
recommend that the DAC-IPAD itself undertake it?
Can we?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Is that --

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

CHAIR HOLTZMAN: By the Secretary?

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

CHAIR HOLTZMAN: I see. Okay.

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

VADM TRACEY: Right.

CHAIR HOLTZMAN: So, is that

objectionable to anybody, that if the Secretary
of Defense does not refer this to the DAC-IPAD,
that they should feel free to do it? Or are we
just saying nothing about it?

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

MS. PETERS: Okay, ma'am

VADM TRACEY: -- the perfect answer.
MS. SAUNDERS: We can work with the language on that.

CHAIR HOLTZMAN: Okay.

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

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

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

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

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

MS. FRIED: I think so.

MS. SAUNDERS: And --

CHAIR HOLTZMAN: Well, just read what
we changed.

MS. SAUNDERS: Okay.

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

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

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

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

CHAIR HOLTZMAN: No, whether --
MS. SAUNDERS: -- whether a recommendation of such a preliminary hearing officer against referral based on lack of probable cause should be given more weight by the convening authority. And then, it would continue with, this review, and the rest would remain as-is.

CHAIR HOLTZMAN: Ms. Fried, are you --

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

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

MS. FRIED: Yes.

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

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

CHAIR HOLTZMAN: -- where we are?

Okay. Mr. Stone?

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

MS. SAUNDERS: Okay.

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

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

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

MR. STONE: Well, we're not actually
going to do that, they are.

CHAIR HOLTZMAN: How is anybody --

MR. STONE: I mean, whether they're

going to --

CHAIR HOLTZMAN: -- going to do that?

MR. STONE: Whether they're going to do

the --

CHAIR HOLTZMAN: How is anybody --

MR. STONE: -- same thing --

CHAIR HOLTZMAN: How is anybody going
to do that?

MR. STONE: They're going to do it the

same way the Subcommittee did if they want,
they'll hold hearings on a non-attribution basis
in closed, non-public setting, if they wish, and
ask them to give them what they think is going
on.

Or they could, in terms of a process,
ask these more senior officials, and this could
be the process in any of the Services, to please
use a check sheet. Or they could ask them to
give a two sentence explanation when they do it.
But I think that if we're going to look at that, recommend that somebody look at it, we should give them some guidance in that direction. If you want to say, how often and the reasons why, if available, but I don't think that's necessary. We're just saying, and the reasons why, they should be asking the question if they can. It's a meaningful question, it avoids confounding two issues, which is what I think happened here.

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

MR. STONE: Yes, maybe you can --

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

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

PROF. TAYLOR: I certainly understand why you would like to know that, on the one hand. On the other hand, when the convening authority is exercising his or her discretion to make one of these decisions, in effect they're exercising quasi-judicial prosecutorial authority, which I
think in the past the Department has generally
not encouraged people to try to penetrate to any
significant extent.

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

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

MR. STONE: I guess where that came
from -- let's see if I can find it here -- is we
got the SAPRO flowchart at an earlier meeting,
perhaps you recall it, and there's a whole -- on
that flowchart -- if I can find it here, give me one second -- it seems to be an analysis of the various reasons why cases didn't go forward.

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

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

I mean, they have all of these explanations and it seems to me, to the extent that they exist and they're putting them in a flowchart and numbering them for us, they may be
able -- they can ask the question.

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

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

And I also don't think it's that helpful. I mean, if we got a whole bunch back, were they just -- even if they just checked off, no probable cause or other, I would find that very helpful when I went back and I looked. That alone would be enough for me.
VADM TRACEY: But the difference in the list that you just run through and --

MR. STONE: Yes.

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

JUDGE JONES: For an opinion, right.

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

JUDGE JONES: Right.

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

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

VADM TRACEY: I think --

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

VADM TRACEY: But that --

MR. STONE: -- remember --
VADM TRACEY: But that is now the view of the court-martial convening authority, whereas those are all facts.

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

JUDGE JONES: Could I just suggest that --

MR. STONE: -- look at that data?

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

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

CHAIR HOLTZMAN: Yes, I'm concerned about where that takes us. And I don't know that
making that a suggestion here is really -- I'm just concerned about it.

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

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

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

MR. STONE: -- where the --

JUDGE JONES: If they want to do it all, I think the better way is to look at one
where the hearing officer says, there's no
probable cause here, but the commander goes
ahead. Then you have a trial record and you have
the report of the reviewing officer. I'm not
suggesting we need to recommend that, but I
wouldn't recommend looking into what the
commanders --

MR. STONE: Okay.

JUDGE JONES: -- involving the
commander.

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

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

CHAIR HOLTZMAN: Okay. I would make,
if we wanted to go there at all --

JUDGE JONES: Right.

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

JUDGE JONES: I think that works.

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

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

VADM TRACEY: Same here.

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

MR. STONE: I can live with that language, but I would still like to have some language that says, taking into account that
acquittals involve the much higher standard of proof, i.e., beyond a reasonable double.

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

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: So, you'd add --

MS. SAUNDERS: Determine whether --

CHAIR HOLTZMAN: -- further analysis --

MS. SAUNDERS: Of or changes to --

CHAIR HOLTZMAN: To, yes.

MS. SAUNDERS: -- the process?

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

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

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

MR. STONE: Yes. At the very end of the sentence, it would say, taking into account
that acquittals involve a much higher standard of proof, i.e., beyond a reasonable doubt.

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

MR. STONE: Aye.

VADM TRACEY: Aye.

CHAIR HOLTZMAN: Opposed?

JUDGE JONES: No.

CHAIR HOLTZMAN: No.

PROF. TAYLOR: No.

CHAIR HOLTZMAN: Noes have it. Okay.

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

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

CHAIR HOLTZMAN: Why do we need --

MS. FRIED: -- comments on --

CHAIR HOLTZMAN: -- to know that now?

We're only on Recommendation 1.

MS. FRIED: Right, but they're disagreeing or not agreeing to --
CHAIR HOLTZMAN: Whether they want to write one, why do we have to know that after every single recommendation? Do we need --

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

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

VADM TRACEY: I don't.

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

MS. FRIED: That's fine.

VADM TRACEY: I agree.

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

CHAIR HOLTZMAN: Okay.

MR. STONE: -- all I can say is I reserve that --
MS. FRIED: That's fine.

MR. STONE: -- question. And --

CHAIR HOLTZMAN: Okay.

MR. STONE: -- when I see what the

staff sends me as their recompiled version --

CHAIR HOLTZMAN: All right.

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

CHAIR HOLTZMAN: Let's --

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

position --

CHAIR HOLTZMAN: Okay. Let's --

MR. STONE: -- to decide.

CHAIR HOLTZMAN: -- go to

Recommendation 2.

MS. SAUNDERS: Okay. Recommendation 2

reads --

CHAIR HOLTZMAN: So, we've supported

Recommendation 1 with the amendments, right?

MS. SAUNDERS: Have you -- I'm sorry,

I guess I should do some housekeeping. Have you

voted on the recommendation as a whole with the

amendments?
CHAIR HOLTZMAN: No, that's what I was asking. Let's do that.

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

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

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

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

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

CHAIR HOLTZMAN: No, definitely --

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

CHAIR HOLTZMAN: -- not the bullets.

MR. STONE: Got you, okay.

CHAIR HOLTZMAN: The bullets will be circulated and --

MR. STONE: Okay. Right, got it.

CHAIR HOLTZMAN: Okay.

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

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

CHAIR HOLTZMAN: Is there discussion of
this recommendation?

MR. STONE: Yes. Unless somebody else
wants to go first.
CHAIR HOLTZMAN: Mr. Stone, the floor

MR. STONE: Sure.

CHAIR HOLTZMAN: -- is yours.

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

CHAIR HOLTZMAN: That's in the bullets though.

MR. STONE: Yes, I know.

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Right.

MR. STONE: -- part from the report.

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

guidance to be considered --

CHAIR HOLTZMAN: What page are you on?

I'm sorry, but --


MR. STONE: Page 15.

CHAIR HOLTZMAN: Oh, he's saying 15.

MS. SAUNDERS: On the -- in the report

that you have at Tab 3, it's --

CHAIR HOLTZMAN: It's on Page 10?


CHAIR HOLTZMAN: Okay, thank you.

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

MS. SAUNDERS: Okay.

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

It starts, Item 2, legislation and the --

CHAIR HOLTZMAN: Right.


CHAIR HOLTZMAN: That's on Page 10 in

our --

MR. STONE: Okay. Well, I'm reading

from the one --
CHAIR HOLTZMAN: Yes, okay.

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

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

The second issue is the specific language of -- it's the last four or five -- the last two lines of that measure, the last three, charges as brought by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt. Okay.
Since the -- on viewing Article 33, going back to, again, what you call Page 10, the next sentence states that this guidance should take into account the principles contained in the official guidance of the Attorney General, blah, blah, blah.

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

And I think that not only takes into account the other guidance, I think it meets the new Article 33 and it avoids us using terms like reasonable likelihood and beyond a reasonable doubt in the standard, both of which I think at that early stage, at a minimum are confusing and
at a maximum don't belong there.

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

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

And I went back and looked, because I used the U.S. Attorneys' Manual all the time when I was a prosecutor at the Department of Justice, and I see that under the paragraph that's being quoted here, which is 9-27.200, and Chapter 9-27 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
and, because I don't think I want to get into all of that and since it's non-binding, for all of those reasons, I would just try and use what the Air Force has already decided is a stricter standard and the Coast Guard and the Navy noted informally to us that they're using the same thing.

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

CHAIR HOLTZMAN: Why don't --

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

CHAIR HOLTZMAN: -- we do Paragraph 1?

MR. STONE: Okay.

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

MR. STONE: I might just add, just one
little footnote to that and that is, not only do
I like what the Air Force and the Navy and the
Coast Guard have done, but I haven't heard from
all the other Services, ourselves, their official
position on a change like that.

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

CHAIR HOLTZMAN: Okay.

MR. STONE: -- that's stricter.

CHAIR HOLTZMAN: So, I have a
suggestion that could solve point one, which is
the use of the word require, since the language,
as you point out, of the Article 33 is
discretionary, not mandatory. What about using
the word include so we're not saying requires?

MR. STONE: I couldn't do that, because

that would just mean it could be more than this.

CHAIR HOLTZMAN: Well, what do you want

then?

MR. STONE: I told you, I want to use

the standard that the Air Force and the Navy --

CHAIR HOLTZMAN: I'm not going --

MR. STONE: -- and the Coast Guard are

using.

CHAIR HOLTZMAN: -- there, I'm just up

to the word require. I'm just changing the word

require, that's all I'm doing, to have the word

include, so that we're not mandating something

that actually Article 33 doesn't mandate. I

thought that was the point you were making.

That's all I'm doing, so that --

MS. SAUNDERS: I think the require as

intended to be what the guidance would say, but

that the guidance would also make it clear that

it was non-binding. That's a little confusing.

MR. STONE: I guess we could use the
word suggest, instead of require.

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

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

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

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

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

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

CHAIR HOLTZMAN: Right.

JUDGE JONES: -- in addition to --

CHAIR HOLTZMAN: Right.

JUDGE JONES: -- what we're saying
here. I mean, I like the Air Force language, but
basically it's a shorthand for what's being said right here, which may give more guidance.

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

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

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

MR. STONE: So, we even put, such as,
right after advocates, instead of required?

Because that would --

CHAIR HOLTZMAN: No.

MR. STONE: -- be good, such as the Air

Force standard?

CHAIR HOLTZMAN: Yes, right, that could

be something, sure. Include --

MR. STONE: That could do all of that.

VADM TRACEY: So, it would say --

CHAIR HOLTZMAN: So, it --

VADM TRACEY: -- disposition guidance

for convening authority and staff judge advocates

that include --

MR. STONE: No, I think it would just

say advocates, such as, the --

VADM TRACEY: Okay.

MR. STONE: -- Air Force standard, and

quote it if you want or --

VADM TRACEY: Okay.

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

JUDGE JONES: And take out the charges

are supported by probable cause and --
CHAIR HOLTZMAN: Right.

JUDGE JONES: -- in this draft?

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

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

CHAIR HOLTZMAN: All right, so this one?

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

CHAIR HOLTZMAN: Okay. Well, I'm not necessarily opposed to that, although I think it may be too limiting. Well, the other way to do it is to leave this present language and say, include the following standard for consideration before referral for court-martial or for
referral, so that you're considering the standard as opposed to actually applying it. I don't know if that works either, just throwing out ideas.

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

CHAIR HOLTZMAN: Do you have it --

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

MR. STONE: The Air Force one?

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

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

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

MR. STONE: Right. Right, they said it wasn't formal, but --
MS. SAUNDERS: Right.

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

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

PROF. TAYLOR: Number 7 of what?

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

PROF. TAYLOR: What page are we on?

Page 4?

MS. SAUNDERS: On Page 4 --

MR. STONE: Yes.

MS. SAUNDERS: -- of your outline. He advocates a standard for referral of whether there is probable cause and a reasonable likelihood of success at trial. That was what the Navy commander testified to before the Subcommittee. He, again, explained that this was
not formalized in any kind of --

MR. STONE: Right.

MS. SAUNDERS: -- policy.

MR. STONE: Right.

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

MR. STONE: Correct.

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

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

MS. SAUNDERS: Right.

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

CHAIR HOLTZMAN: I don't object to it, the present formulation. I agree with Mr. Stone's point that we shouldn't be requiring that's not otherwise required, but --
JUDGE JONES: And I like the idea that we're only saying that it's something that should be included and there are obviously other reasons a commander will make a decision than just this.

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

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

MR. STONE: Except that what the NDAA said was to look at the U.S. Attorneys' Manual, the Attorney General's guidance. And his
guidance, as I just read to you from 9-27.230, specifically goes beyond an assessment of the likelihood of a guilty verdict based on the evidence and allows in an appropriate circumstance or appropriate circumstances to go beyond the strength or weakness and consider matters, including the harm inflicted and the victim's desire for prosecution. So, to the extent they went beyond that, it seems to me we have to be careful about going back. I'm --

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Right.

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

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

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

MR. STONE: You want to just say --
JUDGE JONES: -- I think.

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

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

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

CHAIR HOLTZMAN: No.

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

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

CHAIR HOLTZMAN: Well, he --

MR. STONE: Well, can I --

CHAIR HOLTZMAN: What I was going to suggest, Admiral Tracey, is exactly along those lines, which is, instead of require, you put include, and then you say, the following standard
to be considered before referral to court-martial. It doesn't say, only standard. So, that's another way of doing it, so we just add those four words and replace require with include. I don't know whether that satisfies or not.

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

CHAIR HOLTZMAN: Yes. Okay.

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

CHAIR HOLTZMAN: Judge Jones, did you --

JUDGE JONES: Well, I mean, that's the long way of saying, likelihood of success at trial.
CHAIR HOLTZMAN: Right.

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

(Laughter.)

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

CHAIR HOLTZMAN: Any other comment?

Mr. Taylor, where are you on this? What do you think?

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

JUDGE JONES: Right.

CHAIR HOLTZMAN: Right.
PROF. TAYLOR: -- to which Mr. Stone and the Attorney General's guidance refer and which are really part of the jurisprudence right now.

CHAIR HOLTZMAN: Correct.

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

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

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

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

PROF. TAYLOR: Standard for --
JUDGE JONES: -- factors?

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

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

JUDGE JONES: The ultimate decision.

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

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

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

CHAIR HOLTZMAN: Oh, okay.

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

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Okay.

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

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

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

CHAIR HOLTZMAN: Yes.

MR. STONE: -- case disposition
guidance --

CHAIR HOLTZMAN: Right.

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

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

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

And I don't think it's in the U.S. Attorneys' Manual and those are words are not in
the ABA standard. So, to avoid -- I mean, you can strike those four words or you can just use the Air Force standard, if you think that actually, by innuendo, includes it. Either way, I'm fine, I just can't see injecting, beyond a reasonable doubt, into a standard before you've stepped into a courtroom.

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

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

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

MR. STONE: Yes.

PROF. TAYLOR: Yes.

MR. STONE: No, I mean, some of those do, but what they're directed to look at is the AG's guidelines and the U.S. Attorneys' Manual. And I'm telling you that none of us here have begun to discuss that in the depth, there's
probably 30 pages on this in 9-27, because it
goes from 9-27.00 all the way up. It's a very
long, complicated provision. And they don't just
do it on the elements of each offense, there's a
million other considerations that go in.

MS. SAUNDERS: Right.

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

MS. SAUNDERS: Those would be --

MR. STONE: -- avoid focusing --

MS. SAUNDERS: -- the guideline factors

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

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

MR. STONE: Well, my proposal is we put
in the Air Force standard there or we just delete
the words, beyond a reasonable doubt. And I
could accept either one of those and --

CHAIR HOLTZMAN: All right.

MR. STONE: -- I guess --

CHAIR HOLTZMAN: Admiral Tracey --

MR. STONE: -- if we want to take a

take a vote on one or both --

CHAIR HOLTZMAN: We will.

MR. STONE: -- I'll take whichever one

people like.

CHAIR HOLTZMAN: Admiral Tracey, do you

want to be heard on this?

VADM TRACEY: I could go with striking

the, beyond a reasonable doubt, adopting the

language that's quoted from the Attorneys'

Manual, or adopting the Air Force's.

CHAIR HOLTZMAN: Okay. Well, let's

start, let's break this down into two parts.

Number one, I want to withdraw what I had

suggested before about changing required to

include and I will accept Mr. Taylor's analysis.

And I'd like to have a vote on his language about
non-binding. Is anyone opposed to that?

(Chorus of no.)

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

MR. STONE: Non-binding case disposition guidance?

CHAIR HOLTZMAN: Correct.

MR. STONE: Okay.

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

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

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

JUDGE JONES: Oh, I'm sorry.

(Laughter.)

CHAIR HOLTZMAN: That's the next vote.

You got ahead of me.

JUDGE JONES: Rarely.
(Laughter.)

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

MR. STONE: Aye.

VADM TRACEY: Aye.

CHAIR HOLTZMAN: Opposed?

PROF. TAYLOR: No.

CHAIR HOLTZMAN: No.

JUDGE JONES: No.

PROF. TAYLOR: Good.

CHAIR HOLTZMAN: Noes have it, okay.

So --

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

CHAIR HOLTZMAN: Go ahead.

VADM TRACEY: -- language which will now be used in forming the decision making of
SJAs and convening authorities and we've insisted throughout this process that convening authorities are not experienced in judicial practice and now we've stuck this language about a very high standard, beyond a reasonable doubt, into the decision making process they're going to make based on Article 32 products that don't actually address that issue.

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

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

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

MS. SAUNDERS: What --

JUDGE JONES: Well, I mean, you do -- look, you either do have the proof or you don't, when it's being analyzed by the JAG and the
commander, by his lawyer. And if you don't have
enough, then you don't send it forward. So, it's
not like they --

VADM TRACEY: But the other
formulations --

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

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

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

JUDGE JONES: I just -- Admiral, I know
-- I wouldn't even pretend to know as much about
what actually happens between the commander and
the advice given by his or her lawyer, but beyond
a reasonable doubt is so embedded, I would think
that certainly the lawyer would discuss it and
explain if they thought the admissible evidence
wasn't going to pass that standard.

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

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

VADM TRACEY: But I think these other
formulations --

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

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

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

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

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

JUDGE JONES: -- beyond a reasonable doubt.

MR. STONE: -- in yesterday's Washington Post on Page 3, the article about the Flint water crisis, and they were quoting the fact that they've indicted some people, because
there is probable cause to believe that they
intentionally did some things that were really
improper.

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

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

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

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

CHAIR HOLTZMAN: But that seems to me

is exactly the point about this, which is, the

commander may reject the need for following this

standard, but the commander should have that

standard in mind. That's really the point here.

And I think one of the things that was

cconcerning to the Subcommittee was the thought

that we didn't have to bother about this whole

issue of likelihood of conviction and we didn't

have to think about that.

This doesn't determine the outcome, it

just says, this is a standard that has to be

considered. So, I don't think that -- and I

think by saying non-binding at the top, it makes

it clear that this is still a recommended

guidance.

But I think that the guidance is still

important, because maybe the commander wasn't

thinking about, hey, yes, I mean, any chance of

getting beyond a reasonable doubt? No, I don't
think so. Well, hmm, do I still want to bring this, can I still bring this? And maybe that informs the conversation with the SJA.

MR. STONE: I think that --

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

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

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

And there's going to be very little corroborating evidence at that time. Sure, you might have whether they texted in the past,
whether they were married in the past, or
whatever, but as to that event, what you really
have is simply the demeanor of your victim versus
the demeanor on the stand of the defendant.

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

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

So, I think for the cases we are
focused on, it is an especially problematic use
of those four words. And we did not elicit
testimony before us, the JPP, from the official representatives of all the Military Services we seek to bind and I think that is a very legitimate and difficult question and, therefore, I wouldn't want to suggest to anybody that the UCMJ guidance should start there.

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

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

I would have trouble, I don't know how I would say I have a reasonable likelihood of beyond a reasonable doubt. I'm just evaluating their credibility. So, for this narrow category, I think it's especially problematic and that's -- for the commanding authority, the convening
authority, as was pointed out here by the Admiral.

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

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

CHAIR HOLTZMAN: Oh, I'm sorry.

MR. STONE: -- of Recommendation 2.

CHAIR HOLTZMAN: Forgive me. Okay.

Mr. Stone, do you have --

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay.

MR. STONE: I think that the first sentence, which says, recommends judge advocate and convening authority consider all the prescribed guideline factors, though they should retain discretion, is fine. I think that's right
I think, though, that the last sentence contradicts the first sentence. The factors should be considered in their totality with no single factor determining the outcome. First of all, it's confusing to me, I don't know what that means, unless it means, no single factor can tip the balance. And when you go to - - that would be inconsistent with the report.

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

Factor H was, the availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction. I think any one of those could be a single determining factor and a proper one.
So, I, therefore, think that that last sentence is much too broad and it conflicts with the prior sentence about them having discretion. And I don't think it adds anything, because we've got, consider all the prescribed guideline factors. So, I would -- my proposal is just delete that last sentence.

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

JUDGE JONES: No.

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

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

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

(Whereupon, the above-entitled matter went off the record at 10:51 a.m. and resumed at
11:05 a.m.)

CHAIR HOLTZMAN: We're up to Recommendation 3.

MS. SAUNDERS: Recommendation 3 reads:

the JPP Subcommittee recommends that after case disposition guidance under Article 33 UCMJ is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions.

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

CHAIR HOLTZMAN: Is there any discussion on this?

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

- PROF. TAYLOR: Yes.
CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Any objection to that?

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

CHAIR HOLTZMAN: Oh, Admiral Tracey?

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

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

VADM TRACEY: I agree, yes.
JUDGE JONES: I do remember that.

Okay, thank you.

CHAIR HOLTZMAN: Is there any objection to that change?

(No audible response.)

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

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Thank you. Any other --

MR. STONE: Yes.

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

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

I mean, in other words, it seems a little odd if we think that they don't have to
make a listing and then, we say in the last line,
has had on the number of sexual assault cases
being referred to courts-martial and on the
acquittal rate

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

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

JUDGE JONES: I better respond, let me
just see this. I mean, it does suggest that you
would go and talk to people, the same way the
Subcommittee did. I'm sure -- I'm not quite sure
I understand your question. Whether convening
authorities and staff judge advocates are making
effective use of this guidance, I guess they'll
get opinions from the participants in the system
at the site visits.

    CHAIR HOLTZMAN: Isn't --

    JUDGE JONES: I'm not quite --

    CHAIR HOLTZMAN: Isn't the --

    JUDGE JONES: Go ahead, I'm sorry.

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

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

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

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

CHAIR HOLTZMAN: Correct.

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

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

MR. STONE: But the Subcommittee hasn't
measured. They did 280-some interviews out of 1.3 million people in the military and they took them anonymously and they didn't even suggest that it's statistically significant.

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

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

MR. STONE: Okay.

JUDGE JONES: -- but I think I'd leave that up to them.
CHAIR HOLTZMAN: And, also, the Secretary of Defense may decide, may have some views about how it should be conducted too, so I don't --

MR. STONE: Again, I --

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

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

CHAIR HOLTZMAN: Okay.

MR. STONE: -- that it sounded like we were in the same discussion we'd had before, but we at least are as to the five words on the last line that says, and on the acquittal rate, because once you get to the acquittal rate, you've got a different standard of proof and you can't really go back.
I might add as an example from my experience, when we had GAO audits to see whether the Federal Witness Security Program was a good program, and I was counsel to that program. Initially, they came in and they said, well, are you getting more convictions, because you're providing protection to certain high-status and difficult witnesses, crime witnesses, and are we getting bang for the buck?

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

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

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

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

So, for those reasons, yes, I'm fine
with, has the number of sexual assault cases
being referenced to court-martial, they could
look at that, but, and on the acquittal rate,
that's mixing apples and oranges, so I would move
to just delete those words.

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

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Okay. Are we ready to adopt Recommendation 3?

All in favor, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Opposed.

CHAIR HOLTZMAN: The ayes have it.

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

CHAIR HOLTZMAN: Okay.

MR. STONE: -- of those five words.

CHAIR HOLTZMAN: The ayes have it and

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

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

CHAIR HOLTZMAN: Okay. Any discussion
of this recommendation?
VADM TRACEY: I'd make the same --

CHAIR HOLTZMAN: Yes.

VADM TRACEY: -- Secretary of Defense.

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

JUDGE JONES: No.

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

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

CHAIR HOLTZMAN: Mr. Stone?

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

I mean, I understand that's a rational inference, but even in the Subcommittee report, it said, it may do this. I mean, they heard from some people who worried about it. And in light
of that -- and then the fact that this is one
that I absolutely would have wanted the official
representative of each Service to come in and
tell me why they have it one way, whether it
would bother them to change it the other way,
whether we're affecting the stream of what
they're doing.

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

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

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

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

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

And within the structure of -- I don't
have to tell you, Mr. Stone, you don't release internal memos of advice between people in the Justice Department, all the way up to the top of decision about bringing charges.

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

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

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

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

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

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

That's all we're saying. And it's been a problem that's been highlighted and there's a good rationale for taking a look at it,
so it seems to me that it's something that's perfectly within the norms that they should take a look at.

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

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

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

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

But it goes -- on the same page, and this is the key one, it says, before the committee -- this is, in this case, the committee is the FACA committee, the main committee -- can produce final recommendations, it must gather information, explore options with agencies to get comments and reactions, and evaluate alternatives.
Well, that leaves me thinking, at least as to this one, that before I can vote on a final recommendation, I would have needed to gather information directly from the Military Services, explore the options with them to get their comments, which we ran out of time, and their reactions, and evaluate alternatives, which they may have offered. Now --

VADM TRACEY: Alternatives to conducting a review?

MR. STONE: Excuse me?

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

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

VADM TRACEY: But we're not recommending that.

MR. STONE: -- some paragraphs are --

VADM TRACEY: We're not recommending
that.

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

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

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

It's sort of like me recommending, there could be lots of issues I could hypothesize that I hope that the next committee will review, but I don't feel like there's anything in front of me that, as the main committee in a public
forum, I have to be able to weigh in on that. I don't oppose it, but I also don't -- I feel at a loss to know how I can vote for it.

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

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

MR. STONE: I read those.

MS. SAUNDERS: Okay.

MR. STONE: I say --

MS. SAUNDERS: I'm just saying, I
didn't include --

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

MS. SAUNDERS: -- it in this.

MR. STONE: -- I might be --

MS. SAUNDERS: Okay.

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

CHAIR HOLTZMAN: Okay. Well --

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

CHAIR HOLTZMAN: Okay.

JUDGE JONES: Well, I just think that because, one, the issue was identified to the Subcommittee and, two, this is a procedural recommendation rather than a substantive one and, three, we can all recognize, with or without,
well, the Subcommittee identified it, but with or without that, that this is an issue that is a process treated differently in the military than in the civilian criminal justice system. I think that's enough for our FACA group to determine that we would make this recommendation.

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

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Abstain, one abstain.

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

MS. SAUNDERS: Recommendation 5 reads:

the JPP Subcommittee recommends that Congress repealing provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, Sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to
the Service Secretary.

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

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

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

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

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

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

MS. SAUNDERS: Period and then --

CHAIR HOLTZMAN: Yes.

MS. SAUNDERS: -- the rest --

CHAIR HOLTZMAN: Is harmful, yes, because this says the perception --
MR. STONE: Yes, is harmful.

CHAIR HOLTZMAN: -- oh, and the

consequent negative, yes.

MR. STONE: Is --

CHAIR HOLTZMAN: Are harmful, period.

MS. SAUNDERS: Are harmful, period?

MR. STONE: Right, period.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: Okay.

MR. STONE: Okay.

CHAIR HOLTZMAN: Is there any objection
to that?

JUDGE JONES: No, I agree completely.

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

VADM TRACEY: Not with that change.

CHAIR HOLTZMAN: Okay.

(Laughter.)

MR. STONE: You want your beginning --

CHAIR HOLTZMAN: All right.

MR. STONE: -- change again, too?

VADM TRACEY: No, this is to the
Congress.

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Right.

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

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

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

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

JUDGE JONES: Yes.

CHAIR HOLTZMAN: -- your point?

JUDGE JONES: Yes.

MR. STONE: Yes.

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

JUDGE JONES: Yes.

MR. STONE: That we could --

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

MR. STONE: Right. To review the --

CHAIR HOLTZMAN: -- create these --

MR. STONE: -- regulatory
implementation guidelines that require non-referral to be forwarded.

CHAIR HOLTZMAN: Judge Jones?

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

(Laughter.)

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

VADM TRACEY: I believe that --

JUDGE JONES: -- how the systems --

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

JUDGE JONES: So, in other words, you would still -- you wouldn't have the specifics
that occur here? In other words --

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

JUDGE JONES: I see, so --

VADM TRACEY: -- at a broader --

JUDGE JONES: -- you might recommend
that --

VADM TRACEY: -- category, so I --

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

VADM TRACEY: In the worst case.

(Laughter.)

JUDGE JONES: But that, in other words
--

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

It's not uncommon for us to do that,
when we are trying to fix something. And so, to have engaged in a way that made this less about only not, the evilness of not referring case to court-martial, is what the Congress is --

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

VADM TRACEY: Exactly.

JUDGE JONES: -- is that --

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

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

VADM TRACEY: Maybe something like that, I think.

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

JUDGE JONES: Well, we would --

CHAIR HOLTZMAN: -- the Secretary of Defense.

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

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

JUDGE JONES: Well, we need them desperately --

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

JUDGE JONES: -- to think about --

VADM TRACEY: -- okay for you to --

JUDGE JONES: Yes.

VADM TRACEY: -- go think about this.

I mean, because --

JUDGE JONES: Yes.

VADM TRACEY: -- it was such a pointed
CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: They know your views, Barbara --

JUDGE JONES: Yes, I think they --

CHAIR HOLTZMAN: -- I think, very well.

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

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

MR. STONE: That's right. So, one of the questions that I want to know is, don't you think we could simply recommend that the Secretary review his implementation guidelines to include referral as well as the statutory required non-referral decisions about, blah,
blah, blah, blah, blah? In other words, can't we make a nice recommendation that broadens it and that he could do in his discretion without Congress at all?

VADM TRACEY: I'm with you.

MR. STONE: Got to count on you --

VADM TRACEY: Even just to --

MR. STONE: -- for the language.

VADM TRACEY: -- look at the --

recommend that the Secretary look at the perception, look at ways to address the perception of pressure on convening authorities that is generated by the implementation of those NDAA --

JUDGE JONES: Right.

VADM TRACEY: -- changes.

JUDGE JONES: Right.

VADM TRACEY: Find ways to mitigate those.

JUDGE JONES: Yes, I think we have to play with it, but I would think that's a good idea.
CHAIR HOLTZMAN: So, but is that -- so, then you would, what, junk, sorry, not -- we would just delete or not recommend anything to Congress? I mean, what would we -- if we were going to recommend to the Secretary of Defense that he examine how to implement that recommendation without creating this perception of undue influence, what are we going to do about the Congress? Are we going to just not address anything to them or what do you want to do about that?

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

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

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

CHAIR HOLTZMAN: They listen to us so much --

(Laughter.)

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

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

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- handled. And then, I thought it was even more interesting that the
following year, they added to another category, 
that is the chief prosecutor of the Service could 
request --

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Correct.

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

So, I do think that for us to simply 
recommend that they repeal, as opposed to 
something that's somewhere in-between, because we 
know that their intentions were good, but we 
think that one of the problems here has turned 
out to be, either unlawful command influence,
which we have seen, because people either don't want to make the decision or they think they're going to make the decision a certain way, we've seen some cases about that in the media recently.

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

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

So, I don't know whether the Congress considered that, which would be a less dramatic remedy in some ways. And yet, in other ways, it
would be more dramatic, because it would move the
decision farther away from the person who
actually has responsibility for maintaining good
order and discipline.

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

PROF. TAYLOR: Exactly.

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

PROF. TAYLOR: Right.

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

And so, both Congress and the
Secretary of Defense should consider measures
that, on the one hand, advance the idea of not
ignoring these cases and treating these cases
with the utmost seriousness, and at the same
time, making sure that you don't have undue
command influence. So, I have no problem with,
if the staff can figure out how to say that, I
think that's a good alternative, Admiral.

JUDGE JONES: Yes, I --

PROF. TAYLOR: I agree.

JUDGE JONES: -- I'm for it.

CHAIR HOLTZMAN: Mr. Stone?

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

CHAIR HOLTZMAN: Okay.

(Laughter.)

CHAIR HOLTZMAN: All right. I --

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

CHAIR HOLTZMAN: Yes.

MR. STONE: I would be inclined not to
recommend anything to Congress, because, like you
said, the likelihood it gets done is small. I'd
much prefer to recommend something to a body we
think could do something quickly, which would be
the Secretary or the next committee, without
expecting the stalemate in Congress is going to
change because of our recommendation and then,
it's something that never got done at all.

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

CHAIR HOLTZMAN: I think it's okay to
let Congress know that there's this issue. I
think that that's really important, because I
don't think that -- I mean, I think they acted
with the best of intentions here and I think
they're not necessarily aware of the
consequences.

So, I think it's important to spell
that out to them and to suggest that they
consider approaches to minimizing the unintended
adverse consequences of this.

JUDGE JONES: And I think to some -- it
also, I mean --
CHAIR HOLTZMAN: I don't have a problem with that.

JUDGE JONES: Yes. We've discovered this is a problem and sending it over to Congress in writing validates what other people have been arguing is a problem --

CHAIR HOLTZMAN: Right.

JUDGE JONES: -- validated from us.

So, I think it --

CHAIR HOLTZMAN: Okay.

JUDGE JONES: -- should go to Congress.

MS. SAUNDERS: So, this afternoon, while you're going through some of your other reports, I could try to put some language together --

CHAIR HOLTZMAN: Yes, that would be great.

MS. SAUNDERS: -- and come back a little bit more towards the end of the day.

CHAIR HOLTZMAN: Okay, great.

JUDGE JONES: Great.

MS. SAUNDERS: No pressure.
CHAIR HOLTZMAN: Okay, so --

(Laughter.)

CHAIR HOLTZMAN: So, there's consensus that this is the approach we'd like to take, but we need the language, okay.

JUDGE JONES: Great idea.

CHAIR HOLTZMAN: Okay, thank you. So, we're up to Recommendation 6?

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

CHAIR HOLTZMAN: Admiral, do you have your --

VADM TRACEY: Same thing.

CHAIR HOLTZMAN: -- standard change?

MS. SAUNDERS: Same thing?
CHAIR HOLTZMAN: All right.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: Any objection to --

JUDGE JONES: No.

CHAIR HOLTZMAN: -- the Admiral's language? Okay. Without objection, it is agreed to. You agreed to her --

MR. STONE: Yes, to hers, yes, sure.

CHAIR HOLTZMAN: Yes, right. Okay.

Any other discussion on this recommendation?

PROF. TAYLOR: I would just add one comment. When you start writing the executive summary, and this is a more general comment, I noticed on this page, under the sub-bullet, you use a word like, a very high acquittal rate.

MS. SAUNDERS: Okay.

PROF. TAYLOR: So, I would be very careful about using a word like that, that --

MS. SAUNDERS: Okay.

PROF. TAYLOR: -- doesn't establish a norm. And while I'm talking about it, on the previous page, on Page 8, you listed under the
next to last bullet, site visit coordination from counsel, and on the third bullet, there's a perception counsel would rather refer cases, and obviously counsel don't refer cases, commanders do refer cases.

So, sort of double-check in your executive summary that you don't just lift everything you have in these bullets, as opposed to giving them another scrub.

MS. SAUNDERS: Absolutely.

PROF. TAYLOR: Does that make sense?

MS. SAUNDERS: No, absolutely, thank you for catching that, sir.

PROF. TAYLOR: Thank you.

CHAIR HOLTZMAN: Okay. Any other comment on Recommendation 6?

MR. STONE: Yes. Starting on --

CHAIR HOLTZMAN: Okay, Mr. Stone?

MR. STONE: -- Line 3, after the word -- my preference would be to go from, conviction rates of sexual assault courts-martial, to, determine future recommendations for improvements
in the military justice system.

    I don't think we should be referring
our information from the JPP Subcommittee, which
was not the Committee's, on the military
installation site visits, primarily because we
obtained anecdotal, non-public information and it
does not deal with disposition decisions and
conviction rates. It's not data on that, it's
opinion evidence.

    So, my preference is to just strike
that and just skip from, courts-martial, to,
determine future recommendations for improvements
to the military justice system. I don't think it
detracts from the rest of the recommendation.

    In the event you feel strongly about
it, then I would have to look at the words and
see if I could come up with better language
there. So, I guess my first question is, I would
just drop from the word, to, on Line 3 to the
word, to, on Line 4.

    JUDGE JONES: I'm sorry, could you just
tell me exactly what you want to drop? Maybe I'm
looking at a different --

MR. STONE: Yes. Where it says, to supplement information provided to the JPP Subcommittee during military installation site visits. They didn't get information, they got subjective opinions, which was non-scientifically, anecdotally, collected. And so, we're mixing what we ask for on Line 2, that they gather data and other evidence on decisions and conviction rates, with anecdotal concerns.

And I don't really think that we want to mix those two, I think that confuses the issue. If they choose to do that, that's up to them, but the stuff we're asking for on Line 2 doesn't supplement what is on Line 3, it's totally different kinds of information.

JUDGE JONES: Well, I mean, the information can inform the data or the data can inform the -- can have an impact on the information. I guess I don't -- this is, I believe, just a suggestion, that they should look at the background of what we did get in the site
visits and make whatever analyses they want.

But I think it was just meant to include sort of the background of why we were looking at all the data. I mean, there's --

MR. STONE: I mean, I --

JUDGE JONES: -- lots of kinds of information --

MR. STONE: -- read those summaries --

JUDGE JONES: -- data and --

MR. STONE: -- we got ten summaries, which are now on the record, site visits A to J, I don't think they provide any kind of data.

They provide some anecdotal concerns, which is useful to note, but I don't know how passing that along is as important, for example, as passing along a lot of the statistical stuff that we gathered and we would like to see continue to be gathered. I think those are apples and oranges. So, that's why I prefer not to add oranges to the apples.

JUDGE JONES: I don't think it -- I think it's fine, but I don't feel strongly, I
I think, Mr. Stone, with all due respect, I disagree emphatically with that statement, because I think the statistics that we have on acquittals, on whatever, they are very hard to interpret and hard to draw conclusions from.

I think the, what you call anecdotal data or anecdotal information is vitally important to understanding what people see as problems. Now, I completely agree with your conclusion that this -- we interviewed, I don't know how many people did we interview, 240 people?

Ms. Saunders: Two hundred and eighty.

Chair Holtzman: I mean, how many people are in the military?

Mr. Stone: One point three million.

Chair Holtzman: Yes, it could be a statistically valid number. I mean, not statistically in the sense that it was randomly picked, but the number 240 is not necessarily
bad. I mean, they do national polling, 700 people, to test what 200 million voters think. So, I mean, I don't think the number is way off base.

And I think that the information that was obtained is very important, even though it's not reduced to numbers. And I think it can inform -- it certainly informed my understanding about the process and I hope it helps others, the Secretary of Defense and members of Congress, understand what the perceptions are, if not what the reality is, in the prosecution of these cases and the defense of these cases.

So, I don't -- just as I'm not ready to rank harms, I'm not ready to rank this kind of information against statistics. So, I think that it should stay in here and I think people should look at that, those interviews.

And maybe they'll think they're worthless and maybe they'll think it's helpful, but I wouldn't just discard it because it's not a statistically valid sample, it's not presented as
a statistically valid sample. But it's a lot of
people saying a lot of the same things, so I
think that that's important to hear.

MS. SAUNDERS: Meghan was reminding me
that Dr. Spohn had informed the Panel that
qualitative research, such as interviews and
surveys, can supplement and inform quantitative
data. So, that was her opinion on that.

CHAIR HOLTZMAN: And it's my opinion
too. So, we have a suggestion by Mr. Stone
before us to strike all the words starting with,
to supplement -- wait, we're -- Mr. Stone, could
you --

MR. STONE: Yes, starting with, to
supplement, and ending, and, on the next line.

CHAIR HOLTZMAN: And ending with, and.

Okay. All in favor, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

MR. STONE: Okay. And my --

CHAIR HOLTZMAN: The no's have it.
MR. STONE: My alternative suggestion then --

CHAIR HOLTZMAN: Yes, Mr. Stone?

MR. STONE: -- if you leave it in is that we replace the word, information, with, the anecdotal concerns provided. And I use anecdotal advisedly because I note that on the Chair's changes to the other recommendation, when we get to it later this afternoon, she said, she specifically said, the JPP recognizes the Subcommittee's report and recommendations are based on specific anecdotes.

So, I'm not pulling that word out of the air, it's a word that you've recommended we put in the other place, and I think we have to at least show we're up-front when we recommend something and we know that, even if this was qualitative data, it wasn't part of a statistically-designed survey.

And, frankly, when this was proposed to us in a non-public setting, we were told, and I'll state this for the record, that this was
going to be an issue spotting project, that we were looking to spot issues that we may have overlooked. We weren't looking to rank them, as you said, we were just spotting them.

And I think from that perspective, it was helpful. But I think also that's the same thing as I said before, the staff could have spotted issues for us and that also -- and they have over time spotted issues and that's helpful too.

So, to the extent that they represent the anecdotal concerns provided to the JPP, I think that gives people the right message when they take the data, because they won't have us to ask about how this was gathered and what it might mean and who gathered it and who summarized it, because all of that has been sanitized. So, therefore, I would just change, information, to, the anecdotal concerns.

CHAIR HOLTZMAN: Judge Jones?

MR. STONE: That's the --

JUDGE JONES: I would leave it the way
it is. It's all information. I think it's pretty clear from a number of the reports the process that was used, so I don't think anyone is going to be under any of the assumptions that when we talk about information, we're talking about analytical data. We talked about interviews and reports from 240 people. Those are anecdotes, I suppose, but I think, supplemental information, is fine.

CHAIR HOLTZMAN: Okay. All those in favor of Mr. Stone's recommended change, which is to take the word, information, and to replace it with -- Mr. Stone, help me out.

JUDGE JONES: Anecdotal concerns.

MR. STONE: The anecdotal concerns.

CHAIR HOLTZMAN: -- anecdotal concerns, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

MR. STONE: Okay.
CHAIR HOLTZMAN: Okay. Now, we're on to Recommendation 6.

MS. SAUNDERS: Ma'am, you need to vote on Recommendation 6 as a whole.

CHAIR HOLTZMAN: That's what it is.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: Okay.

MS. SAUNDERS: Great.

CHAIR HOLTZMAN: So, all in favor of Recommendation 6, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Abstain.

CHAIR HOLTZMAN: Okay. Recommendation 6 is carried. Well, I want to ask the members of the Panel. It's 12:00 now, should we break for lunch or should we keep going?

JUDGE JONES: We can keep going as far as I'm concerned.

CHAIR HOLTZMAN: Keep going? Okay.

Recommendation 7?

MS. SAUNDERS: Recommendation 7 --
CHAIR HOLTZMAN: Let's see how far we get.

MS. SAUNDERS: -- reads: the JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs and VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial.

Such training will ensure that SVCs and VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

CHAIR HOLTZMAN: Okay. Is there any discussion of this recommendation? Mr. Stone, do you have -- oh, Mr. Taylor?

PROF. TAYLOR: Excuse me, go ahead. No, I was just concerned, I'm concerned with the word, full access, because it seems to me that some word like, reasonable access, would provide
the same kind of opportunity, but, full, to me, implies unfettered. So, I intend this as a friendly amendment.

    JUDGE JONES: I agree with that

    CHAIR HOLTZMAN: Any opposition to -- so, what would you rather have? Reasonable?

    JUDGE JONES: Reasonable.

    PROF. TAYLOR: Reasonable is my suggestion.

    CHAIR HOLTZMAN: Okay. Any opposition to the recommendation by Mr. --

    JUDGE JONES: No.

    CHAIR HOLTZMAN: -- Taylor?

    VADM TRACEY: No.

    CHAIR HOLTZMAN: Okay. So, that's carried. Mr. Stone?

    MR. STONE: On the next line, after the word, well, after, reasonable access by prosecution to sexual assault victims, we need to insert five words that say, who agree to that access prior to courts-martial.

    Any witness has the right not to be
interviewed if they don't want to. They may
suffer the consequence if the prosecutor doesn't
think he has enough evidence to go forward, but
that's their choice. And, in fact, we give that
to everybody who files a restricted report.

And I'm a little bit worried that if
we don't put that in there, there's an
implication that if the prosecutor is prosecuting
one case that's unrestricted and there's another
sexual assault victim that's related to it, I
don't know, it was a party and there's two or
three victims and the other one files a
restricted report, that somehow we're suggesting
he can get reasonable access to the other person,
too.

In addition to which, Article 6b of
the Uniform Code of Military Justice guarantees
victims their right to talk to counsel and their
right to privacy and if, after talking to counsel
in privacy, they don't want to agree to be
interviewed, just like any witness anywhere, they
have the right to say no.
So, I would just say, to sexual
assault victims who agree to that access, in that
sentence. And before we go on, I think probably
we should deal with that.

JUDGE JONES: I think all this says is
that in the training, they're going to be asked
to or trained to consider the value of that. So,
I don't -- what were the words you wanted to add?
I think everybody knows that the victim can
decide she doesn't want to talk to the prosecutor
at all.

This is just a recommendation that
you be trained to consider at least that there
are pluses to the value of a meaningful victim-
prosecutor relationship, which is something
presumably they would advise them of.

CHAIR HOLTZMAN: Plus, I think the
recommendation is circular, because you're saying
that the training would only go to people who
already agree to have -- to be interviewed by the
prosecutor. Well, what's the point of that?

What you're trying to do is to get
people to consider whether it's desirable and
they may in the end decide they don't want to,
but you would defeat the very purpose of having
the SVCs or the VLCs consider this if you -- by
the amendment. That's my view. Any other
comment? Okay. Those in favor -- Mr. Stone,
could you state your -- I don't want to misstate
it.

MR. STONE: Yes.

CHAIR HOLTZMAN: Could you state your
--

MR. STONE: I think even the training
should make it clear, it's reasonable access by
prosecutors to sexual assault victims who agree
to that access prior to courts-martial. That's --

CHAIR HOLTZMAN: Okay. Those --

MR. STONE: -- highlighting.

CHAIR HOLTZMAN: Okay. Those in favor
of Mr. Stone's recommendation, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?
(Chorus of no.)

MR. STONE: All right. My second --

CHAIR HOLTZMAN: The no's carry. Go ahead.

MR. STONE: My second comment is that I think that the second sentence in there is insulting and I think it's also misleading. I don't think it's necessary to say, will ensure -- of considering the value of a meaningful -- I'm sure that they consider, every lawyer considers the value of whether -- of who his client should talk to. So, I think that is, frankly, I don't know if it's meant to be demeaning, but it comes across that way to me.

And the second thing is, this language about sufficiently developing the rapport with the victim, I questioned this at the hearing that we had on the members of the Subcommittee, but I see it's still here.

I think it violates Article 6b to suggest that prosecutors have a right to some rapport with victims. That is not their client.
They have a right to be provided with the
information they need to fully prepare for trial,
not to have some relationship with the victim.

If that was appropriate, and that's
what we used to have, then we wouldn't have had
to have legislation to provide for a victim's
counsel, because in the past, there was no
victim's counsel, there were prosecutors, but
somehow that was not what the victims wanted.

And I think talking about rapport,
either from the investigators or prosecutors,
when you have VLCs and SVCs and special people
designed to do that job, implies that you're
trying to get inside that relationship, which is
inappropriate under Article 6b. So, I would
change the sentence to simply say, such training
will ensure that prosecutors are provided the
information they need to fully prepare for trial.

JUDGE JONES: Well, they may not be
able to do that either. I mean, you're going to
tell a VLC that they have to make sure that they
do that?
MR. STONE: No. No, that the training is to show -- you want to train the SVCs to understand that prosecutors may need the information that they need to proceed to trial. That's what you're training them on.

You're trying to -- you're not telling them, oh, and somebody has to develop rapport with your client, you're saying, you want to remind them specifically that if they cooperate fully or reasonably -- and that's what we said rapport was, access, when I questioned the witness at the last hearing, I said, what do you mean by rapport, and they said, access. Well, you've got that in the first sentence, when you talk about reasonable access.

So, without insulting anybody or characterizing a relationship that I don't think any longer is appropriate, we're just training the prosecutors -- actually, I'm sorry, we're training the SVCs and the VLCs that they should ensure prosecutors get the information they need.

Now, it may be, it doesn't have to
take an in-person interview, it may be that
they'll do it by a Skype call. It may be they'll
say, oh, this case ought to go on stipulation,
and they'll be happy to provide a stipulation.

It may be they'll say, there was
another witness he'd like you to talk to first,
he or she, the victim is totally traumatized, but
by the way, they told me -- they gave me -- they
wanted me to tell you there was another person at
the party who say this whole thing go down.

That's the question, that they want
them to get sufficient access through counsel to
provide the information they need. And so,
that's why I edited it down to take out the
objectionable language.

JUDGE JONES: I don't know, I have to
think about that.

MR. STONE: You want to think about it
over lunch? We could do that too.

JUDGE JONES: Sure.

CHAIR HOLTZMAN: I just want to make
one point, Mr. Stone, in response to something
you said. I don't think that this is humiliating or demeaning to SVCs and VLCs. Some of them are not really experienced and that's the purpose of the training is to substitute for the lack of experience. And so, I don't think that this is intended in any way, shape, or form --

MR. STONE: Okay.

CHAIR HOLTZMAN: -- to be critical of them. And I think -

MR. STONE: Well, you --

CHAIR HOLTZMAN: -- that your inference about that is not accurate. And I think, also, that it's more than just access that we're talking about here. I mean, if the SVC or the VLC is -- sometimes it is not approaching this with a -- I mean, it's approaching it with a very hostile or an attitude that doesn't recognize that there's an importance for the victim too, because a conviction is, I think, is something that the victim would want.

I understand that there's a tension here. Obviously, the SVC and the VLC is going to
want to protect certain issues on the part of the victim, and that's very important.

But sometimes, if they're not properly trained or they're not properly experienced, they might deny access when the access won't harm the victim's interest, whether it's phone or whether something else, and yet, it will help advance the victim's ultimate interest in a conviction here.

So, it seems to me that -- I don't have any objection to this, I don't see that this is demeaning to SVCs or VLCs, I don't think it assumes that there's some kind of magic relationship between a prosecutor and a victim, I just think it recognizes that there needs to be, to the maximum extent possible in the circumstance where there may be legitimate, totally legitimate reasons to curtail the victim's contact with the prosecutor.

But to have SVCs and VLCs recognize that it's also in the victim's interest to see what can be done to make sure there's a conviction in the case, and that sometimes
requires a kind of access that they might not
have wanted to have, but maybe they'll realize
it's also important. I'm not saying that it's
going to be a magic be-all and end-all, but I
don't see your problem with it --

         MR. STONE: Okay.

         CHAIR HOLTZMAN: -- Mr. Stone, I would
say.

         MR. STONE: I think your statement that
the prosecutor's needs ought to be considered are
considered by me saying, the prosecutors are
provided the information they need to fully
prepare for trial. Okay.

         I don't think there is any longer in
the military a meaningful victim-prosecutor
relationship that is promoted. There is a
meaningful victim's counsel relationship that is
promoted --

         CHAIR HOLTZMAN: Oh, I don't --

         MR. STONE: -- just like there is for
any victim. And a victim can walk away from a
trial any time they wish, especially if they
think that what the prosecutor needs to elicit is
going to so psychologically damage them, they
don't want to go through this again, it's
embarrassing, their life -- some of them want to
just stay in their unit.

I mean, that's why the suggestion in
here cuts against restricted reporting. It's
none of the prosecutor's business whether the
victim wants to go forward, it's the victim's
business and the victim's counsel has a legal
obligation all the time to discuss those things.

They don't agree or deny access
without talking to their client and explaining it
in great detail, because they know it's not their
decision, it's the victim's decision. And so,
this idea, which I see expressed here, the
language, sufficiently developing the rapport,
frankly I think is nonsense --

JUDGE JONES: I have an idea.

MR. STONE: -- and I strongly oppose
it. So, I don't --

JUDGE JONES: I have an idea.
MR. STONE: -- know what else to say.

I was --

JUDGE JONES: I have an idea.

MR. STONE: -- trying to go around it

JUDGE JONES: Okay.

MR. STONE: -- and get to the same place.

JUDGE JONES: I don't like the idea of rapport either, but I would also say that we are dealing with two different roles. The prosecutor has their role. There never used to be a counsel for the victim, I think it's great there is one now, and obviously it goes without saying that that lawyer, the VLC or whichever Service you're in, has the responsibility of advising and then, counseling.

And all we're saying here is we want to train them on considering, we're not even saying you have to do anything, and obviously they know they have to follow their client's wishes, we're just saying that they consider the
value of a meaningful victim-prosecutor relationship.

There has to be some sort of relationship between the victim and the prosecutor. The victim is the main witness. There used to be a much more all-encompassing relationship before the victim had their own lawyer.

But I see that as an additional lawyer in the picture, not the removal of the necessary relationship between any lawyer and any witness that they're going to be preparing and putting on the stand. And then, I might say, to get rid of this rapport stuff, it sounds like if we want to -- and by the way, you have to like the prosecutor too --

(Laughter.)

JUDGE JONES: I don't think we meant to say that. I think we should say, consider the value of a meaningful victim-prosecutor relationship in the advice that they provide their victim client.
And then I would say, with the goal of assisting prosecutors in sufficiently developing the record needed to fully prepare for trial. It seems to me that that hooks it up with the whole point.

And every step along the way, it goes without saying, if they decide they don't want to have any relationship, they can, but we still want their lawyer, the victim's legal counsel, to be considering the fact that there can be a meaningful relationship and that's probably a good thing.

They can decide whatever -- the individual client can decide whatever they want to do. I think that will help you a little bit, if we get rid of rapport. I don't know whether that --

MR. STONE: I want to get rid of the word meaningful too. Will you strike that word? Then I think your language gets closer to what I have in mind, because I don't think it has to be meaningful. They don't represent each other.
They have no lawyer-client relationship.

JUDGE JONES: We're not saying that, we're saying victim-prosecutor relationship.

MR. STONE: I know. There is no formal victim -- it's an informal relationship --

JUDGE JONES: Right.

MR. STONE: -- that's why I think the word meaningful is misleading there.

JUDGE JONES: Okay. What kind of relationship do you want to call it?

PROF. TAYLOR: How about productive?

CHAIR HOLTZMAN: Or effective working --

JUDGE JONES: And that goes back --

CHAIR HOLTZMAN: -- relationship or something --

JUDGE JONES: -- to the prosecutorial --

CHAIR HOLTZMAN: Yes.

JUDGE JONES: -- goal, which the victim may or may not embrace in whole or in part.

Okay.
MR. STONE: I need somebody to read back the language you're suggesting --

JUDGE JONES: What was your last --

MR. STONE: -- for that whole sentence.

JUDGE JONES: -- word, Mr. Taylor?

PROF. TAYLOR: Productive.

JUDGE JONES: Okay. So, such training will ensure that SVCs and VLCs consider the value of a productive -- and we still haven't resolved victim-prosecutor relationship. We could say relationship between the victim and the prosecutor, if you want to do that. And that takes away from the formality of it. All right. In the --

MR. STONE: Okay. I thought Ms. Holtzman said effective rather than productive, is that what you said?

CHAIR HOLTZMAN: Mr. Taylor's language is fine.

JUDGE JONES: I'm sorry, Liz, I didn't hear you.

CHAIR HOLTZMAN: Well, that's all
right.

JUDGE JONES: In the advice they provide their victim client, with the goal of assisting prosecutors in sufficiently developing the record needed to fully prepare for trial. I mean, that's not the only thing the prosecutor needs to do, so maybe that's a little narrowing --

CHAIR HOLTZMAN: Yes.

JUDGE JONES: -- but generally speaking, is that better?

MR. STONE: Yes. Again, I would like the word effective instead of productive, because I don't know what exactly that means.

PROF. TAYLOR: Effective was fine.

MR. STONE: In other words, you want to have --

JUDGE JONES: Effective's fine.

MR. STONE: -- an effective relationship.

PROF. TAYLOR: Sure.

MR. STONE: Then we may be in
 accordance.

        JUDGE JONES: Okay. So, we'll make it
effective.

        CHAIR HOLTZMAN: And you're going to
try to broaden --

        JUDGE JONES: And I need to --

        CHAIR HOLTZMAN: -- the last word.

        Yes.

        JUDGE JONES: Yes. Or we could
probably just say, to fully prepare for trial.

        PROF. TAYLOR: I think that would be
better, because --

        JUDGE JONES: We don't need to talk
about --

        PROF. TAYLOR: -- you're not really
developing --

        CHAIR HOLTZMAN: Right.

        JUDGE JONES: Right.

        PROF. TAYLOR: -- a record at this
point, this is all pre-record.

        JUDGE JONES: Right.

        PROF. TAYLOR: Right?
JUDGE JONES: I was borrowing from, developing rapport, so --

PROF. TAYLOR: Right.

(Laughter.)

JUDGE JONES: Okay.

CHAIR HOLTZMAN: Okay. Do we have the language now in front of us?

MS. SAUNDERS: So, is that, such training will ensure that SVCs and VLCs are considering the value of an effective victim-prosecutor relationship with the goal of assisting --

CHAIR HOLTZMAN: No, in the advice --

MS. SAUNDERS: Oh, I'm sorry.

CHAIR HOLTZMAN: -- they provide.

MS. SAUNDERS: In the advice they provide --

MS. FRIED: No, I think it's the value of a relationship between a victim and prosecutor.

JUDGE JONES: Yes, we got rid of calling it a victim-prosecutor --
CHAIR HOLTZMAN: Okay, right.

JUDGE JONES: -- relationship. So, in

the --

CHAIR HOLTZMAN: Okay. Of an effective

relationship between --

MR. STONE: Between --

JUDGE JONES: Right.

CHAIR HOLTZMAN: -- the prosecutor and

the victim --

MR. STONE: And the victim.

JUDGE JONES: And the victim.

CHAIR HOLTZMAN: -- in the advice they

--

MR. STONE: With the goal of --

CHAIR HOLTZMAN: -- in the advice they

provide their victim clients --

JUDGE JONES: Right.

CHAIR HOLTZMAN: -- with the goal of --

JUDGE JONES: With the goal of --

MS. FRIED: Preparing for trial.

JUDGE JONES: -- fully preparing for

trial.
CHAIR HOLTZMAN: -- assisting
prosecutors, yes, in fully preparing for trial.

Okay.

VADM TRACEY: In fully preparing for
trial.

CHAIR HOLTZMAN: Okay. All in favor of
the Recommendation 7 as amended, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

CHAIR HOLTZMAN: Ayes have it and
Recommendation 7 as amended is agreed to. And
should we try Recommendation 8? Should we keep
going? On a roll, okay.

JUDGE JONES: Keep going.

CHAIR HOLTZMAN: All right.

MS. SAUNDERS: Recommendation 8 reads:
The JPP Subcommittee recommends that the
Department of Defense Sexual Assault Prevention
and Response Office ensure that sexual assault
training conducted by the Military Services
provide accurate information to military members
regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of impairment in this context and that training be timed and conducted so as to avoid training fatigue.

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

CHAIR HOLTZMAN: Admiral Tracey, do you have your --

VADM TRACEY: Same.

CHAIR HOLTZMAN: -- same proposal for the last paragraph? Any objection to that?

JUDGE JONES: No.

CHAIR HOLTZMAN: Hearing none, that's adopted.

Okay, any other comment with regard to Recommendation 8?

MR. STONE: Only that this is one more where we didn't hear the Services come in and
tell us if they have or they are about to change
their training material. And as I looked at the
site visits, there were comments of both ways,
including people who said no. I don't think that
is even in the report that some people said no, I
don't think alcohol, the training I got was
misleading and others said they thought it was
misleading. And some said I don't think that has
affected the outcome of trials and some said they
did. And the same thing about training fatigue.

I think there was some comments on
both sides of this issue. And since we did not
get the chance, since we ran out of time to have
each Service come here and tell us not only their
views on this comment but whether they were
already doing it; whether they already have it in
draft form. I feel, again, unprepared to
recommend that somebody else do it when I don't
have a basis to know whether it is being done, or
it's objectionable, or it's fine. If they are
already doing it, I wouldn't even have to
recommend it.
So given that we didn't, as the JPP, and I don't think anything in the Subcommittee, either, updated what's going on, just like they did with some other things like with investigators, oh, there's a new thing now that the DoD regulation that they can do this and they can do that.

In the absence of having testimony before us from Military Services, I can't take a position on this. I don't oppose the idea but I can't -- I don't think there's a basis to --

JUDGE JONES: I think what we heard and what we actually probably could say we know between the RSP and today and this Committee is that if you ask anyone who is a trainer, they will say we are not training them that way, and I don't discredit that statement, but we still hear, as recently as these site visits, that there is misunderstanding about it.

And so again, all we are doing is recommending that they take a look at this to see if maybe something further can be done to make
the training more understandable to everybody.
It's not that everyone doesn't understand it but it's a concern that it is a recurring misunderstanding that still exists. At least that is the way I would explain it.

CHAIR HOLTZMAN: Okay.

MR. STONE: Would you change any of the language to say that?

VADM TRACEY: We could certainly say that in the explanatory content that comes below the recommendation in the report, right, tie those observations together.

JUDGE JONES: Sure, I could see that.

CHAIR HOLTZMAN: Well, with that suggestion, Mr. Stone, is that satisfactory to you?

MR. STONE: As in terms of a personal preference, it satisfies me and I'm happy to hear it. But does it give me any more basis to vote for or against this recommendation? No, we ran out of time. It's an issue that was spotted. It's a useful issue that was spotted but it's not
enough for me to want to -- I didn't give
Military Services a chance to even talk about it
to me. So, I don't think it's a formal
recommendation. I could like it as a bullet
somewhere under one or the others.

JUDGE JONES: It's really just
recommending another look at a continuing issue
that's been very well-identified. So, anyway,
that's my two cents.

CHAIR HOLTZMAN: Okay, let's go to a
vote.

Those in favor -- well, I don't want
to cut off any -- any further discussion on
Recommendation 8? If not, let's vote.

Those in favor of Recommendation 8,
say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Abstain.

CHAIR HOLTZMAN: Recommendation 8 is
carried, adopted.

We are up to Recommendation 9.
MS. SAUNDERS: Recommendation 9 reads:

The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs and VLCs should all receive training on how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast
doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.

CHAIR HOLTZMAN: Okay, any discussion on this recommendation?

VADM TRACEY: I have a problem with the notion that just assigning a sailor from one unit to another on the same installation does anything to protect them from the accused or the accused's compatriots. I mean you socialize together. You use the same clubs. You use the same facilities. So I'm not sure how the Subcommittee thought this recommendation was going to be effective.

Your daily work life might be protected but the other 16 hours a day, seven days a week are not. So, I wasn't sure why we
thought this was a reasonable recommendation.

JUDGE JONES: My recollection is that or it was my understanding from what I heard and read that there were some installations that were so large, you could be segregated even socially.

I don't know. You would know better than me. That is what my understanding was.

VADM TRACEY: No, not likely.

CHAIR HOLTZMAN: What about the term -- I mean I will give you an example but what the term it's not just are in the same installation or a nearby installation. Does that solve the problem, Admiral?

VADM TRACEY: It certainly is more reasonable, there would have to be more effort running into each other but nearby installations in today's day and age often share the same recreational facilities. If they are that nearby, they share the same recreational facilities.

I mean if what we're suggesting is that we want someone to look at how this policy
has been implemented so that it can be done in a way that minimizes the disruption to the ability to pursue the case while still taking care of the victim's interest, I think that's reasonable. But we are explicitly suggesting they look at just moving the person on the same installation and that doesn't seem to me to make any sense.

CHAIR HOLTZMAN: Well, let me just give you one example that I ran across actually in Korea, where this apparently was a problem, and where the commander said that he was now going to start reviewing whether he could, in fact, transfer people either to the same or nearby installation because of the problem of perception.

VADM TRACEY: And I'm sure that it is --

CHAIR HOLTZMAN: And I'm not sure that he could do it but that is what he said he was planning to do. This was not something he had already done.

VADM TRACEY: Which is fine.
CHAIR HOLTZMAN: Yes.

VADM TRACEY: I don't object to that. But I do object to the Committee suggesting that that's a solution to this problem to just reassign a person.

If you are in Korea, you may have no choice but to look at reassigning the person to another installation or risk that they leave the geographical area and you can't pursue the case because of how remote Korea is. I understand that and there may be reasons why, in that case, there should be an exceptional look at this.

But the issues, I think, that you were trying to address are that when you move the victim it becomes hard for everybody to work the case. I'm sure there is a general rumor mill that victims are using this as an excuse to get to a better duty station. And I am sure there are some victims who are using this as a way to get to a preferred duty station.

CHAIR HOLTZMAN: So what kind of language would you suggest?
VADM TRACEY: You specifically suggest
that -- so I think you want the Department to
look at the ways in which the expedited transfer
opportunity is implemented is such to ensure the
smoothest ability to try the case, while looking
after the victim's interests. And I would
eliminate the discussion of the fraudulent use of
the relocation. You could certainly make that an
item to be followed up. If there is evidence to
that effect, then that should be addressed but I
think that has little to do with the actual
policy issue I think that was trying to be
addressed here.

CHAIR HOLTZMAN: I'm not sure,
Admiral, about that. I think that was the
trigger. I think that was more the trigger that
we heard. But I only went to four sites or four
or five installations.

MS. SAUNDERS: I think one of the
concerns I think that the Subcommittee considered
on the fraudulent aspect of that was more about
the ways that that can be used on cross-
examination in trial and how it could negatively affect the case.

MR. STONE: And it's naive to think that the prosecutors and the victims don't know that any victim's counsel is going to say to his client, you are aware they are going to cross-examine you on this. You realize they are going to try to argue that you did this only for that.

But we also heard testimony as a JPP in the past that the most important thing to victims was their transfer. They didn't even care afterwards about the prosecution. They just wanted to be free of having to bump into that person.

And since we didn't take testimony from the various Services, I'm going to feel free to tell you about my experience as counsel to the Witness Security Program, where witnesses also wanted to be sure somebody didn't bump into them later because they would have been bumped off if they bumped into them later. And we never considered it safe, just as a sort of general
rule, to think that we could hide somebody in the
same community if it was smaller than two million
people -- and you don't have any military bases
of the size of two million -- because in a
smaller arrangement than that, as was mentioned
here, you bump into somebody in the street, you
bump into them in the supermarket, you bump into
them in the health club, you bump into them in
the movie theater and then the person winds up
dead.

And we weren't happy about two million
as a number but we realized, at times, there
might be other considerations like if they are in
a foreign country and they only speak a certain
language that you know you are trying to focus on
how big a community do you need so that somebody
can feel safe.

And I would point out that safety here
is an issue because Article 6b(a)(1) of Uniform
Code of Military Justice says a victim has the
right to be protected from the accused. So, this
is implementing something that is in the UCMJ.
And I totally agree with that and the fact that, sure, some people might abuse the system and some commanders might decide to do more or less but they are the individual, the commanding officer, who decides on the expedited transfer. So, if they think it's not warranted in a case, that's their choice to make.

And if defense counsel want to use that later as a benefit, of course they are going to use it at trial, just like every person in the witness security program when they testified at trial was impeached on the ground well, the government moved you, and they did this for you, and they did that, didn't they? And they argued to the jury later you know they probably did this -- you shouldn't believe them; they did this just to get the benefit. But that goes along with the program. You accept that there's going to be certain things like that.

So, I totally agree with what was stated by Admiral Tracey and I even liked her formulation of it, having added that, of course,
we did not hear any testimony from victims. And
the Subcommittee admitted last time, and you can
see in their report, they didn't even interview
any victims.

So, without any input from victims, I
don't know how you could have a sufficient basis
to even consider this. And I certainly think you
would be trying to take away the most important,
in the eyes of many victims, not the Service, may
be the most important thing in the whole change
of all the regulations and Statutes; that is, to
allow them to start their career and life over in
a place where that assault doesn't follow them.

Oh, and I have one more thing that I
want to point out. I think there is an enormous
misconception, again, from my experience, and I
am going to say this because there was no expert
testimony. There's an enormous misconception
that people in this country have thinking that
relocation is a benefit, even to a place with a
better climate. That is, frankly, bunk. There
is no person that I was involved with that I ever
relocated a long distance who was happy. They left behind their church. They left behind their friends. If they had kids in school, they left behind their schools, their social organizations. They didn't like that because they knew there were bad consequences if they went back, they might bump into that person, whatever.

But only in the movies do they make in My Blue Heaven it's a great thing that these guys are relocated somewhere else. It's not. And as a fact I will tell you that the vast majority in witness relocation programs around the world, including Italy because they have a big program, drop out after five years because they hate that move to a place that they hadn't had in mind when they signed up for this deal. It is an involuntary move and sometimes it includes moving their spouse, which means the spouse has to quit their job and try and find a new one.

It's not a benefit. It may look that way to the public, to the people who make movies, maybe people who go to movies. But being
involuntarily told to move, and especially long
distances, is not anything that the numbers show
out that people are thrilled about.

CHAIR HOLTZMAN: Well, nobody here is
being involuntarily told to move. I think that
is one issue that is a big difference. And
secondly, when you are talking about the witness
protection program, these are people who are
living in a community, generally they have lived
there all their lives. We are talking about
people in the military who are on a temporary
assignment. So I think it is apples and oranges,
to use your words.

But I think about the point about this
and I think Admiral Tracey moved some good points
but I think it's not sufficient, in my judgment.
Everybody understands, at least I do, that
expedited transfers are vital. Okay? Vital.
They were vital when I was a prosecutor. They
are vital in the military. Nobody is questioning
that. This is one of the circumstances in which
we had issue spotting. Nobody here had heard
that there was any issue with regard to expedited transfers. We went out to the field. And guess what? Low, and behold, people said there is a problem with expedited transfers because it raises problems in terms of the prosecution of the case and it raises problems in terms of possible acquittals because of the charges of potential fraud.

Okay. So, here we have a program that has a completely laudatory objective to separate the victim from the perpetrator and allow the victim to live out his or her life in an environment free from that harm. Okay, that's it very important. I'm not arguing against it. I'm just trying -- and Admiral Tracey had good language. I talked about making sure that the Secretary of Defense review how the expedited transfer program is working so that we can minimize any of the harms that come from it, the unintended consequences. I have no problem with rephrasing it that way. I would just say that one of the unintended consequences are these
allegations of fraud and that that has to be
looked at, too, as part of how we minimize the
harms coming from this. That's all I'm saying.

JUDGE JONES: So I -- oh, go ahead, Admiral. This is yours.

VADM TRACEY: My suggestion: The JPP recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed. Delete from "to state" through to "this change will."

So it then will say: whether it should be changed to help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems, period.

Delete "while combating the perception" up through "claims of sexual assault." Then: Commanders and VLCs should all receive training on how relocating victims from less desirable -- I'm sorry.
Make a separate sentence then on additional, we should look at evidence that the perception exists that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault.

CHAIR HOLTZMAN: Don't you want to say something about minimizing that perception? Wouldn't that be a good thing, too? No?

VADM TRACEY: So, keep it where it is and say "while minimizing?"

CHAIR HOLTZMAN: Yes.

VADM TRACEY: Good, okay. I'm happy with that.

MR. STONE: While minimizing what?

CHAIR HOLTZMAN: The perception.

VADM TRACEY: Any perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault, period.

And then I'm good with it. So I think the change that I'm suggesting only takes out the specific recommendation that we look to transferring people on the same installation as
the best possible solution.

PROF. TAYLOR: I have a slightly different idea, if I may, Admiral Tracey. And this may be consistent with yours or may be slightly a different twist.

It would be something like, the Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be modified to determine whether there are circumstances where sexual assault victims might be transferred to another unit on the same installation or to a nearby installation, without sacrificing any interests of the victim.

Because that would keep the focus on the victim, it seems to me, but it would also introduce a balancing test.

I sort of like the fact that --

VADM TRACEY: I'm not unhappy with that but I think that if the policy, as attended today, doesn't address how is the prosecutor going to have access to this victim, that needs
to be corrected.

PROF. TAYLOR: No, that was just my first sentence.

I was happy with what you said thereafter but it seems to me that it might be fair to introduce something like a balancing test that creates the presumption that the interests of the victim are paramount on this question because of the points that Mr. Stone raised about the bumping into people.

And I think the culture for the Navy might be a little different from the Army, for example, because we do have very large installations, you know 50,000 people where it is much less likely, if you are transferring a person from one corner to another, there are different clubs that support different activities. Unlike some of the other Service installations, it might be somewhat more contained.

So, I think it could be possible in circumstances like that to have someone
transferred and the victim was saying that's okay. I don't know.

        VADM TRACEY: I like that. Consider whether circumstances under which it could be and is satisfactory at all times. That works for me.

        JUDGE JONES: And I like a balancing test. It has to be consistent with the needs of the victim.

        PROF. TAYLOR: Yes.

        CHAIR HOLTZMAN: All right but are we going to mention this issue of fraudulent transfers or that's just out?

        JUDGE JONES: I think you added that, too.

        PROF. TAYLOR: Well, to me, that is more of an explanatory note about things to consider and not maybe the rationale itself. I thought, in my mind, at least, this last sentence in the first paragraph sort of overstated the problem of foster the perception among military members that the expedited transfer is being abused.
I know that's a perception but I just don't know if when you add that to "transfers can be used by defense counsel to cast doubt," to me, that's a little bit too much in the weeds for a recommendation, as opposed to some further explanatory note that I would soften a little bit probably, instead of making it quite so in your face.

And again, I'm perfectly willing to ask the Staff to see if they can't do that and then we can use our normal ways of communicating with the Staff Director to try to come up with the final language.

CHAIR HOLTZMAN: If that's okay, why don't we ask the Staff to try to draft up some language? First, we have an earlier recommendation and we have this one. Maybe we can do it before the end of the day today. If not, Maria, can we do that on the phone or we're not allowed to do that on the phone?

MS. FRIED: As long as it's not a substantive change.
CHAIR HOLTZMAN: Well it probably is going to be a substantive change.

MS. FRIED: We could do it on the phone if we open some lines to the public and notice it.

CHAIR HOLTZMAN: Oh, okay.

MS. SAUNDERS: Is that a possibility that we could do that, though?

MS. FRIED: You could have a public meeting.

MS. SAUNDERS: Have a public meeting on the phone.

MS. FRIED: As long as lines are available to the public and you go through the notice process.

CHAIR HOLTZMAN: Okay.

MR. STONE: I have one more comment about the bullets in the underlying report. The first bullet says: Counsel reported that once victims receive expedited transfer to other locations, they are less likely to cooperate with the prosecution.
You can even write defense counsel or some counsel but that's a questionable thing, given that today, they can Skype with lawyers. They have conference calls. If they want to cooperate, they cooperate and I don't think one is a "but for" for the other.

The second thing comes out of the report and on the prior version, it was on page 26, talking about this. I don't know what page it is on now but it is in "see expedited transfer sections." There is a sentence that says: The victims often are able to select the location to which they will transfer.

I think that sentence is absolutely wrong. The commanding officer decides where they are going to transfer. Sometimes they have no choice in the matter. It's take it or leave it. Sometimes they may be given one or two locations but they have to figure out where does money, where is the slot that they qualified to work in. I mean this is a very complex thing and I think the idea, the suggestion that the victims can
select the location to make it sound like they are in control of this process is very misleading. And I don't want us to leave that uncorrected. So I think a bullet has to say commanding officers already determined this process and our recommendation talks about thing they may consider. Something like that.

JUDGE JONES: No, I understand your point. I mean, obviously, a victim can suggest but can't order their own transfer to a specific location. So, we should fix that.

MS. SAUNDERS: I could put in a bullet following this recommendation. I could put language to that effect.

MR. STONE: Yes, it has to be addressed in the report.

CHAIR HOLTZMAN: Well but, of course, you have a bullet here that says some counsel and commanders felt that expedited transfers are abused and perceive their commanders are afraid to say no to victims for fear it will be seen as retaliation.
MR. STONE: Well I don't think we ever heard testimony on that either. That's another one of these things that we should have called for people to testify about.

We heard early on --

CHAIR HOLTZMAN: Why do we need testimony, Mr. Stone? I don't understand. We have --

MR. STONE: Because we're the JPP Panel that conducts proceedings in public.

CHAIR HOLTZMAN: But we can accept the report. I think you're in error here. We can accept the report of the Subcommittee without hearing independent testimony on that. I think that that's clear.

MR. STONE: I believe that when it affects the Military Services that the overall idea behind FACA is that we give the people at issue, in this case each Military Service, just like we did on every other issue, a chance to come in here and we convened panels that were all-defense counsel panels or defense counsel,
and prosecution, and SJAs from each Service and they got to give us their views. It wasn't anonymous. They were happy to do it. These are not issues that, for some reason, they wouldn't comment on.

Inadvertently, many have commented on these issues before and we have heard conflicting views, which didn't cause us to issue a recommendation. So, to do it now, based on a nonscientific sample, hearing the same thing, doesn't seem to me to be what FACA is expecting us to do.

If we had panels called and we had time for it, that would be a different story. We don't.

CHAIR HOLTZMAN: Yes, but I just want to say one thing. I just want to say one thing. Just because people come here and testify doesn't mean that their testimony is any more accurate, any more an accurate description of what's happened than what the Subcommittee heard.

I think if you feel that you need to
have that testimony, that's fine but there's no
legal requirement that we hold independent
hearings and independently verify all the
statements that were or weren't made in that
report. That's the only point I'm making.

MS. FRIED: You are correct, Ms. Holtzman. And Mr. Stone, and the FACA attorney,
and myself had a conversation about the role and
function of subcommittees. And I understand Mr.
Stone has his own views but we're comfortable
that we're operating consistent with the
requirements of FACA and the law.

MR. STONE: Right. And I just want to
say that in my decades of experience as a lawyer,
when somebody is willing to make a statement in
front of the public and be questioned on it, I
find that to be more convincing and credible to
me than when people are in a closed setting, it's
not public, I can't question them about it, and I
have no idea whether they are talking from their
own experience or somebody else's experience.

So, in terms of me being able to rely
on it and do what I think I should be doing under FACA, which is give the public and the agencies a chance to hear and evaluate something, a statement made in public, I find it more credible. That's all I meant.

As Admiral Tracey mentioned before, sure, there are rumors of lots of things but I can't tell from summaries of interviews whether people's information was secondhand from somebody else or firsthand by them. And I didn't get a chance to ask that question either. So, that's where it comes from.

CHAIR HOLTZMAN: I just want to support the -- I just don't like the attack on the integrity of the subcommittee report. I think the fact the report does not purport to be anything more than it is. But he statements that are contained in the recommendations that were made in the report, even though these come from nonpublic hearings, the fact of the matter is that these are statements that were repeated at site visit, after site visit, after site visit.
These are not statements that were made just by
defense counsel, or just by trial counsel, or
just by this counsel, or just by that counsel.

So, I'm not saying that they are
necessarily scientifically valid but I do think
that the Subcommittee felt, and we have very
distinguished members on the Subcommittee, I'm
not including myself on that but the other
members of the Subcommittee, and they felt that
the reports that they heard were important. And
I think the fact is that JPP thinks that they are
important, too, because we have already adopted I
don't know four or five recommendations.

So I just don't think that the attacks
on the Subcommittee process or the Subcommittee
report, itself, are really -- I don't agree with
them.

MR. STONE: Okay, for the record, I'm
not attacking the Subcommittee or the
Subcommittee process. I'm saying that the Panel
ran out of time to take all the issues that they
spotted and handle them in a way that I could
feel comfortable making a recommendation, based on the case law that I've read, based on the regulations.

Legally, we may be able to do that but I'm not comfortable. I don't do it in my legal practice. I don't do it in my life. And I have a lot of qualms about doing it as an appointed JPP Member of the Secretary of Defense.

CHAIR HOLTZMAN: Okay. I think we will take a half-hour break for lunch and then come back and we've got a long agenda to do this afternoon. Let's see if we can get through it.

Thank you very much, Panel Members.

(Whereupon, the above-entitled matter went off the record at 12:48 p.m. and resumed at 1:27 p.m.)

CHAIR HOLTZMAN: Now with all the spiritual sustenance provided by Dr. Janice, we are ready to go full speed head.

MS. PETERS: All right, good afternoon Members of the Panel.

MR. STONE: Wait one second. Before
you jump to that, I just have one wrap-up comment from the last morning session.

CHAIR HOLTZMAN: Yes, sure.

MR. STONE: And I guess it relates to formality, as much as anything else.

I would like to suggest that the title of that report should not be Barriers to the Fair Administration of Justice because there are a lot of things that we have changed and that we might have a title that is more neutral that shows a little more balance, like Additional Concerns about the Administration of Justice.

Because they say what they say but I don't like the title seeming to characterize what's in there before you look at it.

CHAIR HOLTZMAN: Well, I think that's a fair comment but do you want to give us a chance to think about another title?

MR. STONE: Sure. I just wanted to throw that out there.

CHAIR HOLTZMAN: Is that a substance issue or is that a procedural issue that we could
MS. FRIED: I think it's a substance issue but we could --

CHAIR HOLTZMAN: All right, we'll see if we can address that before the end of the day. Maybe we can wait until July.

Okay, so now we are up to judicial --

MS. PETERS: Yes, ma'am. In your red folders there is a revised executive summary and recommendations and findings pertaining to the Sex Assault Investigations Report that we have discussed at previous meetings. The copy provided in your folder has on the front of it The Report on Sexual Assault Investigations in the Military. This is only about five or six pages long.

This version is being provided to you to obtain the Panel's final approval of the language of the Executive Summary and of the recommendations. Now, these recommendations were voted on previously by the Panel. There have
been changes since the last meeting because since May 19th -- during the May 19th meeting I think the Panel gave the Staff some directive to make some changes to the Executive Summary and maybe two minor edits to the recommendation.

The Staff went back and incorporated those edits and those changes into the version you have in front of you. In addition, we received additional comments and edits from Ms. Holtzman and Mr. Stone, which we have incorporated as well into this version.

So what's before you reflects everything discussed in the May 19 meeting, plus additional panel member feedback that has been provided to the Staff since the May 19th meeting and today.

What I can do, ma'am, subject to your or for your decision is I guess we could approach this in one of two ways. We could discuss proposed edits to the recommendations first or go over proposed changes to the language of the Executive Summary but there are two separate
items.

CHAIR HOLTZMAN: Well, what do you recommend? I was actually reading while you were talking. So, I missed what you said.

MS. PETERS: Sure. So, I could refer to the recommendations first. They often will affect the language of the rest of it.

CHAIR HOLTZMAN: Okay, so let's do the recommendations first. That sounds good.

MS. FRIED: If I may just interject.

CHAIR HOLTZMAN: Yes.

MS. FRIED: We call this an executive summary but I don't think we should call it anything except the JPP Report because it's different from what the JPP Subcommittee report is. So you are not really just having a separate executive summary.

CHAIR HOLTZMAN: I see. Oh, okay, that's a good point.

MS. FRIED: So I don't think you need that. So I would just delete the term executive summary.
MR. STONE: Because this is our report.

MS. FRIED: Correct.

MS. PETERS: Okay, thank you. Noted.

The first item then for the --

CHAIR HOLTZMAN: Oh, let me just ask a question, then. Shouldn't it indicate -- it says Report on Sexual Assault Investigations in the Military, including the report of --

MS. FRIED: You can just say it's an addendum.

CHAIR HOLTZMAN: But somehow it has to relate or indicate that we are dealing with a Subcommittee report. It doesn't say that on the outside, did it?

MS. FRIED: In here, we talk about how you came up with your information. But because you are not adopting the Subcommittee report as a whole, you're modifying it --

CHAIR HOLTZMAN: Oh, I see. Okay, fine. Got it. All right.

MS. FRIED: You reference it in here.
CHAIR HOLTZMAN: Even I can learn.

Okay.

Now, we're up to -- so you would suggest we do the recommendations first, Meghan?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay, so what page is that?

MS. PETERS: That is page 4 to this document.

CHAIR HOLTZMAN: Okay.

MS. PETERS: I'm sorry. I'm going to revise that. No, it is page 4.

CHAIR HOLTZMAN: Right.

MS. PETERS: We've just changed the numbers to reflect the current order of reports.

CHAIR HOLTZMAN: Okay.

MS. PETERS: And again, these recommendations have previously been voted on and adopted by the Panel. Subsequent to that, we have received some suggested changes. Those are, first for Mr. Stone, in the body of recommendation, what is now Recommendation 47,
that it stated that the JPP suggests that the advisory committee that follows the JPP, the DAC-IPAD, monitor the effects of the DoD policy.

   And this is changing -- it previously said simply that the DAC-IPAD should monitor the effects of DoD policy. And what I think has been inserted is that we should suggest that the DAC-IPAD monitor the effects of DoD policy. And that's the essence of the recommended change to this recommendation.

    CHAIR HOLTZMAN: Judge Jones?

    JUDGE JONES: I'm trying to read it without the changes. I'm sorry.

    CHAIR HOLTZMAN: Okay, sorry.

    MS. PETERS: Would you like me to read the recommendation as revised?

      (Simultaneous speaking.)

    JUDGE JONES: -- it's revised, right?

    MS. FRIED: I could interject again.

    I guess this document has the proposed edits from Mr. Stone, correct?

    MR. STONE: Right.
MS. FRIED: That's what the red and

the --

MS. PETERS: Yes.

MS. FRIED: Okay. If and until they

are adopted, I guess if what you were going to

say is you were adopting the Investigations

Report as a whole, it's okay to have the

Executive Summary.

MR. STONE: It's what?

MS. FRIED: It's okay to have the

Executive Summary.

CHAIR HOLTZMAN: If what?

MS. FRIED: If you weren't going to

make any changes. I thought these were your

Panel changes. I'm sorry.

CHAIR HOLTZMAN: Oh.

MS. FRIED: So we could revisit after

we have this discussion.

CHAIR HOLTZMAN: Okay.

MS. FRIED: I'm sorry.

CHAIR HOLTZMAN: Okay.

MS. PETERS: Okay, I have highlighted
where the changes are but would you like me to read aloud the original recommendation?

    CHAIR HOLTZMAN: Yes.

    MS. PETERS: Okay.

    CHAIR HOLTZMAN: Well, why isn't it just the pink, the stuff that's in pink?

    JUDGE JONES: I think everything is the same except that there is additional language. Is that right?

    MS. PETERS: I think it's just says the JPP suggests that.

    JUDGE JONES: Okay.

    CHAIR HOLTZMAN: And the word monitor, I see, is also added. Am I wrong?

    MS. PETERS: You know it's highlighted but the word monitor is in the same place in the original recommendation. So that could be an error. It might have been deleted and then re-added and we highlighted out of caution but it is in the original recommendation in the same form, "monitor the effects of the DoD policy" is the same in both.
JUDGE JONES: I don't know that we need that we suggest it. We already call it a recommendation and we say in order to do this, they should monitor. Small thing.

CHAIR HOLTZMAN: Okay.

JUDGE JONES: I don't know if anybody feels strongly about it.

CHAIR HOLTZMAN: All right, let's just vote on that, unless somebody else has a burning desire to talk. Okay.

MR. STONE: I think I would like to say something before you vote.

CHAIR HOLTZMAN: Okay.

MR. STONE: I mean, to be honest, this whole document you are looking at and everything in pink is because I pointed out at our last public meeting that I wasn't ready to vote on this report because I had some concerns about whether we were directing the next panel, based on information which, again, I haven't heard publicly, that I didn't mind the ideas behind it but I didn't feel I had a basis. But I was
perfectly happy to suggest to them that these are topics that we got out of our listening sessions that we felt, if we had had more time, we would have looked at. And in their discretion, we are suggesting that they look at it.

I thought it was -- it struck me as a little bit too much to make, again, a formal recommendation about things that I hadn't exactly heard about here. So, therefore, I just added the word suggest. I didn't think it took away from the substance of the recommendation.

And you will see in each of these, with me just hedging a few words so it doesn't look like I have a record upon which I am making this recommendation. And that is true for every one of these, except what is now 49 and 50, that is just an editorial stylistic change on all but 49 and 50, where I wanted to add some data in order to be able to go along with the recommendation. I didn't change the substance of the recommendation very much but I either changed a bullet or -- I guess I just changed some
bullets and a few words here and there. I was trying to stick with what I thought was the thrust of everybody's views but, at the same time, pointing out what would allow me to feel comfortable going along with it.

So really, 47 and 48 there is virtually nothing of substance changed here except suggests that.

CHAIR HOLTZMAN: Okay so why don't we take the three of them together?

We have a recommendation in Recommendation 47, 48, and 49 --

MR. STONE: Well, and 51.

CHAIR HOLTZMAN: I'm sorry -- and 51.

MR. STONE: Yes.

CHAIR HOLTZMAN: Mr. Stone wants to add the term the JPP suggests that, in essence. And Barbara?

JUDGE JONES: I think recommendation means we are suggesting it.

CHAIR HOLTZMAN: Okay. Any other comment? Okay.
Those in favor of Mr. Stone's recommendation/suggestion say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: Okay, the no's have it. It's not accepted.

Mr. Stone, what's your next item?

MR. STONE: That takes us to Recommendation 49. And when I get to 49, the last two bullets actually relate to the last topic we just spoke about in the recommendation --

CHAIR HOLTZMAN: Is that on page 6?

MR. STONE: I'm on page 6 at the top.

CHAIR HOLTZMAN: The top of 6. Okay, great.

MR. STONE: Yes, we have to be careful about suggesting that SVCs and VLCs don't have a legal obligation to their clients and we have to be more careful in the way we make a recommendation. So, therefore, I added some
language to make it clear that they have a legal
obligation to their client and that those topics
may want additional training, which we just spoke
about in the other recommendation. But I think
it has to be made clear, especially if this
relates to investigators because they are not
lawyers and they do not often understand that
lawyers have an obligation to their client before
they have it to an investigator.

So, therefore, I wrote since some
SVCs/VLCs who attend investigative interviews,
consistent with their legal obligation to their
client, may limit the scope of questioning. I
don't want to cast doubt on what they are doing
when what they're doing is legitimate. It's
just, as a policy matter, we think it may cause a
problem with what the investigators would like.

CHAIR HOLTZMAN: Mr. Stone, would you
have an objection to an amendment to that --

MR. STONE: No. No, that would be
perfectly fine.

CHAIR HOLTZMAN: -- which would say
since some SVCs/VLCs who attend investigative interviews consistent with their view of their legal obligations to their client? Because in fact, their legal obligation may not require them to do X, Y, Z but they think they are required.

Then I would have no objection. I can't speak for anybody else.

VADM TRACEY: Is this a sentence? I get lost here.

CHAIR HOLTZMAN: Do we have a grammatical problem now? Oh, my goodness.

JUDGE JONES: Are you in the box on 49?

MR. STONE: No, we're at the very top --

CHAIR HOLTZMAN: No, at the top of page 6.

VADM TRACEY: Since some SVCs/VLCs who attend investigative interviews consistent with their perceived did we say --

MR. STONE: No, with their view.

VADM TRACEY: -- their view of their
legal obligations to their clients, comma, may
limit the scope of questioning and sometimes
inject to investigators requests for any follow-up
interviews with the victim. And investigators
lose rapport-building opportunities and possibly
important details about the reported offense --
then what?

CHAIR HOLTZMAN: Yes, right. Was
something taken out of this? Meghan, do you have
the original language?

MS. PETERS: I do. And it was a two-line note that said SVCs/VLCs who attended
investigative interviews limit the scope of
questioning and sometimes object to
investigators' requests for any follow-up
interviews with the victim.

MR. STONE: Oh, that's good because
that gets rid of then investigators lose rapport-building opportunities. And there I go again
with rapport-building opportunities who has no
privilege.

VADM TRACEY: But I still -- even if
that is the case, there is still this clause hanging out at the end: whether those topics warrant additional SVC.

CHAIR HOLTZMAN: Where did that come from?

MR. STONE: I don't know. Oh, maybe -- okay so I guess that's in red. I must have added that.

CHAIR HOLTZMAN: What is the original language? If everyone is happy with the original language, we could just go with that.

MS. PETERS: SVCs/VLCs who attend investigative interviews limit the scope of questioning and sometimes object to investigators' requests for any follow-up interviews with the victim.

VADM TRACEY: So Mr. Stone wanted to add the consistent with --

(Simultaneous speaking.)

MR. STONE: No, no, I'm just making more trouble in a confusing sentence.

VADM TRACEY: All right.
CHAIR HOLTZMAN: Okay, fine.

MR. STONE: And I can accept Ms. Holtzman's insertion of view of their.

CHAIR HOLTZMAN: Well, we don't have consistent with their obligations. So, that's out of it.

MR. STONE: No, no, that's still in I think.

VADM TRACEY: No.

CHAIR HOLTZMAN: No.

JUDGE JONES: No, it's out.

MR. STONE: Okay, well, that's what I'm proposing: consistent with their view of their legal obligation to their client may limit the scope of questioning. Because I don't want anybody to think we think they're doing something wrong when they limit the scope of questioning.

CHAIR HOLTZMAN: I have no problem with that but let's vote on it.

VADM TRACEY: I'm sorry.

CHAIR HOLTZMAN: Go ahead.

VADM TRACEY: There's still a last
sentence hanging out. What is the whole recommendation?

CHAIR HOLTZMAN: Go ahead, read it again, please, Meghan.

MR. STONE: Since some SVCs slash --

CHAIR HOLTZMAN: No, not it doesn't start with that. No, go ahead, Meghan, read it.

MS. PETERS: "SVCs/VLCs who attend investigative interviews" with the proposed that it's "consistent with their view of their legal obligation to their clients may limit the scope of questioning and sometimes object to investigators' requests for any follow-up interviews with the victim," period.

MR. STONE: Then I want to get the word some before that because it was definitely not universal, from the interviews with SVCs and the VLCs. It should say some SVCs/VLCs. I mean if that is an observation, it's an observation but it's some.

CHAIR HOLTZMAN: All right.

Okay, those in favor of Mr. Stone's
recommendation -- do we have his recommendation in mind?

In favor of Mr. Stone's recommendation, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Those opposed?

(No audible response.)

CHAIR HOLTZMAN: The ayes have it.

That recommendation is agreed to.

Okay, what's next?

MR. STONE: And then I crossed out the next, the last bullet under that because I didn't think that added anything. And I thought that it was inexplicable the way it stood, as a result of the barriers to the thorough questioning by MCIOs, since details about an incident are coming together all the time.

CHAIR HOLTZMAN: It's not grammatical.

MR. STONE: Am I missing something there?

CHAIR HOLTZMAN: Yes, what is the original language?
MS. PETERS: I think a portion of that sentence was transposed and tagged onto that bullet above, which created the confusion.

CHAIR HOLTZMAN: Okay.

MS. PETERS: The original bullet reads as follows: As a result of the barriers to thorough questioning by MCIOs, the investigators lose rapport-building opportunities, as well as important details about the reported offense, since details about an incident are commonly gathered over time after a traumatic event, such as sexual assault.

CHAIR HOLTZMAN: Okay.

MR. STONE: My suggestion was to take out the remainder of that because we at least have some of this for object to follow-up interviews above and the rest of it is may. It's speculative and I don't think it is necessary.

CHAIR HOLTZMAN: Okay, so you want to strike the bullet.

MR. STONE: Just strike that bullet.

CHAIR HOLTZMAN: Okay, those in favor
of striking the bullet say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: Barbara have you voted?

JUDGE JONES: No, I haven't.

CHAIR HOLTZMAN: We have a tie vote here.

JUDGE JONES: I know. This is really my moment.

CHAIR HOLTZMAN: Right, live it up.

JUDGE JONES: And I'm voting whether to strike or not?

CHAIR HOLTZMAN: Yes.

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay, the no's have it.

Mr. Stone, next.

MR. STONE: Okay, now we have --

CHAIR HOLTZMAN: Did we do 50? Is this part of what we already did?
MR. STONE: No.

CHAIR HOLTZMAN: Okay, Recommendation

50.

MR. STONE: No, we haven't touched this.

CHAIR HOLTZMAN: Okay.

MR. STONE: In addition to the suggest, which is separate and apart from the substantive issue --

CHAIR HOLTZMAN: Right.

MR. STONE: -- I added the last, two, three, four, five words at the bottom of the recommendation talking about trying to get cellular phones and it makes it clear we're not just recommending something willy-nilly. It says which can lawfully be ameliorated. And then I wanted to clarify in the first bullet, which is -- and in the second one actually, the difference between somebody voluntarily turning over their cell phone or not voluntarily turning it over.

And I thought I needed to point out that the Supreme Court unanimously held in 2014
that the information on a cell phone is immune from search. A warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency.

All that language is from the Supreme Court case. It's recent. It talked about whether you can just grab a cell phone, even incident to arrest, which we don't have it from a defendant, and they said no.

So, that's why in the second bullet I wrote, "When a victim voluntarily declines to turn over relevant evidence such as . . . and a warrant for the cell phone is not obtained," that would be the right way to get it, there are military warrants, investigators and prosecutors make decisions by investigating charging without possessing all available evidence.
That's the point. They may decide we're not going to get a warrant or we can't get a warrant, it wasn't turned over. They are going to make a decision without possessing all of the available evidence and that's why in the main recommendation was suggesting that they look at this in ways that can lawfully be ameliorated.

JUDGE JONES: So is the first one in the box you want to add which can lawfully be ameliorated?

MR. STONE: Yes, in other words, consistent with the Supreme Court Riley v. California. Maybe they can come up with something consistent with that. That's fine. But I don't want to suggest that we're ignorant of what the constitutional Fourth Amendment rule is as decided recently by a unanimous Supreme Court, which is odd in itself in the last couple of years, having to do with cell phones.

CHAIR HOLTZMAN: Now before you get to that, why is there a striking through the word
remove? Is that an accident, or do we take that seriously, or what does that mean?

MS. PETERS: That's an edit from Mr. Stone.

MR. STONE: In the second bullet?

CHAIR HOLTZMAN: In the first bullet.

MS. PETERS: In the recommendation we are talking about.

MR. STONE: Because the original recommendation said JPP recommends that the blah, blah, blah consider removing. And what I'm saying is monitor if there are impediments, which can lawfully be ameliorated.

CHAIR HOLTZMAN: But we rejected.

MR. STONE: So I have the ameliorated instead of remove.

CHAIR HOLTZMAN: Okay. But the suggested part we have already voted on.

MR. STONE: Yes. No, I know. You want to get rid of that. I got that.

CHAIR HOLTZMAN: Okay, now, Barbara, do you want to respond to lawfully being
ameliorated?

JUDGE JONES: Yes. Again, I don't think we need it.

I think what we were talking about here is we are asking them to -- well, I don't know. Maybe it's not well-stated. I don't think anybody has any misunderstanding about them looking to go beyond developed Fourth Amendment law. I just think we're asking them to figure out other ways to address the victims' concerns.

And I remember one of the things we talked about was really just sort of the kinds of explanations a victim may need to understand the importance of this evidence getting to the prosecutor quickly to develop leads or, at some time, appropriately to figure out what the defense may be in the case and also to be able to explain that they are able to search without necessarily going beyond the subject matter that is involved in the case.

Those were the kinds of things that we talked about in the Subcommittee that are
possible remedies. And maybe what they all are
is they and a number of other suggestions that
can be used to explain to victims that this can
be done very carefully and with the least
invasion of the victim's privacy in terms of
other events and other things.

So I don't know that we need to say
that -- I don't think we really have to tell
anybody that of course we don't mean we're going
to do unlawful things. So, I just wouldn't put
it in.

CHAIR HOLTZMAN: All right, are we
ready to vote?

MR. STONE: I guess I should just
respond to that. That, unfortunately, is not how
I read this recommendation. The word that was
there originally was remove impediments. And if
you're talking about training SVCs to talk to
their clients, you can't be talking about
training victims because you have no idea who
they are going to be. But the words remove
impediments --
JUDGE JONES: Can I just -- I've got remove in or remove out. Is remove in or out?

MS. PETERS: There are three substantive changes to the recommendation, as we received them from Mr. Stone.

JUDGE JONES: Okay.

MS. PETERS: If I could just highlight them in order and discuss this in the order you want to take them in, where the pink highlight says the JPP suggests that the DAC-IPAD monitor something, that is a substantive change.

Recommendation 46, as voted on last time, said the Secretary of Defense remove impediments to MCIOs obtaining tangible evidence. And there was no mention of a DAC-IPAD. So I just want to highlight that that is the first change in this recommendation.

The second change is that remove impediments. It was the Secretary of Defense remove impediments to access to tangible evidence. Remove impediments has been changed to monitor if there are impediments to MCIOs
obtaining tangible evidence.

JUDGE JONES: Well I remember an issue
that is more to the point here than the ones I
listed and it is perceived difficulties in
obtaining search warrants as an impediment. That
was also discussed. That came up in a variety of
the site visits.

So I guess if we are not going to
assume that we have any proof of any of these
things, it can be are impediments. And I'm
against which can lawfully be ameliorated. I
haven't changed my opinion on that.

MS. PETERS: And that is the third
edit --

JUDGE JONES: Okay.

MS. PETERS: -- adding to the end of
the recommendation, which can lawfully be
ameliorated. That is the third substantive edit
to this recommendation.

CHAIR HOLTZMAN: Okay, so if I
understand it, we have three things that we are
being asked to vote on. Number one, to replace
the recommendation to the Secretary of Defense,

to the recommendation to the DAC, whatever you
call it, the IPAD.

The second is the suggestion that

instead of removing impediments, to monitor

whether if there are impediments. I'm not going

into the grammar here or the style.

And the third is the language which

can lawfully be ameliorated.

Okay, let's vote on this. I think we
can take them as a whole, unless there is

objection to that.

So those in favor of Mr. Stone's

suggested changes, three suggested changes to

Recommendation -- I don't know if it's 46 or 50

but as appearing on page 6, say aye.

MR. STONE: In favor? Aye.

CHAIR HOLTZMAN: In favor, aye.

Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

The recommendation is not carried.
Mr. Stone, we have your next recommendation which on the bullet point number 1, which I think you already explained.

Ms. Peters, is that simply to add this language about the Supreme Court decision?

MS. PETERS: It is that plus there is a minor technical edit to that first line. Instead of asserting that MCIO investigators have difficulties obtaining evidence, it has been changed to MCIO investigators report having difficulties voluntarily obtaining evidence.

So it would be for the MCIO investigators report having difficulties and voluntarily obtaining evidence, as opposed to just has difficulties obtaining evidence.

CHAIR HOLTZMAN: Okay. So, we have two changes in the bullet point. One is changing the first line, basically, to adding the word voluntarily and changing it so that MCIO investigators report having difficulties.

And then the second one is to basically include the language about the Supreme
Court decision, plus some other material above it.

Barbara, do you want to respond to that?

JUDGE JONES: I don't think we need the Supreme Court language in there. And I think I liked it the first time around. I can read it again, Mr. Taylor. This one?

PROF. TAYLOR: This one. Do you want me to read it for you?

JUDGE JONES: No, I can see it.

MR. STONE: I'd like to just say that nowhere in the report is it clear in the Subcommittee's report that there is Supreme Court law, which is something that has to be looked at. And the report, when read on its face, is contrary to the last line of the bullet as it now reads. It talks how the MCIOs found it an inconvenience to be weighed against the claims of police efficiency, which is perfectly acceptable for MCIOs. They are not lawyers but I think that, given our responsibility to be clear, we
just need to say we're cognizant of that, even though the MCIOs in their non-public, non-attributional comments, would have liked police efficiency.

If they had shown up in front of us here, I am certain I would have raised this and maybe they would have said oh, yes, of course, absolutely. But it didn't come up. It is not in the Subcommittee report and it implies that police efficiency is the end all and be all. And I just want it to be clear that there is a balance there and that we understand the balance.

JUDGE JONES: I don't think it's necessary.

CHAIR HOLTZMAN: Since this is all in one bullet, I, personally, don't see that there's an objection to Mr. Stone's change in the first sentence, which instead of MCIO investigators report have difficulties obtaining evidence. I don't mind saying they report having difficulties.

JUDGE JONES: No, I don't mind that
either.

CHAIR HOLTZMAN: And I don't mind the word voluntarily obtaining evidence.

VADM TRACEY: I think that is contrary to what Judge Jones said. I thought that she said that they reported actually having difficulty getting warrants, as well as obtaining voluntarily.

JUDGE JONES: That was one of many follow-ups, yes.

CHAIR HOLTZMAN: Oh, okay. So then --

MR. STONE: That's treated in the second bullet.

MS. PETERS: I think those are two -- both problems in their own right I think from the Subcommittee's --

CHAIR HOLTZMAN: Right, so I think the voluntarily part, I think that is okay. I don't think I have any problem with that first sentence, to changes in the first sentence.

But I agree with Judge Jones about the Supreme Court case and the balance of the
material.

Do you have a view about the -- okay, let's --

JUDGE JONES: Well, I still don't think we need to say voluntarily but maybe I am missing something.

CHAIR HOLTZMAN: Okay, well if you don't --

JUDGE JONES: No, I think the MCIO Investigators report having difficulties is fine with me. I agree with you as you agree with me, we don't need the Supreme Court in there and I just don't think we need voluntarily either.

CHAIR HOLTZMAN: Okay, so let's first -- so let's separate it out into three points.

Number one, I am going to do your proposal on sentence number one without the word voluntarily and then I will ask for the voluntarily. Okay?

So, those in favor of Mr. Stone's suggestion that we change sentence one to say MCIO investigators report having difficulties,
those in favor say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

CHAIR HOLTZMAN: The ayes have it.

Question: Do we want to add the word voluntarily after the word difficulties?

Those in favor say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Then the balance of Mr. Stone's proposal on bullet number one, those in favor say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Okay, bullet two --

MS. PETERS: Ma'am, may I clarify for the Staff's reference on bullet one?
CHAIR HOLTZMAN: Yes.

MS. PETERS: You have discussed the balance of the pink is all about the Supreme Court case, except for --

(Simultaneous speaking.)

CHAIR HOLTZMAN: Yes, right, I said that when I described it. I said the rest of the --

MS. PETERS: The balance of it.

CHAIR HOLTZMAN: -- balance of his proposal.

MS. PETERS: Okay, then, understood.

So, that applies to everything else.

CHAIR HOLTZMAN: Yes.

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

VADM TRACEY: So I'm sorry, now it says, let's see, allows clients not to --

CHAIR HOLTZMAN: It will revert to whatever the original language was. I don't know that we had the original.

MR. STONE: It implies that the SVCs and the VLCs are doing something wrong when it
says openly acknowledged they advised clients not to turn over the cell phones.

And I don't think we should be implying they are doing something wrong when they are doing something constitutional.

CHAIR HOLTZMAN: Or they think it's constitutional.

JUDGE JONES: I didn't know you were challenging -- that's not in pink here. It looks unchallenged.

CHAIR HOLTZMAN: Well, what he's got there is the voluntarily part.

JUDGE JONES: Right, we voted on that.

CHAIR HOLTZMAN: And then he's got diary and -- well, we have voluntarily twice in that bullet. There is a second time voluntarily and then there is diary and privileged materials.

Then he says, therefore, the use of both voluntary productions and the use of military search warrants with cell phones should be monitored. And then there's the Supreme Court reference.
Do you want to revisit that issue?

JUDGE JONES: Aren't we back in the first bullet now about openly acknowledged?

CHAIR HOLTZMAN: Can you read sentence number two of what the original language was, please?

MS. PETERS: The second sentence of the original first bullet reads: Some SVCs/VLCs openly acknowledged that they advised clients not to turn over their cell phones to investigators, even when it is likely to contain potential evidence.

CHAIR HOLTZMAN: Even when "it," when we have cell phones in the plural?

MS. PETERS: That's how it reads right now, ma'am.

CHAIR HOLTZMAN: Yes, there is a grammatical problem there. Really we don't need a -- that's not a substantive issue, is it?

MS. FRIED: No.

JUDGE JONES: So, I understand your point, Mr. Stone, to the extent that openly
acknowledged. The openly part makes it sounds like they're doing something wrong. So I would get rid of openly. And it can be as simple as "have acknowledged" or "some SVCs report that."

CHAIR HOLTZMAN: Yes, that's better report instead of acknowledge because it doesn't suggest something wrong. Right.

JUDGE JONES: Right.

So, anyway, I would go along with getting rid of it and suggest SVCs/VLCs report that they advise clients, et cetera. I would agree to that. That would be my suggestion.

CHAIR HOLTZMAN: And what about the term voluntarily there? Because this is not necessarily in response to a subpoena. That could suggest that they are advising them not to turn over cell phones to investigators. Is that necessary?

JUDGE JONES: I think it's unnecessary for the same reason we didn't need it the first time.

CHAIR HOLTZMAN: Okay.
All right. So, we just voted on that, right?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay.

MR. STONE: We just changed some language, though. And in light of that language, some SVCs/VLCs report --

CHAIR HOLTZMAN: Right.

MR. STONE: -- that, and if you put in a comma, consistent with governing law, comma, they advise clients not to blah, blah, blah. I don't want them being criticized or looking like they are being criticized unfairly when they are acting consistent with governing law. It may not be the best thing for the investigators but it's consistent with governing law the way they're acting.

JUDGE JONES: But I don't think now that we've taken out what I agree with you was language that was inappropriate, a little over the top on this issue, that that's what we're saying.
MR. STONE: But it says it in the Subcommittee report to which we refer to. That's the point. We have a Subcommittee report that backs this up and that report is much more critical without ever recognizing because it's coming from comments by MCIOs who are not typically lawyers, that they are frustrated, and they are angry, and everything else that they are not getting the cell phones and they want them. And frankly, I don't think they've had the legal training to understand that what they should be doing is rushing right out to the warrant procedure and at least trying to get a warrant right away, which they would probably get pretty quickly. Mr. Taylor made that point a couple of days ago.

JUDGE JONES: Well, look, I think the report is recording their statement but this recommendation is not that. And I don't think we need to go any farther than what we've done here.

CHAIR HOLTZMAN: Okay, so let's vote on the proposed change that Judge Jones has made,
which would be in the sentence to strike openly
acknowledge and replace it with report or
reported. Which word?

JUDGE JONES: Reported I suppose.

CHAIR HOLTZMAN: Okay.

JUDGE JONES: I don't think it

matters.

CHAIR HOLTZMAN: All right, those in

favor, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

CHAIR HOLTZMAN: That's carried.

Can we also make the change about "it"
to "they", or turn over -- so that we make the
grammatical change?

MS. PETERS: Yes, ma'am.

MR. STONE: Now, I would like just

like a vote on whether you want to say consistent

with governing law.

CHAIR HOLTZMAN: Okay.

MR. STONE: That would be the phrase
after reported that they, comma, consistent with
governing law.

JUDGE JONES: I mean my view about
that is, in any case, it should be their view of
governing law because I don't know that --

MR. STONE: Okay, could be consistent
with their view. That's okay.

CHAIR HOLTZMAN: But I don't know if
it's necessary.

JUDGE JONES: I mean that's the kind
of phrase that you either do it everywhere or you
don't do it anywhere, it seems to me.

MR. STONE: Well, I think if you are
criticizing the lawyers anywhere, you have to
throw that in.

JUDGE JONES: Well I've tried to take
the wording out that would criticize them. This
is just a fact now that they do this, which I
think takes care of it.

CHAIR HOLTZMAN: Okay, let's vote.

Those in favor of Mr. Stone's
suggestion to use language -- would you state it
again, Mr. Stone?

MR. STONE: Consistent with governing law.

CHAIR HOLTZMAN: Okay -- say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Mr. Stone, we're up to bullet three or two.

VADM TRACEY: I'm sorry, we took out the sentence: Therefore, the use of both voluntary productions and the use of military search warrants for cell phones should be monitored. Did we not agree that both things need to be monitored?

CHAIR HOLTZMAN: Isn't that already -- do we have that in our original language?

MS. PETERS: No, ma'am. It's not in the original language. This is added. This is all part of the new and proposed language from Mr. Stone, beginning with I mean everything above
but --

MR. STONE: That was my new language.

MS. PETERS: -- therefore. The entire section that begins with therefore, everything below it highlighted in pink is all brand new to the report.

MR. STONE: Would you like to suggest we vote on just that sentence? Therefore, the use of both voluntary productions and the use of military search warrants for cell phones should be monitored. I'm fine with that. I second the idea we vote on it.

CHAIR HOLTZMAN: Barbara, do you have --

JUDGE JONES: Yes, I think these are sort of statements of fact to support the recommendation. Right? And now this one incorporate a recommendation that things were not really, I don't think, honing in on the use of voluntary productions and the use of military search warrants should be monitored.

I mean that is a recommendation
somewhere else but I'm not sure why it fits here. It's not the recommendation.

CHAIR HOLTZMAN: Right. Maybe that language could be added to Recommendation I don't know what the number is 46 or 50 right above it.

MR. STONE: It's 50. It's 50 now.

CHAIR HOLTZMAN: Okay, so maybe something instead therefore and maybe just simply the use of both voluntary productions -- I don't know if that is the correct language -- and the use of military search warrants for cell phones should be monitored. I don't know how to incorporate that.

I have no problem with --

JUDGE JONES: Yes, I don't think we thought about monitoring those things. This was to --

MR. STONE: If you make it a whole new sentence, you could put it as the last sentence of the current recommendation.

PROF. TAYLOR: So could I just make one observation about this?
CHAIR HOLTZMAN: Yes, go ahead.

PROF. TAYLOR: I don't know how you do that. I mean I don't know how you would do that unless you sent something out to every MCIO saying that every time you faced an issue involving the need for this kind of evidence that somehow you would file a flash report or keep up with it. It seems to me like this has some really practical difficulties in implementation.

MR. STONE: Well, we might have them just have a place on their normal reporting as to cell phone voluntarily -- cell phone was requested, voluntarily turned over, search warrant requested, search warrant obtained, or search warrant not obtained. I mean we just add that to whatever they're doing on their reporting forms. Because according to the Subcommittee report, this is in a majority of cases.

CHAIR HOLTZMAN: Well, maybe this is covered already under the recommendation that this be monitored to remove impediments. I mean as part of the monitoring you could assess how
the system is working now.

        JUDGE JONES: Yes, I mean that would have to be -- the guts of this is simply to say we're trying to remove impediments and point up the issue on that sometimes it's difficult because victims don't understand or we don't have the technology to be able to persuade them. Those impediments, it seems to me, are very different than, and that recommendation is very different than launching a monitoring system for all search warrants and, I guess, voluntary productions.

        MR. STONE: Could you tell me, practically, what you mean by that when you say victims don't understand? We haven't recommended training for victims and we have recommended training for their counsel. So, I'm not sure what the impediment is, just simply that they don't wish to turn it over?

        JUDGE JONES: No, and I may have misspoke. It is the notion that they -- look, these are all of the same ilk and the VLC, just
to have an appreciation for what the value of
these things are. And we've captured that.

Look, I totally understand a victim
has a right to make a decision. I just want the
victim adequately advised by a trained VLC.
That's the point of all of these.

MR. STONE: But this one is in an
investigation one. Then you want more training
of the SVCs and VLCs instead of remove
impediments.

That's why I said before if you want
to turn this into a training recommendation, that
might be a good way to do it.

CHAIR HOLTZMAN: Meghan, could you
please read the original language of sentence
number in the recommendation so that we
understand what was of asked of the Secretary of
Defense to do?

MS. PETERS: Yes, ma'am. And we're
obtaining copies of the original language because
it is --

CHAIR HOLTZMAN: Well anyway, just
read it to us now, if you don't mind, please.

MS. PETERS: Okay. The first --

CHAIR HOLTZMAN: Yes, Recommendation 50.

MS. PETERS: The original recommendation, ma'am?

CHAIR HOLTZMAN: The original.

MS. PETERS: The Secretary of Defense remove impediments to MCIOs obtaining tangible evidence from a sexual assault victim, particularly information contained on cellular phones or other digital devices, and develop appropriate remedies that address victims' legitimate concerns about turning over this evidence to assure that sexual assault investigations are complete and thorough.

CHAIR HOLTZMAN: All right. What about, Mr. Stone, if we did this: instead of just saying remove impediments, assess and remove impediments? Wouldn't that get to the issue you're talking about, which is to review voluntary and involuntary production?
MR. STONE: No, because I still don't know what the impediments are. This, by the way, was the thing that kept me from being able to join in this whole recommendation last meeting.

CHAIR HOLTZMAN: Yes, it is an impediment. They refuse to turn -- right.

MR. STONE: I'm fine if you can come up with language about training the SVCs about possible impediments to blah, blah, blah.

VADM TRACEY: So I thought that what the Subcommittee found was several dimensions around this. One, that the view was that SVCs didn't always recognize how important it was to the investigation to get data off of these devices. And so they advised their clients in a way that impeded the ability to win the case.

Second, that the MCIOs either didn't ask for or reported difficulty in obtaining warrants. So, they couldn't force the production of these devices.

I think, third, that it wasn't clear that the Government made use of certain
techniques and technologies there are today that
would allow the extract of relevant information
while protecting the privacy of the victim.

So, I think there is actually sort of
three sets of things that were uncovered in these
conversations with MCIOs that merit being
addressed.

MR. STONE: And if you are going to --

JUDGE JONES: And those all constitute
impediments. So whatever those impediments are,
is there a way for them to be remediated by the
DoD?

MR. STONE: If you name those three
things in the recommendation, I think probably I
can go along with it.

VADM TRACEY: I think that's what the
sub-bullets are attempting to do.

CHAIR HOLTZMAN: Correct.

MR. STONE: Well, I want them in the
recommendation because, as I read it and then
look back, it suggests something entirely
different to me. So if that is what they're
looking at, training for SVCs, actually training for MCIOs so they understand what they need to do in these circumstances, and further exploration of possible new technologies. I'm fine with those three things.

I don't call those impediments. It's a training requirement. It's a new technology requirement.

JUDGE JONES: Well, I just don't think it all makes sense.

MR. STONE: So maybe it's just the awkward language in the recommendation that causes me so much trouble and I don't know if somebody here or wants to get back to us with another formulation, or let me take a stab. Or I would love to have you, Admiral, take a stab because you just articulated it pretty well, or somebody else.

I don't have to be the one to name those three things but I'm not troubled with those three things.

JUDGE JONES: All I can say is I think
it's in the bullets and it's modifying the recommendation.

VADM TRACEY: That's what I think as well, that the recommendation says what I think what we want it to say. We found categories of potential impediments in our conversations in the Subcommittee. There may be others and those may be one-offs that came up in those conversations. And the monitoring of the data by whoever in DoD might suggest that there are other problems or these are not real problems or that training is the right remedy or that we actually have to make some policy changes.

And I thought that the bullets were attempting to explain kind of what the foundation of our concerns were.

MR. STONE: I guess then the other option I will ask is that since I don't think those bullets get us there, maybe somebody just wants to clarify the bullets to say each of those three things. And if they said that, I would be fine with it.
I just think this thing is so obscure you don't know if it is telling MCIOs to be cowboys. That's what I think it's suggesting but it's not what's intended.

CHAIR HOLTZMAN: Do you want to try your hand at doing some bullets?

MR. STONE: I'd be happy to do that then circulate them through the Captain.

MS. FRIED: I think that couldn't be today, though. That's how --

CHAIR HOLTZMAN: How we got here.

MS. FRIED: Yes.

MR. STONE: Well, no, no, no. I rewrote the recommendations is how we got here. Now, I'm just rewriting three bullets and we all agree on where it's going.

CHAIR HOLTZMAN: Well, I don't know. Those bullets, some of that material is in the bullets now.

MR. STONE: I just want to make it a little explicit.

MS. FRIED: And again, Mr. Stone can
write separately. The purpose of this was to provide the opportunity for the Panel, because you guys already deliberated on this at the last meeting, the benefit of Mr. Stone's input so you all could consider it, make changes consistent with what he's recommending, discuss it, modify it, or what have you. And you can certainly can have him come back with additional comments but you may have to have another deliberation session.

CHAIR HOLTZMAN: Well, we may have to do that. We already have two recommendations. So, he can come forward with new bullet points. They can be circulated and we can respond to them. And if we like them, we like them; if we don't, we don't.

MR. STONE: Right. It's an easy vote next time; they like the bullets or they don't like the bullets.

CHAIR HOLTZMAN: And the bullets would be really basically to elaborate the points that --
MR. STONE: Exactly. Right, I will suggest the bullets and, at the same time, ask them to be circulated. And if I think other panel members, since we're not voting, could circulate alternative bullets based on mine, so we come in here with maybe not just my version but one or two versions and we simply take a quick vote.

CHAIR HOLTZMAN: I have no objection to that. Or we can do it on the phone if we get a public phone meeting.

MR. STONE: Right.

CHAIR HOLTZMAN: Okay. Now, going to the -- does that remove the proposals you made to the other bullet points, Mr. Stone, or do we have to go through those as well?

MR. STONE: No, I think we took care of the other bullet points because we decided --

CHAIR HOLTZMAN: Well, you took something out over here. Are you still proposing that? Are you still proposing the changes in the last three bullet points? We haven't reviewed
those yet. I just want to make sure.

MR. STONE: Yes, I'm going to propose to rewrite all the bullets because I pointed out that the fourth bullet, nobody talked of it. So, it's a little hard to talk about what it is the victims care about in this thing.

CHAIR HOLTZMAN: Okay, do you want to just suggest that now?

MR. STONE: But I'm going to try and get to Admiral Tracey's three things. I'm going to focus on one, two, three.

CHAIR HOLTZMAN: All right.

VADM TRACEY: But again, with respect to the third bullet, you can certainly admit that some sources interviewed suggested that victims' concerns about providing their cell phones were attributable to the financial loss. That's a fact.

MR. STONE: Okay. Okay, I'll find a way to say that.

CHAIR HOLTZMAN: So maybe the change that we're proposing is that victims reported or
it was reported that victims have concerns, some victims, maybe not many but some victims, have concerns about whatever.

MR. STONE: Right.

CHAIR HOLTZMAN: We don't need to eliminate the whole thing because --

MR. STONE: Okay, that's legitimate. That's what I'm trying to do, get --

CHAIR HOLTZMAN: Okay.

MR. STONE: That's what I tried to say at the outset --

CHAIR HOLTZMAN: Okay.

MR. STONE: -- that I didn't disagree with the thrust of these. I was just trying to get wording that worked.

CHAIR HOLTZMAN: Okay, thanks, Mr. Stone. So if you would please provide that, that would be great.

MR. STONE: Okay.

CHAIR HOLTZMAN: Now what are we up to now, page 7?

MR. STONE: Well, we didn't do the --
yes. Yes.

CHAIR HOLTZMAN: Okay.

MR. STONE: Page 7 and this one is sort of like the others. Oh, it says monitor because that is their job to monitor. So, I thought monitor --

CHAIR HOLTZMAN: What is the original language that this replaces?

MS. PETERS: The original language of this recommendation is: The Secretary of Defense review the resources, staffing, procedures, and policies at forensic laboratories within the Department of Defense to ensure expeditious testing of evidence by forensic laboratories.

CHAIR HOLTZMAN: Okay. So, you still want this changed, Mr. Stone? We can --

MR. STONE: Well I thought that before we recommended to him that he review it, that we at least ask the next panel to look at it because we didn't really get to look at it. We heard they are all behind but maybe the next panel will say last week he doubled their funding and they
can catch up. So, I just wanted to be -- I
didn't want to overload his plate on something.
Again, I didn't ask how are you doing. Maybe
y they contracted with the FBI who is going to pick
up all their overload. I just didn't know.

CHAIR HOLTZMAN: But I think,
according to Admiral Tracey's earlier point and,
Admiral, forgive me for putting words in your
mouth, I don't dare to do that but I do think
that the Admiral's point was to leave this to the
Secretary of Defense to handle how he, now he,
wants to handle it, whether he wants it
personally contracted with the FBI or give it to
the DAC-IPAD or whatever. So that, I think, was
the method behind the madness of this
recommendation.

But if you want to have a vote on it,
we can.

MR. STONE: Well, the point of my vote
was I don't know the current and immediate future
status. I only know what they tell me about the
past.
CHAIR HOLTZMAN: Okay, fine.

MR. STONE: So, therefore, I would have them monitor it. If nobody else thinks that's a problem, you'll out vote me.

CHAIR HOLTZMAN: Okay, fine.

MR. STONE: I would just like to know what the status is before I tell somebody to change something.

CHAIR HOLTZMAN: Okay, so recommendation 51 on page 7, Mr. Stone's suggested change is in pink. Those in favor say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it. Okay, so we are basically finished.

Do we have to do another vote on this?

MR. STONE: We didn't do page 2. I put the big block in page 2, which I think is the only probably it relates to why I said suggested and not recommended. And if you like, I can read
it but it's the big block on page 2.

CHAIR HOLTZMAN: All right, give us a

chance to read it.

MR. STONE: Okay.

CHAIR HOLTZMAN: And that's the only

other thing we have to do? Do we have to vote on

this?

MS. FRIED: I think you need to go

over his edits, the next two -- I mean, assuming

you all accept the edits, there is no need to

vote but you still need to go back to them.

CHAIR HOLTZMAN: Okay. So, let's look

at page 2 and read it.

JUDGE JONES: I honestly don't think

we need to say this. Certainly, the follow-on

committee, as well as the Secretary of Defense,

when we ask him to review something, all we're

doing is from our Subcommittee's site visits,

identifying issues, giving them some color so

they can sense what some of the information is

out there, and suggesting, if you want to call it

that, the recommendation is that they review.
Almost every one of these is review.

If the Secretary of Defense does find out, or the next Panel, in five minutes that the DoD has just tripled the budget of the laboratories, I would be surprised.

I think we are sending along a recommendation to look at these. These may be something you want to follow-up on. We're not telling them to do anything. I just don't see why we need all of this.

CHAIR HOLTZMAN: Mr. Stone, do you want to respond?

MR. STONE: I actually think it speaks for itself. I don't want to send something to the Secretary. I think it looks premature, that we didn't ask Services first to tell us what they think about it here and, therefore, the most I'm ready to do on all of these is recommend it to the follow-on Committee and they can have whatever hearings they want before they say yea or nay. I think that just looks like we are rash going to the Secretary about issues that some of
the Services may have made wonderful progress on.
And it is sort of like a criticism of them. And
I'm not ready to criticize them to the Secretary
when I haven't given them an option, as I said at
that other thing, to respond, have an official
representative respond. That's my view.

  MS. FRIED: Mr. Stone, so for all
practical purposes, the JPP makes recommendations
to the Secretary of Defense and to Congress.

     For all intents and purposes, this JPP
is charged with making recommendations to the
Secretary of Defense or Congress. You could say
the DAC-IPAD here but the effect would still be
the Secretary of Defense would consider it before
it goes to the DAC-IPAD or the DAC-IPAD, on its
own initiative could, assuming they had that
discretion, consider it. But getting stuck on
whether or not it goes to the DAC-IPAD or not I
think is kind of unnecessary because, ultimately,
your report is going to go to the Secretary of
Defense and Congress.

  MR. STONE: Okay.
MS. FRIED: Right? So, I see where you're trying to go with this but --

MR. STONE: Well, I'm trying not to look like we made a recommendation before we had a hearing to Congress or the Secretary. If you want to say we are going to recommend it to them, I still think somewhere we have to acknowledge, in case we look really stupid, like you say that they just quadrupled their budget, that because of the lack of time, and I am willing to maybe even put that in there, because of the lack of time, we didn't get a chance to ask of them what is your budget. Get a guy here. What is your budget? What's your turnaround time? What's your new budget? What do you expect your new turnaround time is? Have you any new arrangements to get rid of that?

I mean we didn't do it and I don't want to criticize anybody or make a recommendation when I don't know what they're doing. That's all. So, I was trying to hedge that so I could stay with your recommendations
without it looking like I could care less what they are doing in the military services; I'm going to recommend it anyway.

That's where I was coming from. Do you think there is another way to hedge those words? I could do it, too. But that was my guess right there.

I mean we said, above, that the views, as you can see, are not universally shared. It had said do not necessarily reflect broad trends. That's true, too. So that's why when I said that, I said you know about whether or not these concerns reflect broad trends.

And then I put the issues ought to be followed up. I'm okay with that. I just don't want us implying and, by the way, our duties under Section 576, I looked it up and I think it is (b) and (c), I have the subsections, say that we are supposed to be making recommendations on trends. That's why the language trends is in here because it says we make recommendations on trends, not that we found oh, there is little
concern that people have. So, I was trying to stick with trends and say well, we don't have it on trends. But, in addition, we still think, based on everything we got, that this ought to be what I have down here further followed up. And then if they decide --

    I don't want to crack the whip on somebody and tell them you need to do this because you didn't do that. And that's what it looks like, otherwise. And I'm just not in a position to feel comfortable doing that when I have no evidence what their old budget was.

    Like with other things, we got the old statistics, the current statistics, projected statistics, budget. I didn't see any of that and so I don't know if this is a problem today. I think the issue is interesting.

    You know this relates particularly to the forensic stuff. The issues are interesting but I want to know it's a problem today before I tell somebody you have got to work on it.

    CHAIR HOLTZMAN: Okay, ready to vote.
The vote is on the pink material, the dark pink material on page 2. Does that include all the material?

MR. STONE: And all the struck stuff right underneath because that is what it replaced.

CHAIR HOLTZMAN: And all the struck stuff and all the additional.

MR. STONE: Yes.

CHAIR HOLTZMAN: All the dark pink materials on page 2 and 3.

MR. STONE: Yes.

CHAIR HOLTZMAN: Those in favor of Mr. Stone's recommendations, with regard to the materials on page 2 and 3 that I described, namely adding the dark pink and striking the materials that are stricken, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Are we finished now with Judicial
Proceedings, Sexual Report on Investigations or
do we have to vote on this pending the -- what do
we have to do now?

MR. STONE: I think we have to wait
until I do the bullets.

MS. FRIED: No, I think Mr. Stone was
going to suggest language for the bullets.

MR. STONE: Right. And I don't want
somebody printing it up before we have done that
because it is a waste of time.

CHAIR HOLTZMAN: Can we approve this,
subject to the bullets?

MS. FRIED: Yes.

CHAIR HOLTZMAN: Okay, so let's just
vote now to adopt this report, subject to a
discussion and vote on Mr. Stone's proposed
bullets for Recommendation 50, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: I have to abstain until I
have the bullets accepted in some form or not
accepted.
CHAIR HOLTZMAN: Okay, is that sufficient?

MS. FRIED: That's fine.

CHAIR HOLTZMAN: Okay. So are we done now with this subject?

MS. PETERS: We have two recommendations from Mr. Stone that are very similar. I just want to make sure the Panel has noted the recommendation on page 5. I think it is the same. We have already addressed the word suggests but recommendations now 48 and 49 --

MR. STONE: We covered those.

MS. PETERS: -- say the DAC-IPAD -- okay and monitor.

MR. STONE: They were not accepted.

MS. PETERS: Okay, I just want to make sure that I'm tracking. Okay.

MR. STONE: And I would request that you circulate at least a draft up to date, as soon as you've got it so we can see where we are, but for the bullets.

MS. PETERS: Yes, sir.
CHAIR HOLTZMAN: Okay so now, what's our next item on the agenda?

CAPT TIDESWELL: Ma'am I would recommend that we allow Ms. Saunders time. She's had the time to go ahead and write those recommendations so you can see the new language for the report.

CHAIR HOLTZMAN: Oh, beautiful. Thank you.

JUDGE JONES: Who is this Ms. Saunders?

MS. SAUNDERS: If nothing else, there will be a new slate on which to write.

CHAIR HOLTZMAN: How are we doing on our time?

CAPT TIDESWELL: Yes, ma'am. There are two reports left to discuss. One is called the Final Report and then the second one would be the Data Report for the FY15 statistics.

CHAIR HOLTZMAN: Which is the first one?

CAPT TIDESWELL: It's the Final
Report.

CHAIR HOLTZMAN: Oh, the Final Report, okay.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: All right, let's see how quickly we can do this.

MS. SAUNDERS: Would you like me to go ahead and read Recommendation 5 or do you want to --

CHAIR HOLTZMAN: Just give me a second.

(Whereupon, the above-entitled matter went off the record at 2:38 p.m. and resumed at 2:41 p.m.)

CHAIR HOLTZMAN: Are we still deep in thought on Recommendation 5 and 9? Are we ready? First of all let me say, now that after four to five of these candies, thank you very much Ms. Saunders for an amazing job in this short period of time. I don't know if I can -- I went through Recommendation 5 and I have some suggestion that doesn't change the substance but
I think might change a problem here because you can't have the Secretary of Defense revise a statutory provision.

MS. SAUNDERS: I tried to say or recommending revision --

CHAIR HOLTZMAN: Well, I know but I did it in a different way.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: So I added the words -- by the way, after while well intentioned, these provisions I put appear to have, instead of have created.

And then instead of have had consequent negative effects, I said and with the consequent negative effects so the term appear to have modifies the whole thing.

MR. STONE: And what is going to go before negative consequences? And what?

CHAIR HOLTZMAN: With the negative effects.

MR. STONE: Oh, okay.

CHAIR HOLTZMAN: So that it is all
modified by appear to have.

Okay and then in the last sentence, what I did was -- I don't know whether this works because it was pretty hasty -- the JPP recommends that Congress and the Secretary of Defense review and consider these provisions, maybe that's the word or statutory provisions, and in the case of Congress, consider revising these provisions and in the case of the Secretary of Defense, developing or develop -- I don't know the grammar here -- procedures to reduce, if not eliminate this perception of undue pressure so that we have given them a different task. I don't know if that actually works and I don't know if my language actually works but that would be kind of the suggestion I would make.

VADM TRACEY: I kind of like that, then further stylistically, the body of the recommendation should be that sentence. The other two sentences belong in the discussion underneath. That would be consistent then with the style.
CHAIR HOLTZMAN: I didn't look at that.

VADM TRACEY: Oh.

MR. STONE: And I was going to suggest that if there is a perception, you can never eliminate but you can mitigate. So I would have said instead of eliminate to mitigate this perception of undue pressure. If somebody believes something, you can't get rid of it but you can try and mitigate it.

CHAIR HOLTZMAN: That's fine.

JUDGE JONES: I don't know. If you eliminate the procedure, then there can't be any more effects from it.

CHAIR HOLTZMAN: Well, that's right, developing procedures to reduce if not mitigate the perception of undue pressure.

I mean so if you want to retype this and we can just circulate it.

MS. SAUNDERS: Certainly.

CHAIR HOLTZMAN: What did you want to do, Admiral? I'm not sure I understood.
VADM TRACEY: I think the blue box should only contain the last sentence, as revised. It's the recommendation.

CHAIR HOLTZMAN: Oh, I see.

VADM TRACEY: And the other is the background.

CHAIR HOLTZMAN: Oh, okay.

VADM TRACEY: Why we're making that recommendation.

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: So just the JPP recommends. And some of the other recommendations have had other language in there but, in this case, you want those to be bullets underneath?

VADM TRACEY: I think so.

PROF. TAYLOR: I would agree with that.

MR. STONE: Yes, me, too.

MS. SAUNDERS: Okay, great.

CHAIR HOLTZMAN: So, can I give this to you --
MS. SAUNDERS: Certainly.

CHAIR HOLTZMAN: -- and you can try to turn this into some kind of --

MR. STONE: And Maria, can we do this if we do a phone thing, since we're talking form now? Can we do a phone meeting?

CHAIR HOLTZMAN: Well we might get this done because we're going to be here. I have to leave at 4:00 but we might be able to make that.

MR. STONE: Okay.

CHAIR HOLTZMAN: So, assuming we get that back, people are kind of satisfied with that or we are on the right track with that?

VADM TRACEY: Yes.

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay. On Recommendation 9, does somebody have some suggestions? I have some thoughts about it.

MR. STONE: Yes, I have got a couple of suggestions.

I thought we got rid of the language
one way or the other on to another unit on the
same installation or to a nearby installation.
So it just would say whether a sexual assault
victim could be transferred without sacrificing
the interests of the victim but I would have put
in Admiral Tracey's language that she used
before, the paramount interest of the victim to
make clear that that is the top interest.

That wouldn't mean that the commanding
officer couldn't use, in an unusual case, the
same installation or a nearby one but that we
were not recommending that. We were just leaving
that open.

And then at the very end, I ended it
-- this is the main paragraph, foster the
perception among military members that the
expedited transfer system is being abused,
period. And I left out the business about
casting doubt on the victim's credibility,
leading to more acquittals because, number one,
it's speculative and, number two, there's going
to be that casting doubt. No matter where they
are moved, they are going to say that.

So I just didn't think that added
anything to the recommendation.

CHAIR HOLTZMAN: I added some language
in the second part of this, where the commander's
sentence. I guess that's the second or the third
sentence there, where I said so commanders in
SVCs/VLCs should -- I think there is a word that
I took out -- should all -- I don't think we need
the word all -- should receive training in how
relocating victims from less desirable to more
desirable locations can foster the reported
perception among military members that the
expedited transfer system is being abused and how
to minimize the ability of such transfers to be
used by defense counsel to cast out on the
victim's credibility.

MR. STONE: You can't. That's
something that they are going to do no matter
what they've got.

CHAIR HOLTZMAN: Yes, I understand
that.
MR. STONE: If they get a $10 gift, they are going to be impeached with it.

CHAIR HOLTZMAN: I understand that. But if we want them to be thinking about this as a consequence, from my point of view, we have an unintended consequence. How do we minimize the harm of that consequence? That's all I'm talking about.

You're saying there's nothing you can do and, with all due respect, I'm not sure there's nothing you can do about it.

And so to the extent you can do something about it, they should be thinking about it. That's just my view about it.

Anyway, Mr. Taylor or Barbara, Judge Jones, do you have --

PROF. TAYLOR: I agree with what you have formulated.

CHAIR HOLTZMAN: Okay but Mr. Stone, let's start with his. He had some suggestions in sentence number one. And Admiral, if you have some changes --
So in sentence number one, Mr. Stone wants to strike --

MR. STONE: To another unit on the same installation or to a nearby installation. Just omit it.

CHAIR HOLTZMAN: Yes, so it would just be -- yes, to strike to another unit or to a nearby unit. Anybody have any comment about that?

JUDGE JONES: Admiral, I hate to throw this to you but I thought you had a phrasing there relating to that issue. Am I misremembering?

VADM TRACEY: So it was my concern that if you transfer them on the same unit, in most cases, that is not going to achieve the separation, the unmonitored separation that you desire. Right?

CHAIR HOLTZMAN: Right.

VADM TRACEY: I think Mr. Taylor's formulation, though, was close to this, if not exactly this. And the difference between what
was originally proposed and his suggestion was that we were originally saying that this should be the preferred method and, in this case, what he's saying is look at this as an option each time. So, I'm okay with this, as it's formulated, with the change to the second sentence that I think makes clear what we're actually trying to say.

CHAIR HOLTZMAN: But you're not for striking that.

VADM TRACEY: No, I don't understand what we are telling them if we strike it.

CHAIR HOLTZMAN: Okay. So you are in favor of keeping the language to another unit or a nearby.

VADM TRACEY: I think we can keep this. What we're saying is every time that you are going to do this, take a look at whether you could achieve the objectives by transferring the victim on the same installation.

CHAIR HOLTZMAN: Oh, okay, fine.

VADM TRACEY: And there are reasons to
do that.

PROF. TAYLOR: Yes, so that was my point.

CHAIR HOLTZMAN: Okay, fine. So in other words, you disagree with Mr. Stone about that.

VADM TRACEY: Correct.

CHAIR HOLTZMAN: Okay.

MR. STONE: What about adding the other word that I had in that same line four or three words later, without sacrificing any interests of the victim?

CHAIR HOLTZMAN: I was going to get to that.

MR. STONE: Okay, paramount.

CHAIR HOLTZMAN: Let's do the first two. Another unit on the same installation; are you still in favor of your amendment, Mr. Stone?

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay.

MR. STONE: I still would rather not have that in there because I don't think it is --
I mean, it's the exception and not the rule.

CHAIR HOLTZMAN: So let's just take a vote. Let's just take a vote on that.

So those in favor of Mr. Stone's proposal to strike the words to another unit on the same installation or to a nearby installation say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Second proposal by Mr. Stone: The phrase without sacrificing the interest of the victim; his suggestion is without sacrificing the paramount interest of the victim.

Any concern with that? Anybody want to speak to that?

I guess my concern would be you know there still is the military and it still is a question of whether there is a military interest here. I don't know that we, again, need to rank this. I think without sacrificing the interest
of the victim says it all to me. Then I'm concerned about making that paramount in the sense of maybe this person needs to be there because he or she has some kind of wartime skill that is vital on some kind of war-making activity. I don't know.

PROF. TAYLOR: Well, since I suggested that language, I would say that what I had in mind is completely aligned with what the Chair just said and that is that in each case will be a balancing act that will have to be considered by the commander to be sure that all of the interests are taken into account but, clearly, not to sacrifice any interest of the victim. And I don't know --

CHAIR HOLTZMAN: What about the vital interest of the victim as opposed to paramount. Would that get closer to you or would that solve your problem, Mr. Stone?

MR. STONE: Yes, I could live with vital.

CHAIR HOLTZMAN: Okay. Anybody object
to that?

PROF. TAYLOR: Sure, I'm okay with that.

CHAIR HOLTZMAN: All right.

JUDGE JONES: That's fine.

CHAIR HOLTZMAN: Then we are on point.

The second sentence we don't have any issues. Do you have an issue?

VADM TRACEY: I have a recommended change.

CHAIR HOLTZMAN: Okay, sure.

VADM TRACEY: The intent of such change would be to strike a balance --

CHAIR HOLTZMAN: Oh, okay.

VADM TRACEY: -- between ensuring that prosecutors have access to victims in preparing for courts-martial and satisfying the need to separate the victim from the accused and maintain the victim's access to support systems.

CHAIR HOLTZMAN: Any objection to that language?

JUDGE JONES: No, I think it's great.
CHAIR HOLTZMAN: Okay. Without objection, that is agreed to.

And then the third sentence, if I can reconstruct it, basically is commanders and SVCs/VLCs should receive training in how relocating victims from less desirable to more desirable locations can foster the reported perception among military members that the expedited transfer system is being abused and in how to minimize the ability of such transfers to be used by defense counsel to cast doubt on the victim's credibility, period.

MR. STONE: Period.

VADM TRACEY: Does this say the same thing, maybe, a little bit simpler? Commanders and SVCs should all receive training -- should receive training and how relocating victims from less desirable to more desirable locations can be used by defense counsel to suggest abuse of the system and to cast doubt on the victim's credibility possibly leading to more acquittals at courts-martial.
CHAIR HOLTZMAN: The only difference is that I'm directing them to minimize the ability of this to be used.

VADM TRACEY: Let's add a separate sentence to do that so that we don't have a run-on sentence.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: We don't want to add a run-on sentence.

CHAIR HOLTZMAN: That's fine or we could just put something in about developing methods to minimize this problem.

VADM TRACEY: The Chairman should help commanders to develop methods to minimize --

CHAIR HOLTZMAN: Minimize this problem or something or address this. Yes.

Okay, so can you give us a -- what do we need, Maria, here? We agreed on the substance.

MS. FRIED: I think if you agree on the substance, it may time to read it back.

CHAIR HOLTZMAN: Okay, so are we
agreed on the substance now of this? We can agree on the substance and, if we get a chance, we will review it before we leave today or, otherwise, it will be circulated for our approval.

Okay, any disagreement with the Recommendation 9 as changed/as amended?

JUDGE JONES: No.

CHAIR HOLTZMAN: Hearing no disagreement, this is accepted. Wow, record time, for what it's worth.

MS. SAUNDERS: Could we do that with Recommendation 5 as well?

CHAIR HOLTZMAN: What is Recommendation 5?

MR. STONE: I don't know. That was the other one she was trying to work on.

CHAIR HOLTZMAN: No, I think we need to do that.

MS. SAUNDERS: Okay.

MR. STONE: And we didn't come up with a slightly different title, either, but we can do
that on the phone as well.

CHAIR HOLTZMAN: Yes, I hope so.

MR. STONE: That would give you some

chance to think about it.

CHAIR HOLTZMAN: So now we want to do

-- we are up to -- do we want to take a break,

five minutes?

PROF. TAYLOR: Yes, please.

CHAIR HOLTZMAN: All right, five-

minute break. Okay, seven-minute break.

(Whereupon, the above-entitled matter
went off the record at 2:55 p.m. and resumed at
3:04 p.m.)

CHAIR HOLTZMAN: I guess our next

issue is the -- and by the way, Panel Members,

thank you very much for your cooperation. We've

really made a lot of progress. And Staff, of

course, thank you for your extraordinary work.

Our next item on the agenda is the

data report. That's in our blue book.

MS. PETERS: Yes, ma'am. That is in

your kind of blue folders.
CHAIR HOLTZMAN: Yes.

MS. PETERS: And Stayce and I are your data team today because Ms. Rozell has been here since Day 1 of the court-martial project and we are here to help answer any of the Panel Members' questions.

This draft report is being provided to you today in your second day-of folder first to obtain the Panel's approval on the final wording of the recommendations. You had previously voted to adopt the three recommendations in this report. They begin on page 3.

During the last meeting, we received some suggested changes from the Panel. And so we are providing you with the recommendations once again in what the Staff proposes as its final form because it reflects those changes and it would need to just be finally approved by the Panel today.

Secondly, we provided you with the body of the data report, really just to familiarize the panel members with the layout of
the report, the data that's in it. And then from this point on, we will provide, of course, the Panel with ample time to review the content of the report and provide feedback to the Staff after this meeting.

But to get a visual of what the report looks like, I just provided you the whole thing today, ma'am.

CHAIR HOLTZMAN: I guess I need Maria's guidance, Ms. Fried's guidance.

So are we going to vote? I just understand the procedure. We'll vote on the three recommendations contained on pages 3 and 4.

MS. FRIED: Yes, ma'am.

CHAIR HOLTZMAN: And then once we review that, we can review the substance of this report and then vote on it on the phone?

MS. FRIED: Only in a public meeting.

CHAIR HOLTZMAN: In a public meeting.

MS. FRIED: Yes, ma'am.

CHAIR HOLTZMAN: So when were you expecting us to vote on this report?
MS. PETERS: We thought that the Panel would have usually a standard about two weeks to review the report on your own, provide any suggested changes to the Staff. The Staff will consolidate those changes, circulate them back to the panel and then we would convene in an appropriate forum the opportunity for the panel to vote on the final report.

CHAIR HOLTZMAN: Oh, okay, great. The phone call meeting.

MS. PETERS: Yes, ma'am.

MS. FRIED: I would also add that the comments that are circulated have to be discussed on the phone call as well, not just consolidated with a new recommendation.

So any input that the Panel gives back to Meghan happens like on an individual basis and then she would put them on the report and attribute the comments to that member and then that would be discussed in a public meeting.

CHAIR HOLTZMAN: Perfect. Okay.

CAPT TIDESWELL: And we still have one
meeting left, Ms. Holtzman.

CHAIR HOLTZMAN: Right. Okay, fine.

Okay, so I think what we'll do is we will start with Recommendation 2, right?

MS. PETERS: Yes, ma'am, I can read aloud Recommendation 52.

CHAIR HOLTZMAN: Good. I'm sorry, 52.

MS. PETERS: The Secretary of Defense and the Military Services use a standardized document-based collection model for collecting and analyzing case adjudication data in order to implement Article 140a, Uniform Code of Military Justice case management data collection and accessibility.

CHAIR HOLTZMAN: Is there any discussion of this?

Could you please explain what a document-based collection modeling is?

MS. PETERS: This is that they actually, instead of taking summaries and notes from the field from all the disparate commands in the field, that when they build a system for
collecting Military Justice data, that they
actually lift it from documents, just as the U.S.
Sentencing Commission does as they advised the
JPP to do.

CHAIR HOLTZMAN: So is this a term of
art document-based collection model? I mean
statisticians understand what that means, as
opposed to --

MS. PETERS: We have been using that
phrasing in conversation with the Sentencing
Commission for the full term of the data project.
So, to that extent, I think it is a term of art.
It's not the only way to say it.

CHAIR HOLTZMAN: Oh, it's not? Okay.

MS. PETERS: I don't think it would
have a technical veneer that a statistician would
say must be used to refer to something specific.
I think it could be rephrased because it --

CHAIR HOLTZMAN: Well, is it going to
be defined somewhere here? I mean I think that
that is really important maybe under that
recommendation. I don't know whether anybody
else thinks it should be defined or described or explained. But you know it's like -- it's the very first term we use and I didn't know what it meant. I mean I don't want to hold myself up as an example but I just want to make sure that people who read know what we're talking about from the get go.

So, can we define that somewhere, maybe a footnote or in a bullet?

MS. ROZELL: Maybe we can define what specific documents.

MS. PETERS: Right.

CHAIR HOLTZMAN: Does anybody disagree with me?

JUDGE JONES: No, I think that's right.

CHAIR HOLTZMAN: Okay, so somewhere put some explanation of this term.

MS. PETERS: Could we do that in the bullet below it?

MR. STONE: Yes, do it in the first bullet, just put another sentence in there.

Okay, any other discussion on Recommendation 52?

VADM TRACEY: Maybe -- I don't see this addressed but I thought that we had suggested that even though the NDAA requires the establishment of the system within four years that we should suggest that the services continue to do this in a way that comports with how they do work today in the intervening four years. Wasn't this the area on which we made that recommendation?

MR. STONE: In other words that they hurry it up, that they don't have to wait four years if they've got --

CAPT TIDESWELL: No, I was going to say it probably will take four years to do a
standardized system but in the meantime that
every service continue to populate data for use
in these reviews. I thought that was -- wasn't
it about this, the gist of that?

VADM TRACEY: Didn't Mr. Taylor point
out that you shouldn't dictate a standardized way
to do it until you actually have the standardized
system, that every Service should be able to do
it within --

CAPT TIDESWELL: I think that context,
ma'am, was the Victims' Appellate Rights Report,
where they were talking about establishing a
system to notify the victims.

VADM TRACEY: Well, maybe you're
right.

CAPT TIDESWELL: Yes, ma'am, but that
doesn't mean you can't put it in here because
they are all so similarly situated that they have
to build a system.

VADM TRACEY: So that's a question.

Why don't we get through all three
recommendations? Maybe we can address whether we
have attacked that.

   CHAIR HOLTZMAN: All right. So, if we
have no further discussion on Recommendation 52,
let's vote on it.

   All in favor say aye.

   (Chorus of aye.)

   CHAIR HOLTZMAN: Opposed?

   (No audible response.)

   CHAIR HOLTZMAN: Hearing none, the
recommendation is adopted.

   Recommendation 53, Meghan, would you
read that please?

   MS. PETERS: Okay, the new Military
Justice Data Collection System required to be
developed pursuant to Article 140a Uniform Code
of Military Justice entitled Case Management and
Data Collection Accessibility should be designed
so as to become the exclusive source of sexual
assault case adjudication data for DoD's annual
report to Congress on the DoD's Sexual Assault
Prevention and Response Initiatives.

   CHAIR HOLTZMAN: Any discussion of
this recommendation?

What does your second bullet mean, military justice practitioners should be responsible for the information collected? Does that mean defense counsel, or trial counsel, or victims' assistance person?

MS. PETERS: I think the essence of it was that Article 140a being part of the Uniform Code of Military Justice is going to be built, and used, and implemented by military justice practitioners who are the source of military justice data, as opposed to the DoD SAPRO Sex Assault Policy Office collecting reporting on the legal status of cases. This would become -- Article 140a would become the system of record for what happened in sex assaults in all cases because it is coming from the legal community. That's the source of the information so that is who should be fulfilling the data collection --

CHAIR HOLTZMAN: So everybody has to input data into the system? Doesn't that create some problems? I mean --
MS. PETERS: I think that, as opposed to dictating the number, I think the Staff's intent was to convey the message that when you're looking at UCMJ data, it should come from the practitioners in the military justice system.

CHAIR HOLTZMAN: What does it mean come from? Come from, that's the phrase that is getting me. Come from meaning they input it or come from means what?

MS. PETERS: Right, they input it. They define it. I mean the military justice community is going to build this database and that is where you want to --

CHAIR HOLTZMAN: They are?

MS. PETERS: Well, they are going to build the information for it. It's going to come between them. The Secretary of Defense has to prescribe it but it's informed by the military justice practitioners in the Services.

But aside from the mechanics of 140a, I think what this was intended to get at is that right now Congress' information on sexual assault
comes from the DoD Sex Assault Policy Office. And that's not where military justice practitioners reside. So, the information is -- so there is a disconnect.

There are military justice practitioners who are practicing or monitoring their own systems and their own cases and then they separately turn and do a hand off to DoD SAPRO that has to then, they translate it, they present it in their own way and send it to Congress.

So, and they also are making these non-legal practitioners and DoD SAPRO Officers making the determination about what in the legal system ultimately goes to Congress, how data is categorized. Whereas, it would seem that Article 140a is something that is going to be built with the military justice community in mind primarily. So you would think that the information is going to come in the form that is more reliable when you are trying to understand the legal outcomes of cases.
CHAIR HOLTZMAN: Well, it's one thing
to -- I mean I'm sorry to harp on this but I,
frankly, am not understanding what you're saying.
Because it is one thing to have a system that is
user friendly. I got that. And I understand
something that reflects information that -- well
and that's another way of saying that it will
contain information that is helpful to the people
who are actually using the system. But that
doesn't get to the point about who is responsible
for the information collected. That doesn't
necessarily seem to me to be the MCIOs or the
defense counsel. I mean they may input some
little information but I'm not following.

And to me there is what you just
called disconnect. I mean I don't know what
we're talking about here. Maybe it's my
deficiency.

MS. PETERS: Well, it may be mine in
trying to proceed too delicately.

If one were to agree with the premise
that some of the data in DoD SAPRO's reporting to
Congress is inaccurate and unreliable, in terms of its legal adjudication data. Meaning, we can't tell what is really going on with these cases. The aggregation of this data is still not clear in terms of what it means.

Rather than have DoD SAPRO tell us what the data is and what it means, if there is a system being built in existence that's being used by the legal community at large across all the services, let's use that system and that legal community to give us legal information because DoD SAPRO's data is inaccurate and unreliable for Congress' purposes and even for the JPP's purposes.

So, this finding is --

CHAIR HOLTZMAN: All right, well maybe the language you are using here is not right in terms of it is possible for the information. I don't know that that is really what we're talking about. That's what just struck me.

MS. PETERS: Yes, ma'am. But I would add one point to that, is that when you, at one
of the meetings, discussed the JPP received its
information directly from the Military Services.
In fact, directly from the JAG Corps in each
Service.

The problems that that alleviated were
before when you look at SAPRO, you don't get the
FAP cases and you get double counting and
miscalculating. You get all these cross-references
to different years. They are all thrown into one
year's report.

When you go to the Military Services,
you get all of the cases, all of the documents
all at once and it alleviates any problems that
were created by DoD SAPRO's methodology.

PROF. TAYLOR: I have a question, if
I could just follow-up on that. I share your
concern. I guess my question is how do we know
that there is any transparency in the system if
you have to go to each individual Service to get
answers to questions? It seems reasonable that
there would be some central point, if not DoD
SAPRO, somebody at the Defense Department level,
whether it is the General Counsel or someone else, who is able to look across all the Services with some transparency to see how they are doing in various areas.

And I guess part of the problem now is that each of the Service JAGs organizes differently, correct?

MS. PETERS: Yes, sir.

PROF. TAYLOR: So depending upon the service you go to, you get the data produced in one way or another. So, how is that going to work?

MS. PETERS: I think, again, I wasn't suggesting -- I don't think the Staff was trying to say that the method is to go to each of the Services because 140a takes care of that problem. 140a is the standardization of one system across all Services so DoD can look down at all the Services in the same way, in a meaningful way.

It's just that using that system -- by placing that system in a UCMJ Article, maybe we're making an assumption there that military
justice practitioners are going to be completing
a system, be the machinery for that system.

    CHAIR HOLTZMAN: I don't know what
that means.

    MS. PETERS: They are going to support
accurate information from documents.

    And so rather than whatever DoD SAPRO
is doing right now, which is for our purposes and
Congress' inaccurate and unreliable, if 140a has
the potential to provide a more accurate
solution, we want military justice case
information to come from the military justice
community.

140a then takes it a step further and
says it is going to be done writ large from all
the services at once.

    CHAIR HOLTZMAN: Why does it have to
come from the military justice community? Maybe
they just scan documents and they read the
documents, the computer reads the documents and
spits out the information. Why does it have to
come from people?
I don't --

MS. PETERS: It doesn't ma'am. And I wasn't --

CHAIR HOLTZMAN: But that's what this says. That's the problem with this is that it says that people are going to be responsible for the information collected. That is the difficulty here. And I don't know why that's a good thing. It suggests to me a big burden on people in the military justice system if they have got to be responsible for the input of the data. I don't know how the system is going to be designed.

JUDGE JONES: So are we trying to say that each of the Services should be responsible for collecting and inputting the data into the system, this 140a system?

VADM TRACEY: Or are we saying that SAPRO should draw military justice information it's going to analyze or submit to the Congress from this Article 140 system?

MS. PETERS: I think that is one
plausible solution. If this system would seem to produce, especially if it is document-based, more accurate information, rather than what's being produced by SAPRO now.

VADM TRACEY: And they should be informed by how the military justice community interprets that data.

MS. PETERS: Yes, ma'am.

VADM TRACEY: Aggregates and interprets that data.

MS. PETERS: Yes.

VADM TRACEY: They shouldn't make up their own way to aggregate and interpret the data.

MS. PETERS: Yes, ma'am.

MS. ROZELL: One other thing is SAPRO is more of a victim-based organization versus military justice who is doing the adjudication of the military justice offenders.

CHAIR HOLTZMAN: If you take revised bullet point 2 --

JUDGE JONES: You know I hate to admit
my ignorance but what does 140a actually say?

MS. PETERS: It says that there will
be a case management system or I'm sorry that in
four years -- let me pull the exact language,
ma'am, that they are going to develop a system
across all of the Services. Let me just get the
exact language here.

CAPT TIDESWELL: Right now, each
Services does have a system and there is a point
of data entry, typically in the field of the
local, where the courts-martial are conducted. I
think 140a is going to sort of take an umbrella
approach, where all of the Services will now feed
into the same system.

JUDGE JONES: Which could add to
uniformity.

CAPT TIDESWELL: Yes, ma'am, a
standardized approach.

JUDGE JONES: But it is not just a
military justice subject matter. It's whatever
you would normally put in your database. Is that
right?
CAPT TIDESWELL: Well, I think it's just from an adjudication perspective.

JUDGE JONES: Well, that's what I'm trying to figure out. This is to get all four or five Services reporting into through one system.

CAPT TIDESWELL: Yes, ma'am.

JUDGE JONES: But is it just the criminal justice aspect?

MS. ROZELL: That's my understanding.

CAPT TIDESWELL: Yes, it's a case management --

PROF. TAYLOR: Well, if that's the case, so you won't be able to look at this data base, as I understand it, and figure out those that are handling it for the Family Advocacy Program, right?

MS. PETERS: That's what SAPRO does.

PROF. TAYLOR: Unless they have also made their way into the adjudication system somehow or another.

MS. FRIED: So I don't think 140a is specific to sexual assault.
MS. PETERS: No, it's not.

MS. FRIED: So they would have all court-marital data on FAP cases or Article 15s as well.

PROF. TAYLOR: Well all I'm saying is that if it is not a case that makes its way into the court-marital system but is handled through the Family Advocacy Program through some other means, it never touches this system. Is that correct?

MS. FRIED: Yes, as long as it is something that is not like an Article 15. If it is a reprimand or something, it probably would not get into 140a.

PROF. TAYLOR: So you could not look at this database and figure out what the full extent of sexual assault is in the military. It's only those cases that make it into the military justice system. Is that correct?

MS. ROZELL: So they could be reported through SAPRO but if there is any administrative or nonjudicial disciplinary action taken against
that person, then of course it would be within 140a.

JUDGE JONES: It would be in the database.

MS. ROZELL: Yes, ma'am, but if they went to FAP but nothing came of it and there was no judicial proceedings or anything like that, then of course it wouldn't be reported in 140a.

MS. PETERS: It has yet to be defined what its purpose in serving as a case processing and management system will be. Those parameters will be defined. If they find it beneficial to start with every substantiated report of every crime, including every unrestricted report of sexual assault, as some Service systems do currently, then they can decide to do that. So we don't know.

What we do know is legal adjudication data will be in there and it will not matter who provides victims' services because the JAG community does not differentiate a case based on who provides victim services. That is a creature
of DoD and that's why they don't have the full
picture of sex assaults right now.

CHAIR HOLTZMAN: All right, I'm going
to suggest that we take out the words responsible
for and just put involved in that bullet. And
then I think that more or less solves that part
of the problem, which is military practitioners
should be involved in the information collected
pursuant to Article 140, which would improve the
accuracy and level of detail currently contained
in DoD's reports. Is that okay?

I mean does that help or hinder? Is
this an impediment?

JUDGE JONES: I think we could still
say military justice practitioners, understanding
that it doesn't mean the defense lawyer or the
prosecutor.

CHAIR HOLTZMAN: Right but I don't
want to take out the words responsible for.

JUDGE JONES: Right.

CHAIR HOLTZMAN: That was my problem
because I don't know that they are going to be
responsible for the information collected. But I have no problem with requiring them to be involved so that we understand exactly how the system should be designed. It should be user friendly. It should get the statistics that the military justice people want to see. So, to that extent --

VADM TRACEY: It sounds to me what I think the intent was.

CHAIR HOLTZMAN: It does?

VADM TRACEY: I think that what was intended that rather than SAPRO creating the military justice data that they create today, that they would actually turn to this Article 140 -created system to obtain that data. Am I right?

MS. PETERS: Yes, ma'am.

VADM TRACEY: So a subset of the data that they submit has to do with the judicial disposition of cases. And we want them to come to this source for that data going forward, not whatever the sources that they use.

Is that correct?
MS. PETERS: Yes.

MS. ROZELL: And because 140a is not limited to just sexual assault, even years from now they can look at what are the trends of other crimes that are being committed as well.

VADM TRACEY: So what if you turn the second bullet around to say that DoD SAPRO will rely on information collected pursuant to Article 140a? Or will obtain its information on --

PROF. TAYLOR: Well I guess the question, Admiral Tracey, will be whether there is anything that they are required to report to Congress under the Sexual Assault Prevention and Response Initiative that they could not get from that database.

VADM TRACEY: I think there are many things that have nothing to do with the adjudication. But anything that they are going to report with regard to adjudication will be drawn from this system I think is what we were trying to say.

PROF. TAYLOR: I see. Thank you.
VADM TRACEY: Is that right or not?

MS. PETERS: Yes, that's right because Congress right now mandates that some sort of analysis of adjudication data occur. And this --

VADM TRACEY: And you are also trying to say that that will be done by people in the legal --

MS. PETERS: Yes, ma'am.

MS. ROZELL: One of the issues that, I guess, we found because we were comparing the SAPRO data versus the actual court-marital documents that we have in our data, that unless you're not very familiar and educated on the actual Statutes, then they can be very confusing for the lay person to actually determine is this an actual rape, or is it a sexual assault, or is it a contact offense. So, I think the legal community is more better honed to define those statutes and those offenses are more precise.

CHAIR HOLTZMAN: So what is the language that we are now focusing on?

MS. PETERS: Whether I think a second
sentence would be added to this bullet indicating that DoD SAPRO will rely on the legal adjudication information in the database to be developed pursuant to Article 140a and providing information to Congress.

CHAIR HOLTZMAN: And military adjudication, what is that supposed -- will have that information just about an arrest or if there was no adjudication? Will there still be information in the system?

MS. PETERS: SAPRO will still be collecting. SAPRO will do what it does, which is the broadest view of the system possible. From the moment an unrestricted report is made, they will collect information.

CHAIR HOLTZMAN: They are still going to be doing data? Are we going to have two data collection systems? No. No, don't tell me that. Is that really what we're doing here? That's incredible.

MS. PETERS: I think the intent of Article 140a is just to give DoD a transparent
look at military justice across the Services.

Military justice involves legal action.

What SAPRO does is a bit of a creature of the requirements from Congress. One way to do this is that it could put the SAPRO -- SAPRO could do what it does, manage cases, manage the disposition of victims' cases but do less in terms of legal adjudication.

CHAIR HOLTZMAN: Well, it's not managing cases. It's recording cases. It's not managing. It doesn't have a management function.

MS. PETERS: Yes, ma'am. So their system is mainly a data aggregator right now. What could happen is Article 140a could supplant SAPRO's role in communicating the legal disposition of sex assault cases to Congress. So Congress could learn about legal outcomes from the Article 140a database and SAPRO can turn to all of the other data that it does around victim reports and satisfaction surveys.

CHAIR HOLTZMAN: So 140a is only on when you have an actual adjudication by a
military justice court. So, it's not going to record arrests. It's not going to record any other kinds of dispositions, disciplinary dispositions by the convening authority or anything like that?

I mean I'm totally flabbergasted. I have to say that in this year, 2017, that the military is going to create two separate systems to record information on criminal activity sexual assault? I don't know maybe I'm overreacting but it seems to me insane.

MR. STONE: For what it's worth, if they are using the Sentencing Commission model, that model only looks at adjudicated cases. It doesn't look at all the cases that were dismissed. It doesn't look at deferred prosecutions. None of that is in there. And I guess if they are looking at that model, that's why they're looking at adjudicated cases and then everything else somewhere else.

CHAIR HOLTZMAN: But isn't there an issue with regard to the accuracy of the
somewhere else?

MR. STONE: Well maybe you want to put in the recommendation that we recommend that they see if they can use common data collection and analysis methods so that the two systems can be viewed in pari materia, if necessary. I mean I can see that.

I don't think we can make them get into one system now but I think that we could recommend that the two talk to each other. I guess there is some language for that. It's not talk to each other but it's --

CHAIR HOLTZMAN: This is absurd.

MS. PETERS: Ma'am, if there is any way that the Panel would find it beneficial to specify or be more specific as to the type of data regarding sexual assault cases that they would like to see, if you still feel that Article 140a is the purview, it is something you want to address specifically as Recommendation 53 does, if we could say when in the process you would like Article 140a to start recording information,
I think the panel is all within its right to be more specific in that regard.

CHAIR HOLTZMAN: Well, we haven't really done any work on that so I don't know it's going to be more specific.

MS. PETERS: And I think the Staff can provide you with more information on when they are going to say a case begins. Are they going to open a line every time an investigation starts into every felony and misdemeanor? I don't know.

CHAIR HOLTZMAN: I'm just thinking about when I had to get clearance for this position, the Defense Department asked me to prove my citizenship and bring my passport. So I said to them, why can't you look up my passport by contacting the State Department? They said our computers don't talk to each other.

MR. STONE: No, they're not allowed to look at passport stuff. That's State Department stuff by definition.

CHAIR HOLTZMAN: Yes, I understand that but --
MR. STONE: But you were going to give them permission?

CHAIR HOLTZMAN: Yes, there should be an ability or call the Congress. I said you have to be a U.S. citizen to be a member of Congress. They can't talk to each other.

So all I am saying is that we are moving into a period of time, we have already moved into a period of time where people need to -- where these computers need to be able to communicate.

So we're building a whole new system. Can it talk to the SAPRO system? I mean I don't know. It just seems to me to be --

VADM TRACEY: I'm sorry. Isn't that what Recommendation 53 says? The new Military Justice Data Collection System required to be developed should be designed so as to become the exclusive source of sexual assault case adjudication data for DoD's annual report to Congress.

CHAIR HOLTZMAN: Case adjudication
data.

MR. STONE: Not case.

VADM TRACEY: Can you expand that -- is it our recommendation that that be expanded in some way we can't define because we didn't do the work but we suggest that rather than develop potentially two conflicting systems that the definition of the start of a case in this system allow for a single database to be maintained? Is that kind of what we're recommending?

CHAIR HOLTZMAN: Brilliant, Admiral. You got my point.

MR. STONE: That's true.

MS. FRIED: You could say SAPRO could leverage the system developed under 140a to meet its reporting requirements with respect to adjudication of cases.

CHAIR HOLTZMAN: Somehow they need to be aware of each other and be able to communicate.

MR. STONE: Have a supplemental database on all other matters.

All right, so are we finished now with Recommendation 53 --

MR. STONE: Unless you're going to change the language of it.

CHAIR HOLTZMAN: -- with Admiral Tracey's recommended change?

MS. PETERS: Ma'am, is that to the wording of the recommendation, would you like that as a finding below the recommendation regarding --

MR. STONE: The wording, you have got to go beyond case.

CHAIR HOLTZMAN: What do you think, Admiral?

VADM TRACEY: I would recommend maybe a separate recommendation or a sub-recommendation that we are saying -- I think this is to your concern -- to the extent possible, the Department should avoid the creation of multiple data sources --

MR. STONE: That do not communicate.
VADM TRACEY: -- that do not communicate.

CHAIR HOLTZMAN: And maybe specifically allude to the SAPRO system and the system built under 140a.

MR. STONE: Yes, a good bullet on that. We would anticipate or we would hope that those two systems would be able to provide overall statistics for adjudication.

JUDGE JONES: So we're for 140a and we want it done so it standardizes wherever it starts with cases the adjudication process but we are making this additional recommendation.

CHAIR HOLTZMAN: Right. So, anybody opposed to that recommendation? So it's 53, as amended.

(No audible response.)

CHAIR HOLTZMAN: Okay and now we have Recommendation 54. Meghan, would you read it, please, for us?

MS. PETERS: The successor Federal Advisory Committee of the JPP, the Defense
Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces should consider continuing to analyze adult victim sexual assault court-martial data on an annual basis as the JPP has done and should consider analyzing the following patterns that the JPP discovered in its analysis of Fiscal Year 2015 court-martial data: A) cases involving military victims and that have less punitive outcomes than cases involving civilian victims; B) the conviction and acquittal rates for sexual assault offenses vary significantly among the Military Services; and C) if a Servicemember is charged with a sexual assault offense, the probability that he or she will be convicted of a sexual assault offense is low.

CHAIR HOLTZMAN: Any discussion?

VADM TRACEY: One of the issues I had with the way this statistical data was put forward, we have a set of questions that were raised in the discussion of a previous report as to whether cases are being sent to trial that
shouldn't be sent to trial, that in fact there is
not enough reason for them to go to trial, and
then the trial is being lost. Well then, that
outcome is exactly what you want it to be if that
is the case.

This formulation of C suggests to the
reader who hasn't been in the room with us all
this time that we are saying that people who have
done bad things are getting away with those bad
things. And I think there's truth to both sides
of that. This is my problem with way that
statistical report was put forward.

CHAIR HOLTZMAN: So what's your
suggestion, Admiral? How do we fix that problem?

MR. STONE: I think we fix the problem
by I don't know if it is extending C or putting
in a D that says although the convictions in the
same cases for related non-sexual offense -- non-
sexual assault offenses raises the probability
considerably. Because what we found in those
cases are if you include both together,
everybody's numbers are that there is a 70
percent conviction rate. It's double the conviction rate, the sexual assault offense when you start including the non-sexual offenses. And we have heard testimony and I have seen it also in the stuff from the Subcommittee interviews that a lot of times people who were sitting on members committees seem to hesitate about putting somebody on a sexual offense registry. So, the result is they convict them of related non-sexual assault.

And I just think that if you put that in there, then we sort of balance this both ways.

VADM TRACEY: Say that again.

CHAIR HOLTZMAN: Okay, so I would suggest, actually, putting it in C so that someone doesn't misread C.

MR. STONE: Okay, yes.

CHAIR HOLTZMAN: And put a comma at the end of low.

MR. STONE: Yes.

CHAIR HOLTZMAN: And it's although the probability of a conviction of a non-sexual
offense is high.

MR. STONE: Of a related.

CHAIR HOLTZMAN: Okay, of a related.

MR. STONE: Yes. In other words, it is in the same case. We're not saying that they have prosecuted in severed case in a bank robbery.

CHAIR HOLTZMAN: No, but we're talking about that a Member is charged with a sexual assault but the probability that he or she would be convicted of a sexual assault offense is low, although the probability that he or she will be convicted of a non-sexual offense in that case --

MR. STONE: In that case --

CHAIR HOLTZMAN: -- is high.

MR. STONE: -- is high. Is much higher.

PROF. TAYLOR: So if I could just add one thing, if we are going to make that level of detail apparent, shouldn't we also say is charged with a sexual offense and pleads not guilty?

That's what we're talking about.
VADM TRACEY: Yes.

MR. STONE: Pleads not guilty.

CHAIR HOLTZMAN: Yes, okay.

MR. STONE: Okay.

CHAIR HOLTZMAN: That's fine.

JUDGE JONES: Pleading at trial or after trial.

CHAIR HOLTZMAN: Yes.

MR. STONE: And I guess I would just add for the record, because I would like it in the transcript right now, since Admiral Tracey and some of the members brought it up, that a good deal of the Subcommittee report that we currently have entitled Barriers to the Fair Administration of Justice repeatedly discusses that the conviction rate is low and that shows all the problems. And it does not recognize or take into account that in fact its own numbers show that there is a 70 percent conviction rate when you include the non-sexual assault convictions in the same cases. And that undercuts an enormous amount of the non-
scientific opinions that were solicited when one
views that critically. And that was a concern to
me but luckily, our version of the report and
recommendations does not, to the same extent,
rely on those allegations that there is too many
cases and the small rate of conviction which
shows there are too many bad things going on.
So, we now have to avoid taking that conclusion
directly into account.

CHAIR HOLTZMAN: Okay. I think we are
-- did we finish voting on our third
recommendation?

Okay, as amended, let's vote on the
third recommendation. Those in favor, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Those opposed, no.

(No audible response.)

CHAIR HOLTZMAN: The ayes have it.

Recommendation 3 or whatever the number is there
is adopted.

We have just two more issues to
address now. I am going to leave at -- Judge
Jones?

JUDGE JONES: Five 'til 4:00.

CHAIR HOLTZMAN: One is a new title to the Barriers Report. I just thought of it right now but can we Report on Issues in the Fair Administration of Justice or Concerns about the Fair Report on Concerns related to the Fair Administration of Military Justice?

MR. STONE: Concerns related -- I like concerns. Can we strike fair and just the administration of justice? I'm fine with just saying that.

CHAIR HOLTZMAN: No, I don't like that. I want fair in there. So, you can amend my amendment.

MR. STONE: Well, that's what I suggested before, earlier in the day, concerns related to the administration of justice.

CHAIR HOLTZMAN: I know but I don't like that.

MR. STONE: You don't like that.

CHAIR HOLTZMAN: I want the fair
administration of justice because I think that is what the issue is. It's not just the administration.

JUDGE JONES: Yes, I'm for keeping fair in.

CHAIR HOLTZMAN: Okay, so shall we vote on that or does someone else have an idea about it?

MR. STONE: Vote on it.

CHAIR HOLTZMAN: Okay. So those in favor of changing the title to Report on Concerns About the Fair Administration of Military Justice in Sexual Assault Cases, those in favor of that say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Aye.

CHAIR HOLTZMAN: Is the aye an opposed?

MR. STONE: Yes.

CHAIR HOLTZMAN: All right. Now we have I think one other person and we have to hear
from our public comment, which is Mr. Christensen.

   Sir, you have really got to keep your comments short because, otherwise, you know this is Cinderella time. The pumpkin is about to arrive.

   Thank you. We received your testimony.

Col CHRISTENSEN: Yes.

CHAIR HOLTZMAN: So you should feel free to just summarize it, if you can.

Col CHRISTENSEN: In fact, I was going to let the Panel just read that separate. This is just a couple of things I wanted to expand on.

CHAIR HOLTZMAN: Okay.

Col CHRISTENSEN: Expand on in a five-minute time frame.

   Well first I want to thank the Panel. I know this is the second to the last meeting for the service that you provided. I think anybody who watches these, as I watch more than most, that you are all very conscientious and I
appreciate that. And the American people appreciate it.

I did want to pass on you said something, Madam Chair, about Congress listening to you or do they do or not. I can tell you from the many times that I have met with congressional staffers, congressional members, the committee staff, they do listen and they are very concerned about what you say. There are many conversations that end with I want to hear what the JPP says. So I think that says a lot to what you have done.

I hope it is for those have heard me before that you understand that I care deeply about the justice system as a whole. You know I have been a defense counsel, a trial counsel, a judge. I care that the process is fair for both sides. That is why, as I know Mr. Taylor has seen this, I don't know if the other members have seen it, that we produced the Disparity Report that came out last week on racial disparity in military justice. That is not something that would align directly to what we do as an
organization for the military sexual assault but it does speak to the fairness of the system.

So, I hope that this Committee understands when I testify I testify because I think that is what is important. Just as I told you two years ago that I thought the one way that Article 120 needed to be amended was to make a specific prohibition against revenge porn. And I think we have all seen that what I said two years ago was probably right.

Now, what I wanted to talk about, Article 32 hearings. I know they have been changed. I know it is controversial. I want to stress that the Article 32 still serves a great purpose in that this process starts with the swearing of charge, the preferral, in which somebody takes an oath and says I believe these charges are true. We're already past the probable cause point at that point. The Government has said these are true.

The Article 32's purpose is to get a neutral person, the convening authority, to say
yes, there is probable cause. We have to remember what the purpose of it is. It is not for the Government to perfect their case. It is not for the defense to perfect their case. And it is a probable cause hearing that meets the standards that any person in the civilian world would have and I would say it is even greater.

So, I worry that there is any kind of discussion to pull back on the reforms on that.

I would say when the defense community complains -- and I understand, I was defense counsel -- that they don't have access to the victim, they have never had the opportunity to force a civilian victim to testify. Dependents rarely have to testify. Child victims never testify. That is nothing unique. It does not say the 32 process is not valuable.

I provided the numbers to you why I think it is valuable and I am almost done.

Expedited transfers I think are extremely important. To see them as a barrier to justice is very concerning to me. When I hear
this comment or complaint from the trial counsel that you must have interviewed in the Subcommittee that this is a barrier to their access, I wonder what the experience level is.

I can tell you as somebody who prosecuted more cases than probably anybody you have talked to in the military justice system, it is not uncommon that the victim is at an entirely different location than where the trial is going to occur. Dependent children, spouses who may be raped and the last thing they want to do is be in that location and they, on their own, go home. Cases that occur in a deployed location, the victim goes back to her base, the accused goes back to his base. They may be in entirely different parts of the world.

It is not a barrier. It is something that experienced counsel can easily overcome and it is something that young trial counsel need to work around. These are not barriers.

I would just say I implore you at the end of the day do not see these as barriers to
the fair administration of justice. See them as necessary changes that have been made.

And I will be done now. And I appreciate, again, sincerely everything this Panel has done.

And the last thing I will say when you talk about convictions, the number one thing that would help is getting rid of minority acquittals. Minority acquittals --

CHAIR HOLTZMAN: What's a minority acquittal?

Col CHRISTENSEN: Well, we have the only system in the country --

CHAIR HOLTZMAN: Oh, you mean not --

Col CHRISTENSEN: Yes, there is not a consensus verdict.

CHAIR HOLTZMAN: I see.

Col CHRISTENSEN: And the lack of consensus verdicts and I would imagine, Judge Jones, you would agree that having people be forced to come up with a verdict is good for the system.
MR. STONE: You mean non-unanimous acquittals.

CHAIR HOLTZMAN: You mean as opposed to -- you mean non-unanimous.

Col CHRISTENSEN: Right. Right and what I'm saying right now is the minority vote can drive an acquittal, whereas there is no other system like that. You might get a hung jury but you don't get an acquittal.

And I personally think our low sexual assault conviction rates is directly tied to the fact that one-third plus one vote, after only one vote, not days of deliberations as we might receive in the Cosby case results in an acquittal. And it is something to think about.

CHAIR HOLTZMAN: Okay. I'm going to try to get our questions quickly. I know Judge Jones has to leave.

JUDGE JONES: I never ask a question.

CHAIR HOLTZMAN: Mr. Taylor, do you have a question? Judge Jones, you can go first.

JUDGE JONES: No, I don't have any.
I think I understand your concern.

Col CHRISTENSEN: Thank you.

CHAIR HOLTZMAN: Admiral?

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: One question. Do you feel the same way about non-unanimous verdicts of guilty?

Col CHRISTENSEN: My personal view is, when I talk about the fairness of the system, we should get two consensus verdicts.

MR. STONE: So you believe we should have unanimous vote as a recommendation in both cases.

Col CHRISTENSEN: In both cases.

MR. STONE: Okay.

Col CHRISTENSEN: I think the system would be better served by an appearance of fairness and do better.

MR. STONE: Okay.

CHAIR HOLTZMAN: Thank you for your comments. I think we have changed the title of
the report so we don't see these as barriers. I think the points you raised are important.

As we've said, I personally feel strongly about the expedited transfer but if we are having an unintended consequence to that, we need to know about it. That's really what you were trying to do here.

But we appreciate your input and your guidance. Thank you.

Col CHRISTENSEN: Thank you.

CHAIR HOLTZMAN: Thanks, everybody.

Thanks to the Panel members. I think we are going to be adjourned.

MS. FRIED: Thank you, the meeting is closed.

(Whereupon, the above-entitled matter went off the record at 3:52 p.m.)
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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 06-16-17

Place: Arlington, VA

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