

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

+ + + + +

WEDNESDAY

JULY 26, 2017

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

PRESENT

Hon. Elizabeth Holtzman, Chair
Hon. Barbara Jones
Mr. Victor Stone
Mr. Tom Taylor
VADM(R) Patricia Tracey

WITNESSES

Ms. Lisa Friel - Special Counsel for
Investigations, National Football League;
JPP Subcommittee Member*

STAFF

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

DESIGNATED FEDERAL OFFICIAL

Mr. Bill Sprance - Alternate Designated Federal
Official (DFO)

*Present via telephone

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

(9:03 a.m.)

1
2
3 MR. SPRANCE: Good morning everyone,
4 I'm Bill Sprance, the designated federal official
5 for the Judicial Proceedings Panel.

6 At this time, I would like to open the
7 meeting and turn it over to the Chairwoman, the
8 Honorable Elizabeth Holtzman. Good morning,
9 Madam Chair.

10 CHAIR HOLTZMAN: Good morning, Mr.
11 Sprance, thank you very much. I'd like to
12 welcome everyone in attendance today to the 32nd
13 meeting of the Judicial Proceedings Panel. All
14 five of the Panel Members are present here today.

15 Today's meeting is being transcribed
16 and the forwarded transcript will be posted on
17 the JPP website at <http://jpp.whs.mil>.

18 Before I go further, I just want to
19 acknowledge the absence of Maria Fried, who has
20 been a constant presence throughout the operation
21 of the JPP. She's not here today because I
22 understand her father is not well. And our

1 prayers are with her.

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

11 Today's meeting will include Panel
12 deliberations on three pending reports. The JPP
13 report on concerns regarding the fair
14 administration of military justice in sexual
15 assault cases, the JPP report on Fiscal Year 2015
16 statistical data regarding military adjudication
17 and sexual assault offenses, and the JPP report
18 on sexual assault investigations in the military.

19 Tomorrow the Panel will conclude with
20 deliberations on the JPP final report. Each
21 public meeting in the Judicial Proceedings Panel
22 includes time to receive input from the public.

1 The JPP received no request for public comment at
2 today's meeting.

3 Thank you very much for joining us
4 today, we are ready to begin the meeting. Ms.
5 Saunders, please walk us through the JPP report
6 on concerns regarding the fair administration of
7 military justice in sexual assault cases. That
8 is the report we will start with.

9 MS. SAUNDERS: Yes, ma'am. And in
10 your materials, your bound materials, you have
11 two versions of that report at Tab 2 and Tab 3.

12 At Tab 2 is the JPP executive summary
13 with all the recommendations, with suggested
14 edits by Mr. Taylor.

15 And at Tab 3 it's the same report,
16 with recommendations, comments and edits by Mr.
17 Stone. But the base material is the same for
18 both of those.

19 If you recall at the last meeting in
20 June, the Panel reviewed the Subcommittee report
21 and deliberated on the Subcommittee report on
22 this topic. And the Panel voted to adopt eight

1 of the nine recommendations of the Subcommittee.

2 The Panel delayed a vote on one of the
3 recommendations, pending some rewording of the
4 language of that recommendation. So, Madam
5 Chair, if it's your preference, should we go to
6 that particular recommendation and go through
7 that, to see how the Panel wishes to vote on that
8 before we get into other edits?

9 CHAIR HOLTZMAN: So what was the
10 number of that recommendation?

11 MS. SAUNDERS: On your materials, if
12 you look under Tab 2, it would be Number
13 Recommendation 56. And it's on Page 9.

14 CHAIR HOLTZMAN: Page 9.

15 MS. SAUNDERS: It's in the blue box
16 toward the bottom there.

17 CHAIR HOLTZMAN: Okay. And I'm sorry,
18 I just was distracted when you were going through
19 it, what was it that you were supposed to do with
20 this?

21 MS. SAUNDERS: This is the one
22 recommendation that the Panel did not vote on at

1 the last meeting. The Panel had voted to adopt
2 all of the other recommendations, but if you
3 recall, the original wording on this
4 recommendation was to ask Congress to repeal the
5 two particular provisions from the NDAA that are
6 discussed here.

7 CHAIR HOLTZMAN: Right.

8 MS. SAUNDERS: And the way that it is
9 now reworded, I can read it to you --

10 CHAIR HOLTZMAN: Yes, please.

11 MS. SAUNDERS: -- it says, the
12 recommendation is, Congress review and consider
13 revising provisions in the National Defense
14 Authorization Act for Fiscal Year 2014 and Fiscal
15 Year 2015, Sections 1744 and 541 respectfully,
16 that require non-referral decisions in certain
17 sexual assault cases to be forwarded for review
18 and decision, to a higher general court-martial
19 convening authority or to the Service Secretary
20 because these provisions appear to have created
21 the perception of undue pressure on convening
22 authorities to refer such cases. The Secretary

1 of Defense should develop procedures to mitigate
2 this perception.

3 CHAIR HOLTZMAN: So this --

4 MS. SAUNDERS: And this was based on,
5 Vice Admiral Tracey at the last meeting had made
6 the suggestion that we involve the Secretary of
7 Defense in this too. So we've tried to draft
8 this provision to take into account both of those
9 factors.

10 CHAIR HOLTZMAN: Is there any
11 discussion about the rewording of Recommendation
12 56?

13 MR. STONE: Yes. Where it says,
14 appear to, I thought it was going to say, may
15 have created. I thought it was going to be
16 slightly less definitive. So I thought that's
17 what we were looking at.

18 JUDGE JONES: I think appear is less
19 definitive, as opposed to -- it's certainly
20 stronger than saying have created. I think
21 appear is less definitive. I don't have any
22 other comments about it.

1 MR. STONE: Appear to have created
2 makes it sounds like it in fact created it in the
3 past. And I was trying to -- it could even say,
4 may create.

5 I was just trying to leave it open
6 because we haven't decided that it did create the
7 perception. Was saying that that's the concern
8 we have.

9 I guess we could say, because these
10 provisions raise the concern that the perception,
11 blah, blah, blah.

12 CHAIR HOLTZMAN: Any other comments
13 about this?

14 PROF. TAYLOR: Well it seemed to me
15 that this is a factually accurate statement,
16 based on what we've heard.

17 MR. STONE: I guess if you look at Tab
18 4 you will see my concern with that. And that is
19 -- I guess Tab 3. I suggested in the commentary
20 that we don't know if it's a factually accurate
21 statement because the data in the second bullet
22 is unofficial data recalled by individual

1 military officials. It was not data that Dr.
2 Spohn got and that she analyzed.

3 So it's one of the situations where
4 we're going beyond Dr. Spohn's data. And that
5 data was not presented by military Services to
6 us, it was passed to us by the Subcommittee. So
7 we have to acknowledge, in some way, that that's
8 not part of, for example, the data reports that
9 Dr. Spohn has reported to us and we've passed
10 along.

11 And so you'll see I just clarified the
12 second bullet. It's on Page 9 of Tab 3.

13 CHAIR HOLTZMAN: Admiral Tracey, did
14 you want to make a comment? You don't have to.

15 JUDGE JONES: It's her last meeting.

16 (Laughter)

17 CHAIR HOLTZMAN: You have a little lax
18 here. You're off the hook if you want to be off
19 the hook.

20 I actually have a suggestion that
21 could solve some of this problem, which is,
22 instead of saying, have created the perception,

1 why don't we say, a perception. And then we
2 haven't said that -- it just makes it a little
3 bit less -- it makes it a little vaguer as to who
4 is perceiving and how widespread it is and so
5 forth.

6 But I'm happy with it this way. I
7 agree with Mr. Taylor that it's an accurate
8 statement. We are not saying in this
9 recommendation anything about how widespread the
10 perception is or how accurate the perception is.

11 So I have no trouble with it. But
12 maybe if you said it appeared to create a
13 perception of undue pressure, we can, I mean,
14 make it a little bit vaguer, but I have no
15 problem.

16 VADM TRACEY: Should we change it --
17 I'm sorry.

18 CHAIR HOLTZMAN: So it would say,
19 because these provisions appear to have created a
20 perception of undue pressure. It's a very
21 minimal change, and maybe it's a meaningless
22 change.

1 MR. STONE: Can you put that together
2 with what I suggested and say, may have created a
3 perception, because I'm fine with that?

4 CHAIR HOLTZMAN: I'm not in favor of
5 that. Of your change. Because I think they have
6 created a perception, or the perception.

7 I think that that is, as Mr. Taylor
8 said, is an accurate statement. Whether the
9 perception is justified, whether the perception
10 is accurate, how widespread the perception is,
11 how nefarious the perception is, we're not making
12 any statement about that in that, and there's
13 maybe no conclusions about that. In this
14 recommendation. So that's why I'm okay with it.

15 But let's -- well, okay, so let's just
16 take these in order. So, first, those in favor
17 of, let's take a vote, first, on Mr. Stone's
18 recommendation which is to strike the words
19 appear to have created and insert instead, may
20 have created. Is that a correct formulation?

21 MR. STONE: Yes.

22 CHAIR HOLTZMAN: Okay. Those in favor

1 say aye?

2 MR. STONE: Aye.

3 CHAIR HOLTZMAN: Opposed?

4 (Chorus of no)

5 CHAIR HOLTZMAN: The no's have it.

6 Well in that case, let's move to Recommendation

7 56 itself. Accepting the whole record.

8 MR. STONE: Well, what about your
9 suggestion of the word, a instead of the, are you
10 withdrawing that?

11 CHAIR HOLTZMAN: No. If you prefer
12 it, I'll definitely --

13 MR. STONE: I think that's better.

14 CHAIR HOLTZMAN: Okay.

15 MR. STONE: If the Panel agrees. If
16 everybody agrees.

17 CHAIR HOLTZMAN: Okay. Well, I'll
18 then offer that amendment. Instead of, created
19 the perception, to change the word, the to a.
20 Those in favor say aye?

21 (Chorus of aye)

22 CHAIR HOLTZMAN: Opposed? Ayes have

1 it. No, for Recommendation 56, those in favor
2 say aye?

3 JUDGE JONES: Aye.

4 VADM TRACEY: Aye.

5 PROF. TAYLOR: Aye.

6 CHAIR HOLTZMAN: Aye. Opposed? The
7 ayes have it.

8 MR. STONE: Abstain.

9 CHAIR HOLTZMAN: Ayes have it.

10 MS. SAUNDERS: Okay, so with that, all
11 nine recommendations have been adopted by the JPP
12 and will be forwarded.

13 Following the last meeting, we sent
14 you JPPs, the recommended JPP executive summary,
15 along with the recommendations --

16 MR. STONE: Before you go on to that
17 --

18 MS. SAUNDERS: Okay.

19 MR. STONE: -- I think there is
20 another issue, before we go through this line by
21 line.

22 And that's the material that the staff

1 sent us about Article 33. Which I think impacts,
2 directly, Recommendation 53.

3 That I, for one, have to suspend
4 whatever I voted on Recommendation 53 because we
5 got a very nice package that's quite long and has
6 explanatory material, that frankly renders what
7 we, covers pretty much everything and more.

8 Goes, in some ways, further than we
9 did in our Recommendation 53. And renders it,
10 essentially, unnecessary. And it makes it look
11 like we're not paying attention to what's going
12 on elsewhere, if we endorse it as it stands.

13 And when I looked at the draft final
14 report, which is Tab 8 that we got, I noticed
15 that there was one section of that report that
16 spoke about, let me see if I can find it, the
17 page for you, things that we didn't have to do
18 because they got handled by Congress or other
19 ways before we got to it. Let's see what page
20 that was.

21 CHAIR HOLTZMAN: Are you talking about
22 the Joint Services Committee?

1 MR. STONE: Yes. Yes. The Joint
2 Service Committee.

3 I mean, one way or the other we should
4 be doing something with that. And it seemed to
5 me this is maybe one more item where we need to
6 acknowledge, at a minimum acknowledge, and at a
7 maximum accept the fact that they went further
8 than us.

9 They have a huge number of
10 considerations. And it includes the stuff about
11 the standard of proof, admissible evidence,
12 probable cause in sending it forward, that it's
13 non-binding.

14 I mean, they spent a lot of time and
15 did a very thorough, I think, proposal. Which we
16 got. Which the staff sent us.

17 And so I think we at least have to --

18 MS. SAUNDERS: Would it be helpful for
19 me to go through, procedurally, what the Joint
20 Service Committee has done with this?

21 The Joint Service Committee released
22 a draft, executive order, on July 11th. And it's

1 in the Federal Register, open for public comment
2 for a two-month period.

3 And part of this large executive
4 order, that's out there, is the proposed rules
5 which would implement Article 33 of the UCMJ.
6 Which is the subject of these recommendations.

7 If you recall, the JPP Recommendation
8 Number 53 recommends that the standard for
9 referral be, the charges are supported by
10 probable cause, and there's a reasonable
11 likelihood of proving the elements of each
12 offense, beyond a reasonable doubt using only
13 evidence likely to be found admissible at trial.

14 The guidance that's been put out by
15 the Joint Service Committee has been provided to
16 you. It's in your materials.

17 What's a little bit different about
18 theirs is that they do retain probable cause as
19 the standard for referral. What they do is have
20 a list of considerations that the staff judge
21 advocate and convening authority should consider
22 in all cases.

1 Among those considerations, if you
2 look on Page 3 of the draft EO that we sent you,
3 Number H is, admissible evidence will likely be
4 sufficient to obtain and sustain a conviction in
5 trial by court-martial.

6 I think where this differs somewhat,
7 from the recommendation of the JPP is, rather
8 than having that, or the language that you
9 selected as your standard for referral, that this
10 is simply one consideration among others to be
11 considered in making a referral decision.

12 We also included, in the back of that
13 packet of material that we sent you, this is from
14 the Military Justice Review Group report. If you
15 recall, the Military Justice Review Group, which
16 was led by former Judge Andy Effron from the
17 Court of Appeals from the Armed Forces, they put
18 together the original recommendation for Article
19 33 that was then subsequently passed in the FY17
20 National Defense Authorization Act.

21 Which if you recall, that provision
22 specifically refers to the U.S. Attorney's

1 Manual. That they should look to that for
2 guidance.

3 So this is kind of the historical
4 material that was provided in their report, under
5 Article 33. And they do cite to, in some of the
6 highlighted material, they do cite to the U.S.
7 Attorney's Manual in talking about the standard.

8 That the attorney for the Government
9 should commence, or recommend federal
10 prosecution, if he or she believes that the
11 person's conduct constitutes a federal offense,
12 and that the admissible evidence will probably be
13 sufficient to obtain and to sustain a conviction.

14 So I guess that is the primary
15 difference between the JSC proposal. It is one
16 factor to be considered.

17 But probable cause is still the
18 standard for referral, versus, I think what the
19 JPP has recommended, which is, that the standard
20 for referral should be that the charges are
21 supported by probable cause and there is a
22 reasonable likelihood of proving the element of

1 each offense, beyond a reasonable doubt, using
2 only evidence likely to be found admissible at
3 trial.

4 MR. STONE: The Tab 5 and what we have
5 has what was sent to us ahead of time, but that
6 does not include what's in your folder, which is
7 longer than that, which is the same as Tab 5, but
8 that includes all of the material from the
9 Military Justice Review Group, that has the
10 summary, the background, the historical
11 background, the relation to civilian practice,
12 the relation to objectives and provisions,
13 legislative proposal.

14 And I think the interesting thing,
15 which was of some question when we got this
16 proposal is, and I think this is in both
17 versions, the one in Tab 5, yes, on Page 7, the
18 analysis that has now been put forward, as an
19 executive order, says, in the very last
20 paragraph, the disposition factors contained in
21 this appendix are adapted primarily from three
22 sources.

1 Principles of Federal Prosecution
2 issued by the Department of Justice, the American
3 Bar Association, the Criminal Justice Standards
4 for the Prosecution Function and the National
5 District Attorneys Association, the National
6 Prosecution Standards.

7 So to the extent that that's been put
8 forward, that resolves at least my question that
9 I had early on, about whether Article 33, as
10 rewritten, should really only focus on the
11 Department of Justice. What they call the
12 Principles of Federal Prosecution.

13 But that's included in the U.S.
14 Attorney's Manual. That is 9-27. That's the
15 chapter. It's just another way of calling it
16 that chapter.

17 And I didn't know whether we should be
18 going beyond that, because it wasn't in there.
19 But this analysis, and what's now been put
20 forward as the Joint Services Committee,
21 understands it, is looking to all three.

22 So even though they have a lot more

1 factors in here, it seems to me that they have
2 spent, not only a lot more time and detail, you
3 know, a lot more detail to this, but they also
4 are consistent with everything, which was
5 previously done by the Military Justice Review
6 Group.

7 And I was concerned way back, if you
8 may recall, that we and the Military Justice
9 Review Group might overlap and be ships passing
10 in the night and say slightly different things.
11 And I didn't think that that was, it just wasn't
12 going to be helpful if we didn't acknowledge each
13 other's work.

14 But they said their work was done in
15 closed session and they couldn't share it with
16 us, et cetera. But now that it's an open
17 session, and it's been proposed, I don't think
18 there's any consideration in here that we haven't
19 also tried to cover.

20 And so since it's now been put forth
21 officially, I frankly think that we look kind of
22 foolish recovering that ground. Or at least we

1 would look out of date.

2 And so I suggest that we drop
3 Recommendation 53 here, but that we include in
4 the piece of the final report, where it talks
5 about things that we didn't need to get to, that
6 this is something which we held hearings on and
7 we discussed.

8 Here it is, it's one, oh no, not the
9 final page.

10 VADM TRACEY: This is now, it's in for
11 public comment, right?

12 MS. SAUNDERS: That's right.

13 VADM TRACEY: It's a 60-day public
14 comment period, so this won't actually become an
15 executive order, if ever, until after September.

16 MS. SAUNDERS: September 11th, that's
17 right.

18 VADM TRACEY: So I'm not sure that
19 it's inconsistent for the Panel to continue to
20 recommend, or recommending. It may be
21 appropriate to acknowledge in the sub-bullets
22 that there is this executive, draft executive

1 order out there, that would appear to be
2 consistent --

3 MS. SAUNDERS: Sure.

4 VADM TRACEY: -- with our
5 recommendation. If it is, our deliberations on
6 that may determine that there are variances that
7 we're still not comfortable with.

8 MS. SAUNDERS: And that, I think, that
9 opens it up to the Panel too, whether or not we
10 would like to make a public comment on this
11 proposal by the Joint Service Committee.

12 CHAIR HOLTZMAN: Judge Jones?

13 JUDGE JONES: Well, I think we should
14 continue to have some recommendation that
15 obviously acknowledges what they've done.

16 I actually, in looking at it, it's
17 more style than substance in terms of the
18 difference.

19 CHAIR HOLTZMAN: Right. I agree.

20 JUDGE JONES: I think the referral
21 section basically, when it says, consider the
22 matters, yes, probable cause, but also consider

1 the matters in 2.1.

2 And of course, one of the matters in
3 2.1 is that admissible evidence will likely be
4 sufficient to obtain and sustain a conviction.
5 So that's what we're saying.

6 And so I don't exactly know how I want
7 to proceed, but clearly we should say that.

8 I also think, they being who they are,
9 have done a good job of reminding everybody about
10 the interests of justice and good order and
11 discipline in here, which we didn't discuss.
12 Perhaps wasn't in our sights.

13 So at the moment, I don't dislike
14 their proposal at all. I might even -- I guess
15 it goes farther than ours in some ways, but it is
16 a better handling, maybe, of the whole topic.

17 MS. SAUNDERS: Yes. And I believe the
18 Subcommittee's intention was to simply put forth
19 the standard without really getting into all the
20 other factors.

21 JUDGE JONES: Right.

22 MS. SAUNDERS: But I think they just

1 wanted that to be the standard out there.

2 Probable cause plus this other --

3 JUDGE JONES: Yes. Well I think
4 reading this, that's what they're saying. It's
5 longer, but I think it's the same standard.

6 CHAIR HOLTZMAN: Taylor, did you have
7 a --

8 PROF. TAYLOR: Yes. The only thought
9 I had about this, when I started looking and
10 comparing the two, is that to the extent that we
11 were talking about everything in their proposal
12 up to, and including 2.3, those were issues that
13 we did or did not discuss when we're focusing on
14 standard.

15 But then when you get into the
16 materials from 2.4 and following, when it gets to
17 the question of prosecutions and which
18 jurisdiction and plea agreements, agreements
19 concerning disposition, those were issues we
20 didn't address at all.

21 JUDGE JONES: Right.

22 PROF. TAYLOR: So I really think that,

1 to the extent we want to make any comment, if we
2 do, it really should be confined to the limited
3 issue of referral and not to anything else in the
4 comments.

5 JUDGE JONES: Right. Well, I agree
6 with that.

7 CHAIR HOLTZMAN: My view, I agree with
8 that too. I agree with Admiral Tracey. This is
9 not the Joint Service Committee's proposal. It's
10 not yet simply a proposal.

11 We spent a lot of time discussing
12 this. I think it's important for our
13 recommendation to be out there. Maybe that will
14 also add some emphasis to the approval of the
15 Joint Service Committee's recommendation.

16 So I suggest that we adopt
17 recommendation, or not adopt, but that we retain
18 -- we already approved it. I'm not in favor of
19 disapproving it again.

20 I do think it's a good idea to note,
21 that the, in another bullet, that the Joint
22 Services Committee has proposed, in section

1 whatever it is, 2.3, 2.1, 2.2, 2.3, essentially a
2 similar change in terms of considerations for
3 convening authorities and staff judge advocates.
4 So that would be my proposal.

5 But are we ready -- Mr. Stone, do you
6 want to say anything?

7 MR. STONE: No, we can start from the
8 top again, as long as everybody wants to keep it
9 in there and we're talking about maybe an
10 additional bullet, maybe we can ask the staff,
11 during a break or over lunch, hearing what we
12 just said, putting a little bullet that says, to
13 the extent that the Joint Services Committee
14 addressed this topic, we endorse their efforts.
15 You know, this topic.

16 Or in 2.1 to two point whatever it is,
17 this topic, that limited thing, we endorse their
18 proposal. Something like that.

19 That shows that we knew about it,
20 we've read it, we understand. I totally agree
21 with both Member Jones and Member Taylor, that
22 the Joint Service Committee is way more

1 prescriptive in detail than us and also went
2 further and covered other topics.

3 That's right. I mean, they did have
4 the time and the staff to really review the
5 subject. And we don't need to endorse things
6 that go beyond what we had here.

7 But yes, but I do think that it would
8 really be, it makes us look -- it makes it clear
9 from the paperwork, for people who are going to
10 read this transcript, that we were aware of what
11 they were doing, that we're on the same page with
12 it, basically, and we're not suggesting somebody
13 start over. I wouldn't want to sort of suggest
14 that.

15 So whoever has to implement our
16 recommendations knows that it may be that one is
17 already implemented.

18 CHAIR HOLTZMAN: But that raises a
19 separate issue. It's one thing to have a bullet
20 acknowledging the existence of this report, the
21 Joint Services Committee proposal, and to say
22 that it is essentially similar to our

1 recommendation and note that the proposal became
2 public after our work on this recommendation.

3 But it's another thing to endorse it.
4 And the question is, are we ready to endorse
5 that?

6 Have we had a chance to, I mean, how
7 comfortable do we feel about doing that?

8 JUDGE JONES: I'm inclined to say that
9 their recommendations, which relates to our
10 recommendation 53, are consistent. I'd still
11 like to think about it a little bit more.

12 CHAIR HOLTZMAN: Okay.

13 JUDGE JONES: Over lunch.

14 CHAIR HOLTZMAN: Okay let's -- so, Mr.
15 Stone, if it's okay with you and other members,
16 the staff should prepare a bullet that says that
17 this, whatever the date was, or after our
18 consideration of the Recommendation 53, the Joint
19 Services Committee came out with a proposal that
20 is essentially identical in sections 2.1, 2.2.

21 And then you could have another
22 sentence, we could look at that one, in that

1 Panel endorses that. And we can vote on both of
2 those.

3 I mean, if the first one we decide
4 that we want right now, or we could just vote on
5 both of them later. I'd personally prefer not to
6 vote on the endorsement right at this moment
7 because I haven't had a chance really to look in
8 that kind of depth at the Joint Services
9 Committee proposal.

10 VADM TRACEY: And it may be different
11 once --

12 CHAIR HOLTZMAN: Oh yes, right, of
13 course. Exactly. That's a very important point
14 that we, you know.

15 MS. SAUNDERS: And I just think --

16 CHAIR HOLTZMAN: So I don't know that
17 we have to endorse it. We can make a --

18 MS. SAUNDERS: You can choose to make
19 a public comment in endorsing it or providing
20 other information. If you choose. We're in that
21 period right now.

22 PROF. TAYLOR: It seems to me that I

1 would not feel comfortable going much farther
2 than saying we acknowledge its existence and
3 think it's generally consistent. Or something
4 like that.

5 CHAIR HOLTZMAN: Yes, exactly.

6 PROF. TAYLOR: Because in looking at
7 the factors, I really wonder about some of these
8 factors that they list here. I mean, I can see
9 some that I can easily agree with, such
10 admissible evidence and availability of the
11 victim and other witnesses.

12 And then I look at some of the others
13 and I'm thinking, I don't know how much weight I
14 would give to some of these other factors. I
15 mean, they're probably things that go through
16 your mind, but without hearing people talk about
17 it or thinking about it more.

18 Like, the truth-seeking function of
19 trial by court-martial. What in the world does
20 that mean?

21 I don't know. So I'm comfortable with
22 a more limited acknowledgment and saying it seems

1 generally consistent, but not going much beyond
2 that.

3 CHAIR HOLTZMAN: Right.

4 JUDGE JONES: I agree.

5 PROF. TAYLOR: Focusing on 2.3.

6 MR. STONE: And I'm fine with that
7 language too.

8 JUDGE JONES: Right.

9 MR. STONE: And maybe we can just get
10 that, something like that drafted.

11 JUDGE JONES: Okay.

12 CHAIR HOLTZMAN: Okay, certainly.

13 MR. STONE: Okay. That's good. I
14 just didn't want us to ignore it --

15 CHAIR HOLTZMAN: All right.

16 PROF. TAYLOR: No, I agree with it.

17 MR. STONE: -- because the staff sent
18 us a thing to highlight it, our Recommendation
19 53, so at least we know where we are.

20 CHAIR HOLTZMAN: So, are we now up to
21 considering Tabs 2 and 3?

22 MS. SAUNDERS: Yes, ma'am.

1 CHAIR HOLTZMAN: Okay. So we have Mr.
2 Taylor's comments in Tab 2.

3 MS. SAUNDERS: Do you want to start at
4 the beginning and go through Mr. Taylor's --

5 CHAIR HOLTZMAN: I mean, if everybody
6 has read them, this seems to be relatively, well,
7 I don't know.

8 PROF. TAYLOR: Well, since they're my
9 comments --

10 CHAIR HOLTZMAN: Why don't you --

11 PROF. TAYLOR: Yes. So since they're
12 my comments I'll be glad to take the lead on
13 this.

14 On Page 1, I thought it was fair to
15 point out that one sign of the changes having
16 been valuable is that not only have the number of
17 sexual assault cases being reported gone up, but
18 there's been a decrease, overall, in the number
19 of reports by annual surveys. Because I think
20 those are twin indicators that changes are
21 occurring.

22 And of course, ideally at some point,

1 we will get to the point where there are fewer of
2 one, and more of the other, in an even more
3 concise way.

4 And also, on the second point that I
5 made there, has to do with this whole question
6 about perception. And it's the question of
7 maintaining both the reality and the perception
8 of a justice system. The importance of that.

9 So I didn't see that as being
10 particularly controversial, but if someone has a
11 problem with it, it was just an effort on my part
12 to flesh that out a little bit.

13 CHAIR HOLTZMAN: Can we just do it
14 page by page there? Is there any objection to
15 these changes Mr. Taylor's proposed on page 1?

16 VADM TRACEY: I have no objection, but
17 the edit as it's made in the paragraph on this
18 declining number of unwanted sexual conduct,
19 we've now sort of disrupted a thought here.

20 The last sentence of that paragraph
21 refers to the content of the first, observation.

22 So, one possible sign, while it's

1 caused, the it's refers to the one possible sign
2 and we've now got the SAPRO information. It's
3 just a grammatical --

4 MR. STONE: I'm sorry, where is this
5 one possible -- where is that?

6 CHAIR HOLTZMAN: You're at paragraph
7 3, is that in paragraph 3?

8 VADM TRACEY: In paragraph 3.

9 CHAIR HOLTZMAN: Okay, what change are
10 you objecting to?

11 VADM TRACEY: I don't object to the
12 change, I'm just trying to make it a little bit
13 clearer --

14 CHAIR HOLTZMAN: Okay, can you explain
15 again?

16 VADM TRACEY: -- paragraph structure.

17 CHAIR HOLTZMAN: Because we were -- I
18 was lost when you said --

19 VADM TRACEY: So, the sentence -- the
20 second sentence begins, one possible sign.

21 CHAIR HOLTZMAN: Right.

22 VADM TRACEY: And, the original

1 version, the next sentence began, while it's
2 caused. The it's refers to the one possible
3 sign. Now we've got another thought in the
4 middle that disrupts --

5 CHAIR HOLTZMAN: I see.

6 VADM TRACEY: -- the connection.

7 MR. STONE: So, grammatically, you
8 have an issue?

9 VADM TRACEY: Yes.

10 PROF. TAYLOR: How about something
11 like, while the causes for these trends cannot be
12 identified with certainty?

13 VADM TRACEY: That would be fine.
14 That would be great, that would work.

15 PROF. TAYLOR: That's a good thought.
16 While the causes for these trends cannot be
17 identified with certainty.

18 VADM TRACEY: Many believe they
19 indicate greater confidence. That -- so that,
20 you know, that's my problem is that the --

21 PROF. TAYLOR: Right.

22 VADM TRACEY: -- rise in cases being

1 prosecuted would connect to the confidence of the
2 criminal justice system. The decrease in the
3 number of reports wouldn't be connected to that.

4 MS. SAUNDERS: So, the next -- so the
5 second sentence should now read, while the causes
6 for these trends cannot be identified with
7 certainty, many believe they indicate greater
8 confidence that the criminal justice system will
9 help the victim and vigorously prosecute the
10 accused?

11 VADM TRACEY: Well, that may work in
12 implying that it's a deterrent effect of the
13 accused.

14 CHAIR HOLTZMAN: Oh, I see what you're
15 saying. That the decrease in the number of --
16 oh, I got you.

17 MR. STONE: I guess I don't know what
18 now happens to the third sentence. Is it struck?

19 VADM TRACEY: Yes, we were trying to
20 modify it so that it was the right conclusion. I
21 think you'd want to draw a conclusion. Right?

22 CHAIR HOLTZMAN: Well, why don't you

1 just limit it to the increase? While the cause
2 of the increase cannot be identified with
3 certainty, many believe that the rise indicates
4 greater confidence in the criminal justice --

5 Oh no, I see, he addresses both of
6 them. I think it's okay.

7 PROF. TAYLOR: And, that was my point,
8 yes.

9 CHAIR HOLTZMAN: I think it's okay,
10 Admiral. I think if you said while the causes --
11 do you want to read that sentence again?

12 PROF. TAYLOR: While the causes for
13 these trends cannot be identified with certainty,
14 maybe it's the trend in the increase in the
15 number of sexual assault cases being reported and
16 the decrease in the number of reports.

17 VADM TRACEY: Many believe that they
18 indicate greater confidence that the criminal
19 justice system will help the victim and will
20 vigorously prosecute the accused.

21 PROF. TAYLOR: That's good.

22 JUDGE JONES: That's fine.

1 PROF. TAYLOR: Thank you.

2 CHAIR HOLTZMAN: Okay, any objection
3 to this change? To these changes as amended?

4 Okay, hearing none, we're going on to
5 page 2 of 3, Mr. Taylor.

6 PROF. TAYLOR: Okay, so, at the bottom
7 of page 2, as written, we talked about the
8 counsel perceived that convening authorities feel
9 pressure to refer sexual assault cases, as
10 written originally, regardless of the strength of
11 the evidence in the case.

12 And, I just suggested the change to
13 say even based on weak evidence, because that was
14 the language that the Subcommittee report had
15 included. I was just trying to make the two
16 consistent.

17 CHAIR HOLTZMAN: Okay. Any objection
18 to that change?

19 JUDGE JONES: No.

20 CHAIR HOLTZMAN: Okay, that's
21 accepted.

22 Now, the next change on page 3?

1 PROF. TAYLOR: So, this gets a little
2 bit into Mr. Stone's comments that he made about
3 these two cases.

4 My only comment here was that I did
5 not attempt to change it other than to say that
6 we really ought to be relying upon the
7 declaration that had been submitted as part of
8 the pleading to the Court of Appeals for the
9 Armed Forces rather than relying upon media
10 reports.

11 Because, I think it's fair to say that
12 at the time the staff wrote this, they hadn't had
13 a chance to go back and actually get all the
14 actual documents.

15 But, we should be relying in this on
16 the court filings, which they have done. And, I
17 have no particular comment at this point on the
18 way they have described it. It seemed -- but I
19 know Mr. Stone did. So, we may want to defer
20 this to a later discussion or not.

21 CHAIR HOLTZMAN: Can we do -- can we
22 adopt yours and then consider Mr. Stone's changes

1 later? Because I think -- I don't think that's -
2 - is that inconsistent?

3 Because this just clarifies the
4 description of the U.S. v. Barry and then, Mr.
5 Stone basically wants it all out. Am I
6 misstating what you want, Mr. Stone?

7 MR. STONE: Well, it is more than
8 that, that's correct. Because this is not even -
9 - we can postpone this discussion if you'd like
10 for a moment.

11 But, the description in the draft is
12 actually, unfortunately, citing these cases for
13 the exact opposite of what they stand for. And,
14 therefore, slightly modifying them is, itself,
15 still incorrect.

16 The now-Retired Rear Admiral said
17 nothing about undue influence, command influence.
18 His affidavit that's attached, if you look at Tab
19 4, says only -- his only concerns were the
20 sufficiency of the evidence based on his reading
21 of the record and the legal considerations. He
22 said nothing about undue command influence.

1 The pleading of the attorney, and by
2 the way, it's a pleading of a private defense
3 attorney, so this has no reflection on any
4 military attorneys, is that, oh, this must mean
5 that there was undue command influence and the
6 only support of that is an affidavit by somebody
7 else who says, quote, third-hand, I heard that
8 there was undue command influence on this person.

9 But, this person, the Retired Rear
10 Admiral, doesn't say word one, even though his
11 affidavit was obtained by that defense counsel
12 and filed in support of it.

13 So, the newspaper, the media, got it
14 completely backwards. I mean, the affidavit that
15 says there was undue command influence says it
16 was obtained third-hand.

17 In other words, they couldn't even
18 find -- go back to the person who told it to them
19 and say, we got it second-hand.

20 Now, what's really disturbing about
21 the way the media reported that is, when you go
22 to the case, and I have a copy of it here in case

1 anybody didn't get it, and I pulled the case, the
2 first thing that the Navy-Marine Corps Appeals
3 Board says in its opening footnote of the case,
4 because they had the case, is that we're talking
5 about the second convening officer here.

6 Because, when there was an allegation
7 earlier to them on the appeal about undue command
8 influence, they immediately said, wait, don't
9 file anything. And they sent it to back and gave
10 the defendant a second convening authority who
11 was completely new.

12 So, first of all, we're talking about
13 the second convening authority.

14 Then, after the five Judges on the
15 Navy-Marine Corps Appeals Court write an opinion,
16 which I've also got here, saying, the legal
17 objections that they made across the board did
18 not carry any weight.

19 And, they have the footnote. They
20 reprint the entire comment by that second
21 convening authority who, to be transparent, said,
22 it's quoted in full, not like in this pleading

1 attached here in Appendix 4.

2 He put everything he considered there
3 and said, my misgivings have to do with the
4 sufficiency of the evidence as I understand it.

5 But, of course, he was not a lawyer
6 and the lawyer who was assigned to advise him did
7 not believe there was a problem with sufficiency
8 of the evidence.

9 And, the five Judges on that court
10 said, we don't think so, either.

11 It then goes up -- an appeal was taken
12 to CAAF who decides the case on April 27th, and
13 that opinion is also cited in my other note to
14 you. And CAAF says, we don't find any legal
15 errors here, either, unanimously.

16 That's five Judges on the Military
17 Court -- Navy-Marine Corps Court of Appeals. And
18 then, another five on the CAAF in addition to the
19 Trial Judge who didn't have a problem with the
20 sufficiency of the evidence.

21 And, after they write that opinion,
22 the private defense counsel raises these

1 allegations that are attached in Tab 4. And
2 they're extremely flimsy because, although the
3 Retired Rear Admiral's cooperating and filing an
4 affidavit for him, he does not say word one about
5 undue command influence.

6 And, despite that, post-argument --
7 those post-argument affidavits filed on May, I
8 believe it's 9th, it's in the material, May 8th,
9 on May 11th, in a pleading that the Captain just
10 got for us in the same case, the prosecution, the
11 military prosecutors immediately came back and
12 said, we have absolutely no concerns or
13 objections to this being remanded for a look into
14 undue command influence, in effect, even though
15 these are flimsy allegations.

16 And they cited a whole string of cases
17 which is standard case law for the last 11 years
18 that says when there's any allegation at all, you
19 send it back because nobody wants, you know, to
20 think that there could be undue command
21 influence.

22 And, by the way, it only has to do

1 with clemency. It doesn't have to do with
2 processing the case in the first place. Well, I
3 guess it does because he -- there's all kinds of
4 claims in it.

5 But, so the military endorses the
6 idea. And, subsequent to that, in June, CAAF,
7 because both sides agreed to send it back, has
8 sent it back, which is where it is now.

9 So, what the case shows and the media
10 completely missed is this is a tremendous amount
11 of cooperation by all sides in wanting any
12 allegation at all, even a flimsy one that the
13 individual involved filed an affidavit for, but
14 doesn't even say it in there, to have a hearing.

15 And so, they sent it back and CAAF
16 said, please have the hearing and send me your
17 recommendations after you looking into this issue
18 by November 1st.

19 So, instead of it reading as if
20 there's something that isn't, you know, that this
21 reflects that there's problems here, it's just
22 exactly the opposite. It reflects when there's

1 any shred of evidence, and it's not, by the now-
2 Retired Rear Admiral who was cooperating with the
3 defense.

4 So, when there's third-hand
5 information, they will still send it back and
6 that isn't even new. It's not a recent judicial
7 development because the prosecutor cites a string
8 of cases that go back a dozen years and
9 specifically cites to a 2014 case which the Navy-
10 Marine Court of Criminal Appeals specifically
11 addressed the same kinds of things that came in
12 the Barry case, which is also old.

13 And said, we absolutely don't want
14 anybody to have unresolved concerns about this.
15 You make any allegation like that and we're going
16 to resolve it.

17 So, it's back there now to see if the
18 defendant gets a third convening authority.

19 I mean, I don't know how that isn't,
20 you know --

21 CHAIR HOLTZMAN: I'm very confused, I
22 must say. Mr. Taylor cites to the case of Barry.

1 I see an affidavit in Barry. I know it's signed
2 by Patrick J. Lorge who says that he's a Rear
3 Admiral, Retired.

4 In which, in paragraph 6, talks about
5 that he was -- he considered whether he
6 disapproves of finding any results or concerns
7 about the impact on the Navy if I were to
8 disapprove of the finding.

9 And, you're objecting -- are you
10 saying that that's not an example of undue
11 influence?

12 MR. STONE: I'm saying --

13 CHAIR HOLTZMAN: I know, I'm asking
14 you just about this affidavit.

15 MR. STONE: Absolutely. All that says
16 is I was also concerned. If you look at
17 paragraph 4, he says, I did not believe the
18 evidence supported the finding.

19 CHAIR HOLTZMAN: I'm asking you about
20 paragraph 6.

21 MR. STONE: I wasn't claim to
22 disproof.

1 CHAIR HOLTZMAN: Okay, so you -- in
2 other words, you disregard paragraph 6 and the
3 basis on which he decided --

4 MR. STONE: I think that'll have to be
5 decided on a remand because he specifically said,
6 and this, what you're looking at, is not what he
7 sent at the time he decided it. This is two
8 years later.

9 If you look at what he said to the
10 court --

11 CHAIR HOLTZMAN: Well, I don't care
12 what the time is, I'm just talking about --

13 MR. STONE: Okay --

14 CHAIR HOLTZMAN: -- this paragraph.

15 MR. STONE: Well, why I don't just
16 read -- I'd like to read into the record --

17 CHAIR HOLTZMAN: Well, okay, let's --

18 MR. STONE: -- then what he said to
19 the court.

20 CHAIR HOLTZMAN: Wait, wait, wait,
21 wait, wait, wait, we're going to have --

22 MR. STONE: Because it's on 20165 CCA

1 Lexis 634.

2 CHAIR HOLTZMAN: We're going to have
3 to have a kind of regular order here about how
4 we're going to proceed.

5 The question is, do we go into the --
6 should we postpone this -- should we have this
7 debate right now about Barry or do we finish Mr.
8 Taylor's comments? How do you want to proceed?

9 PROF. TAYLOR: Well, I would just say
10 that all I said to kick out this discussion was
11 we ought to rely upon the declaration and the
12 court filings rather than the media.

13 The language that's been added here
14 was added by the staff. So, I did not author
15 that which is underlined, although it seemed to
16 me to be fair statements based on what I saw
17 here.

18 So, I have not read the cases as Mr.
19 Stone has read the cases. And, the changes that
20 were proposed were proposed by the staff, not by
21 me. I just proposed that they actually go to the
22 source rather than rely upon media reports of

1 what the various parties had said.

2 CHAIR HOLTZMAN: So, what is your
3 change, Mr. Taylor?

4 PROF. TAYLOR: That was it, is that
5 the staff go back and look at the actual court
6 documents to provide a write-up.

7 So, I did not author any of this
8 language.

9 CHAIR HOLTZMAN: So, he's on page 3,
10 I see something in blue. I see something in
11 purple. Which is which? Who -- which colors
12 belong to which person?

13 MS. SAUNDERS: The --

14 CHAIR HOLTZMAN: Or which entity?

15 MS. SAUNDERS: The Track Changes that
16 you see in this second are from the staff.

17 CHAIR HOLTZMAN: Which Track Changes?
18 The purple?

19 MS. SAUNDERS: The one -- the purple
20 ones.

21 CHAIR HOLTZMAN: Okay, and the blue?

22 MS. SAUNDERS: The blue is -- the only

1 thing, if you see down at the bottom that's
2 highlighted in blue, query, was there a petition
3 filed? That sentence, that was from Mr. Taylor.

4 And, based on that query, we did
5 obtain the affidavit and we -- the language
6 that's changed within this paragraph reflects
7 just simply a transition from quoting to the news
8 article to quoting from and citing to the
9 affidavit and the filings.

10 VADM TRACEY: Do we actually need to
11 reference these two cases to make our case?

12 I would argue on the one hand that the
13 fact that there was media coverage that described
14 them as undue command influence is the damaging
15 issue.

16 That's where Sailors and Soldiers get
17 their perception, they're not going to do the
18 analysis that either of the two attorneys did.
19 They're going to go with what the media said.

20 So, you have potential risk that
21 people believe that the media coverage is correct
22 and that here are two instances in which people

1 were railroaded because of undue command
2 influence.

3 And, Admirals and Generals are saying
4 that they were -- their careers were at risk and
5 they chose their careers over the truth, like
6 justice and the American way.

7 So, that's the point to me of these
8 two articles. That's the only point of these two
9 articles.

10 And so, anything that requires us to
11 get into this kind of depth of quoting legal
12 documents gets us way off point and potentially
13 takes us down a path where there's still
14 decisions to be made as to what the truth is.

15 PROF. TAYLOR: So, I don't disagree
16 with what you said, Admiral Tracey. My only
17 point was, rather than rely upon media reports of
18 what someone said, they should be looking at the
19 court documents to see what the person actually
20 said.

21 But, that doesn't take away from your
22 point that, again, I thought the real purpose in

1 having these two cases was to talk about concerns
2 related to pressure on convening authorities,
3 pressure on convening authorities, not ultimately
4 whether it was or was not unlawful command
5 influence.

6 I mean, I agree, I don't think we need
7 to get into that level of detail. But, the point
8 is, there is a lot of feeling out there that
9 commanders feel pressured to refer cases when
10 otherwise they would not have. Left to their own
11 devices, absent the climate that we now live in,
12 they would not have referred these cases.

13 VADM TRACEY: To the extent that I
14 agree with Mr. Taylor, to the extent that we're
15 going to delve below the fact that, hey, there
16 were these two cases that hit the media while we
17 were in the midst of our deliberations, beyond
18 that statement, then we shouldn't be quoting from
19 the press about what the facts of those
20 statements are.

21 Once you start down that path, then I
22 think you're in the quandary that Mr. Taylor

1 points out that, you know, there's been some
2 developments around both of these cases that
3 would tend to suggest that they're not as they
4 were portrayed in the press.

5 CHAIR HOLTZMAN: So, how would you
6 address the problem?

7 VADM TRACEY: Either don't refer to
8 the two cases at all --

9 CHAIR HOLTZMAN: Or?

10 VADM TRACEY: -- or simply mention
11 that while we were in the course of our
12 deliberations, the media covered two different
13 cases that asserted that there were -- was
14 evidence of undue command influence.

15 And, the crux of our concern is what
16 the people in uniform believe. It's not what
17 Judges and lawyers do, it's what the people in
18 uniform believe about the fairness of the system.

19 JUDGE JONES: So, I think I agree with
20 everything that's been said. But, I would make
21 this point.

22 We are trying to say there is a

1 perception out there of undue influence.

2 Regardless of how this case comes out, and by the
3 way, I think that there is no way that we should
4 write anything because I don't believe there is
5 anything to criticize, either the judicial system
6 for, at this point, or the way the military
7 commanders have handled the prosecutors or
8 anybody else.

9 But, the point is, if we're going to
10 say there's a perception out there and possibly
11 be challenged, which you have every right to do,
12 Mr. Stone, about whether it's a real perception
13 or a little perception or no perception, then I
14 think we're -- I think we need to refer to this.

15 We have a declaration that, to me at
16 least, is clear and it's under oath that there
17 was some influence. So, it's an example.

18 We don't need to refer to the media.
19 We could cut this way down to two sentences if we
20 needed to.

21 But, I think we have to support this
22 perception and this is about as recent and the

1 best evidence, maybe true or not, I'm not saying
2 anything's true just because it's signed under
3 oath, that we have.

4 So, I think it needs to be in here,
5 but I'm happy to figure out ways to, you know,
6 whittle it down.

7 And, we're not relying on what the
8 rulings are in the court, we're talking about an
9 instances of where somebody who was a Rear
10 Admiral in the Navy, he had a perception, right?
11 And, that's really what we're talking about here,
12 I think.

13 VADM TRACEY: I think we've
14 accomplished what we need to accomplish. I agree
15 with what you said, but I think you can
16 accomplish that if you go simply with the first
17 sentence, edit it a little bit.

18 The JPP notes media coverage of two
19 court-martial appellate cases, both of which came
20 to light following the Subcommittee's issuance of
21 its report that underscore the Panel's concerns
22 related to appearance of pressure on convening

1 authorities.

2 CHAIR HOLTZMAN: Okay, that's good.

3 VADM TRACEY: And cite the two cases,
4 just the names of the two cases so that, to your
5 point, we didn't just hear some whining defense
6 counsel who lost. You know, there's actual
7 fairly public media coverage suggesting that this
8 is an issue. And, it feeds the perception.

9 CHAIR HOLTZMAN: But, why not also
10 include what I think Judge Jones point is very
11 persuasive to me.

12 Something that backs that up to give
13 some substance to the media reports because you
14 have, whether it's true or not or how it's going
15 to be dealt with by the military are separate
16 issues.

17 But, you have an Admiral who's claim
18 that it's basically the political environment
19 that made him make a decision that he would --
20 did not want to make.

21 VADM TRACEY: So, it'd be the purple
22 -- the next purple sentence there?

1 CHAIR HOLTZMAN: Maybe not even as
2 much as that. Yes, right, because, right. My
3 consideration -- right, right. Okay, whatever it
4 is.

5 VADM TRACEY: That would be -- I would
6 not be uncomfortable with that.

7 CHAIR HOLTZMAN: Okay. So, we quoted
8 from his declaration. So, I don't know that we
9 need anything else about that.

10 And then, I don't know about Boyce,
11 maybe that could be also similarly compacted,
12 reduced in size and so forth.

13 And, we could say simply that these
14 cases are being adjudicated at this point.

15 MS. SAUNDERS: In the Boyce case, I do
16 cite from the Court of Appeals for the Armed
17 Forces in finding apparent unlawful command
18 influence in that case.

19 And, I do have a couple of quotes down
20 at the bottom of page 4 in Tab 2 on that. I
21 don't know -- and they do talk about this specter
22 of unlawful command influence.

1 MR. STONE: You haven't discussed,
2 though, in Boyce that they found that there was,
3 in fact, no unlawful command influence that they
4 --

5 MS. SAUNDERS: Right.

6 MR. STONE: -- agreed to reverse the
7 case for a new trial, that there was no prejudice
8 to the defendant. It did not occur and all they
9 were talking about was, again, perhaps the media
10 and the look of the case.

11 MS. SAUNDERS: Right.

12 MR. STONE: And because the convening
13 authority who they accepted the truth of his
14 statements that there was no unlawful command
15 influence said.

16 But, I imagine with all this talk
17 that's been out there in the public media, it's
18 likely that people may think there was. They
19 accepted that at face value.

20 And, therefore, they said, not for the
21 military litigators but for the public they were
22 going to reverse it in a 3 to 2 decision, which

1 is not yet final because the time to petition to
2 the Supreme Court has not run.

3 And, in addition, that whole episode
4 that they are referring back to, and that gets
5 referred to in this paragraph where it refers to
6 the Wright case here, U.S. v. Wright, is what the
7 Navy-Marine Corps was addressing in -- and
8 correcting, by the way -- as described here in
9 the opposition to those memos which are attached
10 at Tab 4 which we got yesterday and are in your
11 packet, but not in the tabs, United States v.
12 Howell, the 2014 case from the Navy-Marine Corps
13 Court of Criminal Appeals describing curative
14 measures taken by the Commandant of the Marine
15 Corps following allegations of unlawful command
16 influence regarding the disposition of sexual
17 assault cases in the Marine Corps, curative
18 measures.

19 So, there's no mention of that either.

20 Now, I do not -- and I do not really
21 care to cite media reports when we're writing a
22 report for Congress where, first of all, the

1 heading says, Recent Judicial Developments, and
2 now we're talking about media reports.

3 We're not talking about judicial
4 developments and we're not talking about recent
5 ones because the case law that's being referred
6 to, the most recent case is the 2014 case in
7 Howell where efforts have been to address the
8 public impact.

9 The other cases are about immediately
10 giving the guy a remand to look into if there's
11 any allegation, if, when a party makes a
12 colorable showing. It doesn't have to be
13 provable, a colorable showing of probable --
14 possible prejudice due to this kind of processing
15 error.

16 They immediately remand for new trial
17 processing and they go back to cases decided in
18 1996.

19 Now, one of the reasons we don't need
20 to mention it is because, on the page before, the
21 very last item on the page number 4 says, counsel
22 perceived that convening authorities may feel

1 pressure to refer the sexual assault cases even,
2 now it's going to say, based on weak evidence to
3 trial.

4 That's exactly what was going on is in
5 the affidavit. That's exactly what is said by
6 the affidavit.

7 And, we also just discussed that we're
8 going to have Recommendation 56 that talks about,
9 and we just looked at the language, appear to
10 have created a perception of undue pressure and
11 then, we have bullets.

12 So, we have discussed this, first in
13 the report of the Subcommittee that we have, and
14 then in our own recommendation with bullets.

15 And so, this aside about cases which
16 were never presented to us either by the military
17 prosecutors and defense counsel who handled them,
18 or the military Services, muddies the water and
19 makes it look like this is a problem today that's
20 ongoing and hasn't been addressed when, in fact,
21 the military was aware of it at least since 2014
22 and has been carefully addressing it.

1 CHAIR HOLTZMAN: Well --

2 MR. STONE: So, I think that's
3 misleading and I wouldn't want to leave the
4 impression, the misimpression to the people who
5 get our report that we think that this ongoing.

6 Yes, it happened, but these two cases
7 don't show that it's not getting attention. In
8 one case, the guy's about to get his third
9 convening authority because he didn't like the
10 first one and now doesn't like the second one.

11 And, in the other case, they said, we
12 absolutely find there was no undue command
13 influence. But, by the way, since the public,
14 not the military Services, can be misled just for
15 preventative purposes, we're going to send it
16 back.

17 That's what those cases say. I have
18 copies here.

19 And, by the way, just to emphasize
20 that, eight days after the Boyce opinion issued,
21 the Court of Appeals for the Armed Forces issued
22 United States v. Shea May 30th, I have the

1 opinion here and copies for you if you would
2 like, where they declined to follow Boyce because
3 that was a case that dealt with an appearance in
4 the public but not in the military.

5 And, they specifically stated, just
6 because there are allegations in the air, quote,
7 unquote, about undue command influence, doesn't
8 mean that that's even an issue that is raised or
9 has any merit and they declined to apply their
10 decision of eight days before. And, that's a
11 unanimous opinion in Shea, all five Judges.

12 So, I mean, there's a lot of
13 complication here. We don't just throw out some
14 cases and then not very, very carefully explain
15 not only what they held, but what they might mean
16 for the future.

17 And so, I don't think we need any of
18 this. I'm not saying we should go into that. We
19 don't need to look like we are a legal panel
20 rather than a policy panel.

21 CHAIR HOLTZMAN: Okay. I think, Mr.
22 Stone, first of all, just to respond on one small

1 thing, we're not talking about ancient history.
2 The Patrick J. Lorge affidavit is dated May 5th,
3 2017.

4 MR. STONE: But, it deals with his
5 actions years before though.

6 CHAIR HOLTZMAN: His -- the actions
7 years before deals with --

8 MR. STONE: Yes.

9 CHAIR HOLTZMAN: -- 2015 which is also
10 two years ago. So, that is not recent.

11 Secondly, we are talking about
12 something, whether -- we're not talking about
13 judicial decision about whether or not or how
14 they're going to take command influence into
15 account. That is not what our job is and we
16 never addressed it.

17 So, all of what you're talking about,
18 in all due respect, is not really relevant to the
19 point we're making which was made by Admiral
20 Tracey.

21 We're talking about the perception in
22 the military about these issues, whether the

1 courts deal with them effectively or not, may
2 also, in the end, contribute to that.

3 But, we didn't look at the court
4 decisions and we didn't look at how the court
5 decisions affect people's attitudes about it.

6 So, it seems to me that, the real
7 question here is, narrow this down to try to
8 figure out how we can -- because I think some of
9 the points you're making are legitimate in the
10 sense that we don't need to have this kind of
11 very long conversation about the judicial
12 opinions and suggest that somehow they are the be
13 all or the end all.

14 They are just another kind of evidence
15 of the problem that the Subcommittee had
16 uncovered. That's all, it's not saying that it's
17 correct. I mean, I'd say it's incorrect. We're
18 not saying how it's being handled, we're just
19 saying this is just another example of what's --
20 of what we have to deal with.

21 VADM TRACEY: Citing these two --
22 excuse me --

1 CHAIR HOLTZMAN: Yes?

2 VADM TRACEY: Citing these two cases,
3 are they indicative of more than Issue Number 4?
4 One page 2, we've got this list of seven issues
5 that the Subcommittee raised.

6 So, these two cases illuminate --

7 CHAIR HOLTZMAN: Page 4?

8 VADM TRACEY: -- more than Issue
9 Number 4?

10 MR. STONE: It's one page 2.

11 VADM TRACEY: It's on page 2.

12 MS. SAUNDERS: At the bottom.

13 VADM TRACEY: At the bottom, the
14 report of the subcommittee lists seven issues.
15 Issue number four is the perception that
16 convening authorities feel pressured to refer
17 sexual assault cases, even based on weak evidence
18 to trial.

19 CHAIR HOLTZMAN: They simply support
20 that, don't you think?

21 VADM TRACEY: But that's all they
22 support. Of this list of seven, that's the only

1 issue that these support.

2 CHAIR HOLTZMAN: Right --

3 VADM TRACEY: If we're going to keep
4 whatever we're going to keep about these two
5 cases.

6 CHAIR HOLTZMAN: Right.

7 VADM TRACEY: Do those discussions
8 belong here, or do they belong in the
9 extrapolation of our comments on issue number
10 seven -- or issue number four?

11 CHAIR HOLTZMAN: Good point. Where is
12 issue number four dealt with?

13 MR. STONE: Fifty-six, recommendation
14 56.

15 MS. SAUNDERS: It's dealt with, this
16 whole issue is dealt with obviously more at
17 length in the Subcommittee report, which should -
18 -

19 MR. STONE: But that's not before us.

20 VADM TRACEY: The discussion of it is
21 in recommendation number 56.

22 CHAIR HOLTZMAN: Where is that in our

1 --

2 MR. STONE: Page nine.

3 CHAIR HOLTZMAN: You need to put that
4 in a bullet over there.

5 MS. SAUNDERS: So we could put that?

6 VADM TRACEY: Whatever the content is
7 that we decide we want to --

8 PROF. TAYLOR: Shrink it to a bullet
9 then put it there.

10 VADM TRACEY: Put it there.

11 PROF. TAYLOR: That makes sense to me.

12 CHAIR HOLTZMAN: Anybody object to
13 what --

14 (Simultaneous speaking.)

15 CHAIR HOLTZMAN: -- taking it from
16 where it is now and putting it into a bullet
17 under recommendation 56.

18 JUDGE JONES: No.

19 CHAIR HOLTZMAN: Any objection to
20 that?

21 PROF. TAYLOR: No.

22 CHAIR HOLTZMAN: Okay, so we can now

1 address the substance. Do we want to ask the
2 staff during our lunch break? Of course, they
3 don't get to eat lunch. Sorry about that. To
4 cut this substantially. I'm just trying to
5 understand.

6 MS. SAUNDERS: We can work something
7 out on that and present it to you this afternoon.

8 VADM TRACEY: I think it may be
9 possible to accommodate some of Mr. Stone's
10 concerns that he, to acknowledge that in fact
11 management of these, both of these cases,
12 suggests that the system does in fact lean very
13 heavily towards assuring, guarding against undue
14 command influence and what have you.

15 But the issue that we're trying to
16 address is the things that contribute to the
17 Members' perception, Servicemembers' perception,
18 that despite that there is this undue command
19 influence. You have to get all the way to CAAF
20 to get it resolved. The damage has already been
21 done, all right.

22 CHAIR HOLTZMAN: So let's see if you

1 could try and handle that, so. Now we're back to
2 --

3 PROF. TAYLOR: Page seven.

4 CHAIR HOLTZMAN: Page five.

5 MS. SAUNDERS: That was just a comment
6 from the staff, that as of the last meeting, only
7 eight of the nine had been narrowed.

8 CHAIR HOLTZMAN: Okay, so we're up to
9 page seven.

10 PROF. TAYLOR: Yes, page seven, the
11 first bullet. As written, this talks about the
12 new Article 32 preliminary hearing is not a
13 meaningful process for evaluating the strength of
14 the case, or for any other purpose, which seemed
15 to me to go a bit far.

16 CHAIR HOLTZMAN: Right.

17 PROF. TAYLOR: Because you're still
18 making a probable cause determination.

19 CHAIR HOLTZMAN: Any objection? Any
20 objection to that suggested change by Mr. Taylor,
21 am I hearing you object?

22 VADM TRACEY: No.

1 CHAIR HOLTZMAN: Okay. That's
2 accepted, now we're up to page eight.

3 PROF. TAYLOR: On page eight, this was
4 simply to use a standard format in the way we are
5 describing how we are making these
6 recommendations. I think Admiral Tracey pointed
7 out the Secretary of Defense always has the
8 option to do whatever the Secretary wants to do.

9 So this just makes the standard to use
10 these phrases uniformly from here throughout the
11 remainder of the recommendations. That's all
12 that does, to establish a system format.

13 MS. SAUNDERS: And I'll just say the
14 only way I did, the only reason I did make that
15 one a little bit different, Mr. Taylor, was just
16 it seemed to be suggesting that the Secretary of
17 Defense conduct installation site visits. So I
18 thought maybe that would be awkward. But if you
19 think that that's sufficient to go back to the
20 other way, that's.

21 PROF. TAYLOR: Well, the Secretary of
22 Defense is ordered in numerous statutes to do

1 many things which the Secretary never does.

2 MS. SAUNDERS: Right.

3 PROF. TAYLOR: He has other, or she
4 has others do them, so. It doesn't bother me,
5 but.

6 MS. SAUNDERS: Okay.

7 MR. STONE: I have a question about
8 that. I thought we had to put the word should in
9 where you have will crossed out, because the next
10 sentence says, They should also. And so I
11 thought the first was a should, and then they
12 should also.

13 MS. SAUNDERS: Mr. Stone, the way
14 we've been doing these recommendations throughout
15 the JPP is the should is understood at the
16 beginning. So like for example, if you look at
17 recommendation 55, the Secretary of Defense and
18 the DAC-IPAD review whether Article 34, and so --

19 CHAIR HOLTZMAN: And that was the
20 format in the RSP as well.

21 PROF. TAYLOR: Yeah, that was the
22 reason I didn't tinker with that language,

1 because I understood that, right.

2 MR. STONE: I guess unless we say
3 somewhere in the first one, I mean, how do they
4 know that it's a should and not a demand that
5 they will? I mean, I don't know. I wish it was
6 --

7 (Simultaneous speaking.)

8 CHAIR HOLTZMAN: -- standard format.
9 It's just a standard. It was done in the RSP
10 that way, all of the recommendations were --

11 MR. STONE: All right, as long as
12 we're saying for the record then. Say it for
13 record that you mean it to be a should. Okay.

14 PROF. TAYLOR: Well, I also struck the
15 word will there, because --

16 MR. STONE: Yeah, I saw, yeah, I saw
17 that. That's what made me wonder about whether
18 it should be should.

19 MS. SAUNDERS: Yeah, I apologize, I
20 don't know how that snuck in there.

21 MR. STONE: It didn't know if that
22 gets confusing or not.

1 CHAIR HOLTZMAN: Thank you for getting
2 that. All right, any objection to that one?

3 (Chorus of no.)

4 PROF. TAYLOR: So on page, I'm sorry,
5 is somebody --

6 CHAIR HOLTZMAN: No objections, so
7 that's agreed to.

8 PROF. TAYLOR: So page nine, again,
9 just wordsmithing a little. As well as a
10 recommendation of what should be taken, as
11 opposed to as well as a recommendation for action
12 by the convening authority.

13 MR. STONE: Wait, which one are you
14 proposing? Because I see red and blue. I don't
15 know which one is the one you're proposing.

16 PROF. TAYLOR: So mine is as well as
17 a recommendation for action by the convening
18 authority.

19 MR. STONE: Okay.

20 CHAIR HOLTZMAN: Any objection?

21 JUDGE JONES: No.

22 CHAIR HOLTZMAN: Agreed to. Now we're

1 off the page.

2 PROF. TAYLOR: So this was a question.
3 The word universally. Trial and defense counsel
4 on site visits universally perceived there to be
5 pressure. This is, this gets at, to me, a
6 factual question, and if the Subcommittee thought
7 that it was universal, that's fine. But I
8 thought that might be a little too broad.

9 MR. STONE: I'm fine with your
10 recommendation to take it out.

11 CHAIR HOLTZMAN: Is generally a
12 better, a fairer term?

13 PROF. TAYLOR: I would be fine with
14 generally. I just thought universally, unless we
15 knew that was true.

16 CHAIR HOLTZMAN: No, I agree with you
17 about that.

18 PROF. TAYLOR: I'm fine with
19 generally.

20 CHAIR HOLTZMAN: Someone could always
21 pop up and say --

22 MR. STONE: I'd rather have it deleted

1 all together. I don't like to characterize it.
2 They perceived it, then we get back to the how
3 many, and did they all perceive it.

4 There were certainly some comments in
5 the summaries that some didn't perceive it. I
6 just think that we don't need to characterize it
7 with an adverb, so I liked the original
8 recommendation to just strike it.

9 CHAIR HOLTZMAN: Okay, well any
10 discussion on Mr. Stone's proposal?

11 VADM TRACEY: I think we can live
12 without it, I think striking it would --

13 JUDGE JONES: I'm fine with it too.
14 It can just read --

15 CHAIR HOLTZMAN: Okay.

16 JUDGE JONES: Trial and defense
17 counsel.

18 VADM TRACEY: Same language here on,
19 as you recommended earlier, Mr. Taylor on page --

20 JUDGE JONES: I'm sorry, I can't hear
21 you.

22 VADM TRACEY: On page two, we edited

1 the similar phrasing as the rest of the sentence.
2 We edited it earlier to say authority is to refer
3 to sexual assault cases to trial, even based on
4 weak evidence.

5 PROF. TAYLOR: I think that would be
6 a good fix, be consistent. And it'd be
7 consistent with the Subcommittee report. That's
8 the words they used.

9 MR. STONE: Right, instead of
10 regardless of, right. Even based on.

11 PROF. TAYLOR: Right.

12 JUDGE JONES: Right.

13 PROF. TAYLOR: I would favor that.

14 CHAIR HOLTZMAN: Well, I thought we
15 agreed on that.

16 JUDGE JONES: I thought we'd done --

17 MR. STONE: It's the second place.

18 JUDGE JONES: Oh, it's the second
19 place.

20 PROF. TAYLOR: It's the same place.

21 MR. STONE: On page ten, the same
22 words --

1 JUDGE JONES: Oh, okay, I was back on
2 two.

3 MR. STONE: In the first bullet.

4 CHAIR HOLTZMAN: Where on page ten?

5 MR. STONE: First bullet.

6 MS. SAUNDERS: The one that begins
7 trial.

8 MR. STONE: End of first sentence.

9 CHAIR HOLTZMAN: Oh, I see it,
10 regardless of the strength of the evidence. I
11 got it.

12 PROF. TAYLOR: Right, change that to
13 even based on weak evidence.

14 JUDGE JONES: Okay, good.

15 CHAIR HOLTZMAN: Okay, so there's no
16 objection to those two changes.

17 (No audible response.)

18 CHAIR HOLTZMAN: Okay.

19 PROF. TAYLOR: And then in the first
20 bullet under recommendation 57, counsel on site
21 visits reported high acquittal rates, etc. The
22 low standard of probable cause for referral, I

1 would just want to use sole instead of low.

2 JUDGE JONES: Do you want to say --
3 oh, you want to say sole?

4 PROF. TAYLOR: Right.

5 JUDGE JONES: Or just the standard.

6 MR. STONE: Because in the Air Force,
7 we know they use more. So maybe just say the
8 standard again and get rid of the.

9 PROF. TAYLOR: I would be fine. I was
10 unhappy characterizing as a low standard.

11 JUDGE JONES: No, I agree, low should
12 go. I just couldn't figure out what the proposed
13 change was. Oh, to sole? I think I like just
14 standard.

15 PROF. TAYLOR: I would be fine with
16 that.

17 MR. STONE: Me too.

18 CHAIR HOLTZMAN: Any objection?

19 (No audible response.)

20 CHAIR HOLTZMAN: Okay, that change is
21 accepted. Mr. Taylor, we're up to 11.

22 PROF. TAYLOR: On page 11, this is

1 just a question of reordering the bullets so that
2 we have like things together. So one has to do
3 with training in general. I mean two bullets
4 have to do with training, two bullets have to do
5 with understanding of impairment, and they were
6 not organized together.

7 So this is just a question of moving
8 a bullet. No change in actual language.

9 CHAIR HOLTZMAN: Is there any
10 objection to that?

11 JUDGE JONES: No.

12 CHAIR HOLTZMAN: Without objection,
13 it's agreed to.

14 PROF. TAYLOR: Thank you.

15 CHAIR HOLTZMAN: And we're finished
16 now with Mr. Taylor's proposals. We're up to Mr.
17 Stone's proposals. Shall we take a five minute
18 break now?

19 MR. STONE: Sure.

20 (Whereupon, the above-entitled matter
21 went off the record at 10:19 a.m. and
22 resumed at 10:36 a.m.)

1 CHAIR HOLTZMAN: We're up to page one
2 in Mr. Stone's comment.

3 MR. STONE: Okay.

4 MS. SAUNDERS: That's at Tab 3.

5 CHAIR HOLTZMAN: That's at Tab 3.

6 MR. STONE: Right.

7 CHAIR HOLTZMAN: Do you want to
8 proceed?

9 MR. STONE: Sure. The first
10 paragraph, I would strike the last sentence
11 because of two separate things. The first is I
12 don't know the documentary film Invisible War, I
13 don't know who made it. I know the Panel never
14 screened it as a panel. So I don't want to talk
15 about what, or even imply that I know what it
16 covered, because it wasn't something we got to.

17 And we didn't have members certainly
18 of the U.S. Senate here. We had some House
19 members. And when they came to us, they, I don't
20 think they said anything about sexual assault
21 being rampant.

22 They had concerns about it, but I

1 don't think they used that language. I think
2 some of that language, again, may be from, goes
3 back to this thing about media reports. And I
4 don't want to suggest the House and Senate
5 officials, elected officials, are casual or
6 overstate what they think is the problem.

7 And then I am upset by the phrase,
8 Swept the problem under the rug.

9 I think that is an incorrect phrase
10 regarding failure to effectively prosecute and
11 failure to treat the victims with dignity and
12 compassion, both because as we see in the two
13 cases we just discussed, the military immediately
14 if there's a colorable claim, sends it back for a
15 hearing, has been doing so since at least 2014,
16 with precedent that goes back a dozen years.

17 And the language, Swept the problem
18 under the rug. If you go and look at, and it was
19 actually quoted in more detail, that same phrase
20 seems to be the phrase that came out of the
21 affidavit which was quoted back in the last
22 section that we got here, the last segment of

1 this booklet, on page three, where the
2 declaration from the retired rear admiral said,
3 Avoiding the perception that military leaders
4 were sweeping sexual assaults under the rug.

5 Well, you know, there's an old lawyer
6 joke that in a divorce case, the attorney cross-
7 examining the husband says, Do you beat your
8 wife? You beat your wife, didn't you, sir. And
9 the guy says, Of course not. And then in closing
10 argument, that same attorney gets up to the jury,
11 and he says to the jury, You heard him talk about
12 beating his wife.

13 And I mean, lawyers think that's kind
14 of funny. And somehow it gets turned on his
15 head, because he was talking about the topic, but
16 that wasn't what he was saying. And that's the
17 same thing with this phrase here. This phrase is
18 coming out of an affidavit where the person said,
19 Because we all wanted to avoid looking like we
20 were sweeping things under the rug.

21 So I mean, maybe in that sense --

22 CHAIR HOLTZMAN: Ok, Mr. Stone, let's

1 try that --

2 MR. STONE: But those are the reasons
3 I was wanting to simply strike it. I don't think
4 we need that whole last sentence. It doesn't add
5 anything important to what we got.

6 CHAIR HOLTZMAN: Okay. Any comment
7 about that? Hearing none, I just would like to
8 say that it may be that some of the language of
9 this last sentence is either too colloquial to
10 pass muster in such a formal setting, and that
11 there may be some legitimate concern about
12 eliminating documentary film -- reference to a
13 documentary film.

14 But I do think that the background of
15 this is whether we have courts dealing or saying
16 that the problem is being addressed but the fact
17 of the matter is that if you talk to people
18 anywhere in the country, no one thinks it is
19 being addressed. So there is a problem. There's
20 a serious perception problem.

21 And indeed the military itself
22 acknowledges that there not only was this

1 perception problem, but the problem, and Congress
2 as well, that the problem needs to be addressed.
3 Because they're constantly making additional
4 rules and additional changes. If everything
5 were, to use a colloquialism, hunky-dory, it
6 wouldn't happen. If we were in Nirvana, it
7 wouldn't happen.

8 So I think some reference, maybe it
9 could be more elegantly stated, to the
10 circumstances are, some reference is warranted.

11 MR. STONE: Don't we say that in the
12 -- at the end of the sentence before? In the
13 past several years, the problem has sparked a
14 huge public outcry.

15 CHAIR HOLTZMAN: Outcry about what?

16 MR. STONE: What it said in the
17 sentence before that, large-scale issues in the
18 military's handling of sexual assault cases.

19 CHAIR HOLTZMAN: Well, what about the
20 handling of the sexual assault cases?

21 MR. STONE: That's what we're going to
22 talk about in the rest of this report. That's

1 the first paragraph of the introduction.

2 CHAIR HOLTZMAN: Yeah, but I object to
3 that. I think it's too vague at the beginning,
4 and I think you have to explain what you're
5 talking about. So my view is that we need
6 something that explains what the concern was
7 about how the military handles it.

8 If you want to get it, if you want to
9 reduce it to media reports and the work of
10 members of Congress have fostered a public
11 perception that the military has failed to
12 effectively prosecute the accused and failed to
13 treat victims with dignity and compassion. I
14 have no problem with cutting that sentence to
15 that, to do that. But I --

16 MR. STONE: Okay, media reports and
17 what do you want to -- how do you want to, and
18 what, the work of the Congress, the?

19 CHAIR HOLTZMAN: The work of members
20 of Congress.

21 MR. STONE: And, okay. And the work
22 of members of Congress. And did you then jump to

1 have failed --

2 CHAIR HOLTZMAN: Have fostered a
3 public perception. I don't mind taking out
4 sexual assault is rampant.

5 MR. STONE: Okay. They fostered a
6 public perception --

7 CHAIR HOLTZMAN: That the military
8 failed effectively to prosecute the accused and
9 failed to treat the victims of sexual assault --

10 MR. STONE: Perception of failing to
11 effectively prosecute, because of -- that's fine
12 with me. That's okay.

13 CHAIR HOLTZMAN: Now, we might have to
14 say sexual assault. I don't know how that -- Ms.
15 Saunders, when we get finished, can you give us a
16 --

17 MR. STONE: Prosecute, instead of
18 accused you want to say sexual assault cases?

19 CHAIR HOLTZMAN: Yeah.

20 MR. STONE: Sexual assault allegations
21 or cases?

22 CHAIR HOLTZMAN: By failing in sexual

1 assault cases to effectively prosecute the
2 accused --

3 MR. STONE: Okay.

4 CHAIR HOLTZMAN: And to treat the
5 victims with dignity and compassion.

6 MR. STONE: Okay, I'm fine with that.

7 MS. SAUNDERS: And just a, this was
8 intended to be historical comment, not what is
9 happening now in the military, but several years
10 ago. Which then leads into the next paragraph,
11 to address these concerns, Congress, the
12 Department of Defense passed all of this
13 legislation.

14 JUDGE JONES: No, and I think it's a
15 necessary entree into the next paragraph.

16 CHAIR HOLTZMAN: Admiral.

17 VADM TRACEY: I would make two
18 recommendations. One, I think the first sentence
19 ought to stand alone, because this is not, this
20 report is talking about some issues that are not
21 then the subjects of the following paragraphs,
22 right.

1 Then you have the historical context,
2 and I recommend we begin with a paragraph that
3 begins, Within the past several years, media
4 reports and work of the members of the House and
5 Senate, or the Congress, have fostered a public
6 perception that the military has --

7 MR. STONE: Failed.

8 VADM TRACEY: Whatever, so has failed
9 to effectively prosecute, whatever that edit was.
10 Then pick up to address these concerns. I think
11 that, I think the second paragraph should be the
12 sentence I was just playing around with and
13 what's now the second paragraph. Those should be
14 combined.

15 MR. STONE: I accept all those
16 changes.

17 CHAIR HOLTZMAN: Any objection?

18 JUDGE JONES: No.

19 VADM TRACEY: Then you have the next
20 paragraph we edited in Mr. Taylor's review to
21 include both the increase in --

22 MR. STONE: Yeah, yeah.

1 VADM TRACEY: Reports and the decrease
2 in events.

3 MR. STONE: Right, we've already
4 changed that one.

5 CHAIR HOLTZMAN: Yeah, are you still
6 on 16, Mr. Stone, on your change?

7 MR. STONE: No, no, because I like the
8 change, because it talks about the increase and
9 the decrease. Okay.

10 CHAIR HOLTZMAN: Okay, now we're up to
11 paragraph one, two, three, four --

12 MR. STONE: Well, I wanted to put may
13 have in the next paragraph instead of, as
14 constructive and important these changes -- they
15 may have also produced unintended negative
16 consequences.

17 And then these changes may have,
18 because we're dealing with anecdotal, not
19 statistically significant evidence. And I think
20 we just have to be, I don't want to be criticized
21 for relying on those summaries which are not
22 identified and not statistically validated.

1 So I think we say the same thing as
2 long as we say may have. Because we go along,
3 and if we're going to make recommendations later,
4 it's just that we want to show what we've got
5 here.

6 CHAIR HOLTZMAN: Well, my reaction to
7 that is that it seems a little too weak. If it's
8 only may and so problematic, I would rather say
9 appear to have, because then we're not saying
10 they actually did, but we at least say there's
11 the appearance of that.

12 MR. STONE: Okay, I can take appeared.

13 CHAIR HOLTZMAN: Is there any
14 objection to that?

15 MR. STONE: In both places?

16 JUDGE JONES: No.

17 MR. STONE: These changes appear to
18 have?

19 CHAIR HOLTZMAN: Right.

20 MR. STONE: Okay. And I don't think
21 we need on the next line the word serious. They
22 raised questions about the fundamental fairness.

1 That's a serious question by definition. I think
2 that that word is superfluous in there.

3 CHAIR HOLTZMAN: Is there any
4 objection to striking serious?

5 VADM TRACEY: No.

6 JUDGE JONES: No.

7 CHAIR HOLTZMAN: Okay.

8 MR. STONE: And I'm in the next
9 paragraph. I never saw, I move to strike a
10 sentence that says, I'm fine with if the system's
11 to be seen as fair, we changed that a little bit.
12 Right, we just changed that to be as fair and
13 just and perceived as such. Okay.

14 Then we've got this next sentence
15 about undermining morale, affecting recruiting,
16 and creating a corrosive cynicism among military
17 personnel. We heard testimony about morale, but
18 I don't think we ever heard testimony recruiting,
19 we didn't have recruiting numbers, we didn't have
20 recruiting officials in here.

21 And I actually think it's exactly the
22 opposite when it comes to women. We may have an

1 easier time recruiting women now, if there's some
2 publicity for these changes. So, and I actually
3 thought that was one of the main purposes of what
4 Congress has been doing, to be able to recruit
5 more qualified women, and to get them to
6 reenlist. So.

7 VADM TRACEY: I think this was an
8 assertion of a principle that guided the Panel's
9 deliberations. And a military justice system
10 that is not perceived by all to be essentially
11 fair and just is corrosive, will affect morale.

12 That was one of the -- it's the
13 principle that guided my participation in this
14 panel. It's not a reflection of any testimony.
15 It was an underlying principle on which we heard,
16 we listened to testimony, and we processed that
17 testimony.

18 MR. STONE: Okay, taking what you just
19 said. After the word perception in the new
20 version we have, do we want to say among
21 everyone, or among all, or among -- in other
22 words, see, I took that to mean among the

1 military members. But you're saying it's really
2 in society. If you're going to recruit people,
3 they're people who are not in yet.

4 CHAIR HOLTZMAN: It's both.

5 MR. STONE: Well, okay, so how can we,
6 what words can we put in there to get at --

7 CHAIR HOLTZMAN: We don't need to. I
8 think it's clear in itself that we're talking
9 about, that you don't have to say in society and
10 in the military.

11 MR. STONE: I'd say among all.

12 CHAIR HOLTZMAN: Among all?

13 MR. STONE: Among all citizens.

14 CHAIR HOLTZMAN: Citizens, it could to
15 be aliens as well.

16 MR. STONE: Well, they don't get to
17 enlist.

18 CHAIR HOLTZMAN: Yes, they do.

19 JUDGE JONES: Yes, they do.

20 CHAIR HOLTZMAN: Yes, they do, if
21 they're documented.

22 MR. STONE: If they're documented,

1 permanent resident aliens. You want to say among
2 all permanent alien resident and citizens?

3 CHAIR HOLTZMAN: No. That's not
4 correct. Because even if it's widespread among
5 other people too, it will affect everybody. It's
6 like a public health issue.

7 MR. STONE: I'd like some kind of a
8 word in there.

9 CHAIR HOLTZMAN: All right, let's get
10 --

11 MR. STONE: I don't care about which
12 word, but I think just to broaden it. Because I
13 took it to mean among the military members,
14 because that's who we're sort of talking to. So
15 I would like, that's why originally I said among
16 everyone, but. Among all persons?

17 VADM TRACEY: How about, the failure
18 to maintain both the reality and the widely held
19 perception of a just system.

20 MR. STONE: That's the -- I don't
21 know, that doesn't quite get where I was going.
22 All right, it still could be among the military.

1 I would just like it to say among all persons, I
2 guess.

3 CHAIR HOLTZMAN: In the world, in
4 what?

5 MR. STONE: Among all persons, that's
6 everybody.

7 CHAIR HOLTZMAN: In the world.

8 MR. STONE: Well, I don't need in the
9 world. Among all persons.

10 CHAIR HOLTZMAN: We do. I mean, okay,
11 let's just vote on it. Mr. Stone wants to add
12 the word all after --

13 MR. STONE: Among all persons. After
14 perception. On Taylor's version, we're on
15 Taylor's version.

16 JUDGE JONES: You want to add among
17 military personnel and the public.

18 MR. STONE: That's okay.

19 JUDGE JONES: Well, I know it's okay
20 with you.

21 MR. STONE: Yeah. Among military
22 personnel and the public.

1 JUDGE JONES: Does that do it, or does
2 anybody, I don't know.

3 CHAIR HOLTZMAN: If that does with Mr.
4 Stone, it's okay with me. Anybody have an
5 objection to that?

6 VADM TRACEY: I have no objection.

7 PROF. TAYLOR: I'm okay with that.

8 CHAIR HOLTZMAN: All right, let's go.

9 MR. STONE: Great, okay.

10 CHAIR HOLTZMAN: The bottom of the
11 page.

12 MR. STONE: The bottom of the page, my
13 one, but it's, I don't know if it's one or two.
14 It said changes, how these changes were, and it
15 used to say being carried out. But to be
16 consistent with what is later we say in a million
17 places, it should be perceived. Because that's
18 what they were looking at, the perceptions.

19 JUDGE JONES: No, we were also looking
20 at, I think the Subcommittee was also looking at
21 what was actually happening with these changes.
22 So it wasn't just the perception, they were also

1 looking to see what was going on. In fact --

2 MR. STONE: Everything we talk about
3 later is a perception.

4 CHAIR HOLTZMAN: Well, that may be the
5 problems that were identified. It may be that
6 what was actually going on was okay. So I don't,
7 I think that the --

8 JUDGE JONES: We were looking at the
9 reality of what was being carried on.

10 MR. STONE: But we didn't collect any
11 numbers on the reality of what was going on. We
12 interviewed people for their subjective opinions,
13 for their perceptions. And we didn't even do
14 that, the Subcommittee did that.

15 JUDGE JONES: There's lots of ways to
16 figure out --

17 MR. STONE: And none of those people
18 came here to tell us.

19 JUDGE JONES: How things were carried
20 out. That's all I'm saying, is that.

21 CHAIR HOLTZMAN: So why don't we do it
22 as being carried out and perceived, how about

1 that?

2 VADM TRACEY: I'm okay with that.

3 JUDGE JONES: Okay.

4 CHAIR HOLTZMAN: Are you okay with
5 that, Mr. Stone?

6 MR. STONE: Okay. Okay, on the next
7 page.

8 CHAIR HOLTZMAN: Page two.

9 MR. STONE: At the top, where we're
10 describing the 280 individuals, my initial
11 concern was it said representing 25 military
12 installations. And I realized they did not get
13 called to represent, they were not official
14 representatives from the 25 military
15 installations. They were just individuals from
16 25 military installations.

17 And then I realized that we really
18 needed a little more description of who they were
19 and their affiliations, etc. So I wrote, During
20 13 days of closed-door hearings, they heard from
21 panels of similarly employed individuals who
22 chose to come forward, including more than 280

1 individuals from 25 military installations.

2 Blah, blah, blah, blah.

3 And then I wrote, A few commanders,
4 because if you look at those summaries, I think
5 they only heard from seven commanders out of the
6 280 people. The vast majority of the commanders
7 gave a welcoming speech, and there's only site
8 report where they had commanders in a panel. And
9 I think it was six, and then later they heard
10 from a seventh.

11 And then I thought we needed to be
12 clear at the end and say, but no victims. This
13 is just simply because I want us to be completely
14 accurate about what happened. And we don't have
15 that description anywhere else that I can see.

16 JUDGE JONES: Okay, well, first, I
17 don't know that anybody chose to come forward. I
18 mean, maybe I didn't, I didn't organize who we
19 saw. But I was under the impression that they
20 were probably ordered, or given that assignment
21 to come and talk to us. But I'm not sure. Maybe
22 the staff can help.

1 MS. SAUNDERS: Well, what the staff
2 had done is for each base that was, for which
3 there was going to be a site visit, they asked
4 the Services to identify a representative who we
5 could communicate with who would set everything
6 up.

7 So, how those people, we told them who
8 we wanted to talk to and who the Subcommittee
9 wanted to speak with. And then they actually
10 organized it and told us who they were going to
11 send.

12 MR. STONE: So we don't know if the
13 representative came, or if they just posted a
14 note and said anybody on the base who'd like to
15 talk with blah, blah, blah, just put your name on
16 a list.

17 MS. SAUNDERS: Well, for example, we
18 said for example, we want a panel of prosecutors,
19 we want a panel of defense counsel, special
20 victim counsel, etc. And then in most, if not
21 all, of the places the Subcommittee went to,
22 there were other military installations

1 surrounding the installation where the meetings
2 would take place.

3 So then we asked would you also
4 coordinate with these other installations so
5 that, for example, if we're at an Army base, a
6 nearby Air Force base could also send a
7 prosecutor or a defense counsel. And they
8 organized all that internally.

9 MR. STONE: So we don't have any idea
10 how they got selected.

11 VADM TRACEY: They weren't there to
12 speak on behalf of the installation.

13 MS. SAUNDERS: No, in fact most of
14 them, many of them made it clear they were
15 speaking personally.

16 JUDGE JONES: For themselves, right.

17 CHAIR HOLTZMAN: So representing is
18 not a good word. I think that Mr. Stone's
19 correct.

20 JUDGE JONES: I like from, yeah.
21 Okay.

22 MR. STONE: And maybe we should in the

1 line before that I had just say, During 13 days
2 of closed-door hearings, they heard from panels
3 of similarly employed individuals who came
4 forward. And just leave that open. Yeah,
5 similarly employed individuals including more
6 than.

7 VADM TRACEY: How about they heard
8 from more than 280 individuals from 25 military
9 installations?

10 JUDGE JONES: Period.

11 CHAIR HOLTZMAN: Do we, yeah, so in
12 other words --

13 JUDGE JONES: Who came forward doesn't
14 add a thing to that.

15 MR. STONE: But the fact that each
16 panel was similarly employed individuals does.

17 CHAIR HOLTZMAN: What do you mean
18 similarly employed? I don't --

19 MR. STONE: We heard panels of people
20 with a vested interest.

21 CHAIR HOLTZMAN: With a who?

22 MR. STONE: They each had a vested

1 interest, whether there was a panel of
2 prosecutors, whether it was a panel of defense
3 counsel --

4 VADM TRACEY: You mean a shared
5 perspective.

6 MR. STONE: Whether it was a panel of
7 victim service people.

8 CHAIR HOLTZMAN: You don't mean a
9 vested interest.

10 VADM TRACEY: You mean a shared
11 perspective.

12 MR. STONE: Okay, a shared
13 perspective.

14 CHAIR HOLTZMAN: Well, that's not
15 necessarily true, because some of the defense
16 counsel could have been trial counsel, and some
17 of the trial counsel could have been defense
18 counsel. And some of the special victims'
19 counsel could have been both, so I --

20 MR. STONE: In the past.

21 CHAIR HOLTZMAN: In the past, right.
22 So this, I --

1 JUDGE JONES: I don't know what this
2 adds. What are you trying to say?

3 MR. STONE: I want them to know that
4 these were not panels the way we had panels,
5 where we had a prosecutor, a defense counsel, a
6 victim service representative, and an
7 investigator at the same time.

8 CHAIR HOLTZMAN: Oh, well, so they
9 were an hour apart?

10 MR. STONE: These are, these were --

11 CHAIR HOLTZMAN: I mean, what is the
12 point here, Mr. Stone?

13 MR. STONE: These were interested
14 panels.

15 CHAIR HOLTZMAN: No, no, no. What's
16 the point here, Mr. Stone, that they weren't
17 varied panels at the same time but we heard them
18 one an hour later than the other? I mean, what
19 is the difference?

20 MR. STONE: Yes, it means number one
21 that they didn't necessarily get the same
22 questions and topics thrown at them. They may

1 have been worded differently.

2 And it also means that it allows
3 someone who hears something that was not high on
4 his agenda to talk about, hears someone else and
5 says, Oh, yes, I second that too. Even though it
6 might have been 14th on his agenda.

7 It makes a difference when you have a
8 panel that each one has a single set of
9 participants with a similar focus. And I don't
10 know how to, you want to put it in there. But I
11 put it in similarly employed, because they were
12 in fact, if you look at the list of all of those
13 summaries, and I did, the panels were of
14 similarly employed people.

15 CHAIR HOLTZMAN: It's a meaningless
16 phrase to me.

17 MR. STONE: Not to me.

18 CHAIR HOLTZMAN: And I don't think any
19 public, any person reading it will understand
20 what you're talking about, and so I object to it.
21 And I don't think we need that whole first
22 sentence, during 13 days of closed-door hearings.

1 I mean, I think --

2 (Simultaneous speaking.)

3 MR. STONE: Okay, and the other reason
4 that --

5 CHAIR HOLTZMAN: And the balance, I
6 think it's as Admiral Tracey said, it's just
7 enough to say, what was it, we met with 200.

8 MR. STONE: Okay.

9 CHAIR HOLTZMAN: So take out your --

10 MR. STONE: No, no, no.

11 CHAIR HOLTZMAN: I don't agree with
12 the --

13 MR. STONE: Fine, let me respond to
14 that. We did not hear from or conduct 280
15 interviews. Instead, we have transcripts of 13
16 days of panel hearings. There is virtually not
17 one individual interview. And when you read
18 this, spoke to more than 280 individuals,
19 somewhere we need to clarify that we didn't speak
20 to them individually, we spoke to them in a
21 panel.

22 And that right there changes the

1 nature of what they may have, off the record,
2 felt comfortable saying. They may, in the
3 presence of the prosecutor with other prosecutors
4 there, may not have felt comfortable and quite as
5 candid as he would if you interviewed him alone.

6 So when we say 280 individuals, it
7 sounds like it was 280 interviews. They were
8 not.

9 CHAIR HOLTZMAN: You know, Mr. Stone,
10 I think what you're doing here is trying to
11 attack the credibility of the work of the
12 Subcommittee. And I really think it's
13 unnecessary at this point. I don't think anybody
14 said when they spoke to more than 280, you can
15 just mean individuals. Members of the military
16 may be individuals implies individually.

17 But I don't think there was any effort
18 to change anything. And if you want to take the
19 Heisenberg Principle, just the mere fact of
20 talking changes peoples' minds. So are we
21 getting the truth, truth, truth? What is the
22 truth?

1 So I think this is like angels dancing
2 on the head of a pin -- how many of them are
3 there? I just really think that it's not
4 necessary to suggest that there's some real
5 credibility issue with the work of the
6 Subcommittee, which is what these changes, or
7 this change at least, suggests to me, so I.

8 MR. STONE: Okay, it wasn't intended
9 that way. It was intended simply to detail what
10 we actually heard in our public meetings when the
11 Panel members, the Subcommittee members got up
12 here and said, we had panels, we brought in blah,
13 blah, blah, blah, blah, blah, blah.

14 They spoke about panels, they did not
15 speak about individual interviews. And I just
16 want to report accurately, since this is our
17 report, what went on. It doesn't say the
18 slightest thing criticizing what they heard. It
19 just details how they proceeded.

20 CHAIR HOLTZMAN: What did the
21 Subcommittee, how did the Subcommittee report
22 describe what it did?

1 MS. SAUNDERS: I think that this was
2 taken, if not exactly word for word from the
3 Subcommittee report, at least very similarly. So
4 they said, At the request of the JPP, they spoke
5 to more than 280 individuals, all involved in the
6 military justice process, from 25 military
7 installations in the United States and Asia about
8 the investigation prosecution, and defense of
9 sexual assault offenses.

10 MR. STONE: But orally in the
11 transcript, they said they were panels.

12 JUDGE JONES: Well, look, why don't we
13 just add including panels of, and then it's made
14 clear, or clearer.

15 CHAIR HOLTZMAN: Panels of what,
16 Barbara?

17 JUDGE JONES: Prosecutors, defense
18 counsel, special victims' counsel.

19 VADM TRACEY: What's the rest of that
20 sentence?

21 CHAIR HOLTZMAN: And you're leaving
22 off victims.

1 VADM TRACEY: Well, I'm not finished.
2 I don't think we need a few commanders. I think
3 commanders is enough.

4 And I don't know why we have to say,
5 but no victims. I think that's unnecessary.
6 We're talking about who we did interview, not who
7 we didn't. So I would remove both of those. But
8 I would add panels, if that helps to clarify.

9 PROF. TAYLOR: It seems to me that
10 since the Subcommittee has already described in
11 the sentence, I'm looking at it right now, what
12 they did, if we just simply add the word panels,
13 members of the JPP Subcommittee, at the request
14 of the JPP, spoke to panels including or
15 consisting of more than 280 individuals.

16 JUDGE JONES: Right.

17 PROF. TAYLOR: All involved in the
18 military justice process, from 25 installations
19 in the United States and Asia about the
20 investigation, prosecution, and defense of sexual
21 assault offenses. That's what they said they
22 did. I don't know why we wouldn't just use those

1 words.

2 CHAIR HOLTZMAN: Well, of course if
3 you say in panels, it doesn't even indicate that
4 these were panels consisting solely of
5 prosecutors or whatever. So you're not resolving
6 the problem that Mr. Stone raised. I just point
7 that out.

8 So I'm opposed to adding the word
9 panels, but if everyone's in favor of it, let's
10 vote on it. Shall we add the word panels to,
11 where are we putting it? They spoke to more than
12 --

13 MR. STONE: To panels.

14 CHAIR HOLTZMAN: To panels of more
15 than 280 individuals. All those in favor of
16 adding the word panels say aye.

17 (Chorus of aye.)

18 CHAIR HOLTZMAN: Those opposed.

19 No.

20 Panels is added.

21 MR. STONE: Now I'd like it to do,
22 take a vote on whether they spoke to panels of

1 more than 280 similarly employed individuals,
2 instead of individuals.

3 CHAIR HOLTZMAN: Okay, those in favor
4 of saying similarly employed, say aye.

5 MR. STONE: Aye.

6 CHAIR HOLTZMAN: Those opposed.

7 (Chorus of no.)

8 CHAIR HOLTZMAN: The no's have it.

9 MR. STONE: Okay, next change is the
10 word representing to from.

11 CHAIR HOLTZMAN: I think everybody
12 agreed to that already.

13 JUDGE JONES: Yes.

14 MR. STONE: Okay, the next change to
15 vote on is whether it should say a few
16 commanders, because six out of 280 it seems to me
17 requires a clarification.

18 JUDGE JONES: I don't know how you're
19 counting the six. Are you counting the six who
20 are the installation people who greeted us?

21 MR. STONE: No, I'm absolutely not --

22 JUDGE JONES: Because we had

1 commanders in our interviews.

2 MR. STONE: I know. I looked. If you
3 like, I can break it out. I have it with me. I
4 have all the summaries. I went through every
5 summary, and there was only one panel at one
6 location where commanders spoke not as a
7 greeting. Because there were paragraphs that
8 say, We were greeted and the introductory speech
9 --

10 JUDGE JONES: I'm aware of that.
11 That's not the question.

12 MR. STONE: Okay, there's only one
13 panel where the commanders are involved. I
14 counted six, and then one other individual to
15 make seven at a different place. That's the
16 total.

17 And I think that's not fair to
18 commanders. Commanders might feel they'd want a
19 little more input. They don't want to suggest
20 that, I mean, we make a lot of recommendation
21 thing, and comments later, some of which, you
22 know, dig deep into the weeds.

1 And I don't think the commanders, as
2 a group, were represented when you talk to six.
3 And victims weren't represented either, and
4 that's why those two changes are there.

5 CHAIR HOLTZMAN: Okay, so let's take
6 them one by one. Those in favor of adding the
7 words a few in front of commander say aye.

8 MR. STONE: Aye.

9 CHAIR HOLTZMAN: Those opposed.

10 (Chorus of no.)

11 CHAIR HOLTZMAN: No's have it. And
12 then we're up to, what, no victims. Those in
13 favor of adding comma but no victims, say aye.

14 MR. STONE: Aye.

15 CHAIR HOLTZMAN: Those opposed.

16 (Chorus of no.)

17 CHAIR HOLTZMAN: The no's have it.

18 The next one is, I guess, these individuals.

19 MR. STONE: I don't know.

20 VADM TRACEY: No, it's just a comment.

21 CHAIR HOLTZMAN: Oh, okay. All right,
22 fine. What's your next proposal, Mr. Stone?

1 VADM TRACEY: Adding the word both.

2 MR. STONE: Yeah, I thought there was
3 something there that needed the word both in it.
4 I'm not sure it still does. You happen to have
5 both reports -- oh, because it's talking about
6 the two reports.

7 JUDGE JONES: I think it actually says
8 both, right.

9 MR. STONE: In the sentence above.

10 MS. SAUNDERS: Right.

11 MR. STONE: Recent experience, and
12 it's second report.

13 MS. SAUNDERS: Right.

14 MR. STONE: So JPP adopted both
15 reports. Isn't that right?

16 MS. SAUNDERS: I think both was in
17 there already.

18 MR. STONE: Okay.

19 MS. SAUNDERS: I think that both was
20 highlighted because there was a comment that was
21 going to be made. But I don't think we have, I
22 don't think there is anything actually in the

1 comment log.

2 MR. STONE: Okay, forget it, forget
3 it.

4 CHAIR HOLTZMAN: Then we're up to
5 paragraph --

6 MR. STONE: Three. Okay. The last
7 sentence before the work reported the
8 Subcommittee, I thought it was made clear by
9 Maria that we don't adopt the Subcommittee report
10 and recommendations, that we attach it. And
11 therefore, I made the changes that she said last
12 time so it would simply say, The Subcommittee's
13 report and recommendations.

14 And I guess it would be are attached
15 as Appendix A, instead of is attached. That's
16 based on what Maria told us last time, that we're
17 not, as a JPP, we don't adopt.

18 MS. SAUNDERS: But I think in the
19 previous Subcommittee reports, I think she did
20 say that they were adopted. That they are
21 adopting the recommendations, is that what you
22 recall from the --

1 MS. PETERS: Yes.

2 MS. SAUNDERS: The other report, okay.
3 And that is what we have in the other
4 Subcommittee reports, that they adopted them with
5 modifications for the recommendations.

6 MR. STONE: Of the Subcommittee
7 reports, or the JPPs?

8 MS. SAUNDERS: Right, but for the
9 other JPP reports that were based on the
10 Subcommittee reports, they said the language in
11 the JPP executive summaries or reports says that
12 they adopted the Subcommittee's recommendations
13 with modifications.

14 MR. STONE: We didn't -- okay, but
15 then not their report. So adopting their -- but
16 ours are very different. And we're not adopting
17 their report, we have our own report.

18 MS. SAUNDERS: In fact, in the
19 investigations report, it does say that the JPP
20 adopted the Subcommittee's report and
21 recommendations.

22 MR. STONE: Well, that's probably

1 inaccurate and should be changed too. We have to
2 talk about that, that one is later on our agenda
3 today.

4 CHAIR HOLTZMAN: Mr. Sprance, are you
5 familiar with this issue?

6 MR. SPRANCE: No, ma'am, I'm not. But
7 it's, I mean, we're talking about it --

8 CAPT TIDESWELL: Ma'am, I believe the
9 Panel has three options. They can adopt the
10 Subcommittee recommendation as is in its
11 entirety, if that's what you all deliberate on.
12 They can modify it, or they can outright reject
13 it.

14 MR. SPRANCE: Reject it.

15 CHAIR HOLTZMAN: Well, didn't we
16 accept the recommendations from the Subcommittee?

17 CAPT TIDESWELL: In some instances,
18 yes.

19 CHAIR HOLTZMAN: And the
20 modifications.

21 CAPT TIDESWELL: You adopted it with
22 modifications.

1 CHAIR HOLTZMAN: As a result of this
2 deliberation, the JPP adopted the Subcommittee's
3 report and recommendations with modifications.
4 Is that a true statement?

5 MR. SPRANCE: Yes, I believe so.

6 CHAIR HOLTZMAN: And are we allowed to
7 make that statement?

8 MR. SPRANCE: I believe so.

9 MR. STONE: I believe so, yes.

10 CHAIR HOLTZMAN: Legal, okay.

11 CAPT TIDESWELL: As long as you
12 deliberate on it.

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: I think if you go back to
15 what Maria said at the last meeting, which is in
16 the transcript, she said no, we make our own
17 report. And that's why we have to have an
18 executive summary and a report, however short.

19 VADM TRACEY: I believe she said we
20 could not modify the report.

21 CAPT TIDESWELL: Right.

22 JUDGE JONES: Correct.

1 MR. STONE: I thought she said we
2 couldn't adopt it either.

3 VADM TRACEY: You cannot modify the
4 Subcommittee's report.

5 PROF. TAYLOR: That's what I would
6 have thought as well.

7 MS. SAUNDERS: We can certainly pull
8 the transcript and see exactly what she said.
9 But I think the way we wrote it up in the
10 investigations report is that the Subcommittee's
11 underlying report, you could adopt the body of
12 the report and forward it as your own, and it
13 would be attached to the executive summary. And
14 then you adopt, with modifications, the
15 recommendations and forward them as your own.

16 CHAIR HOLTZMAN: Well, I propose, let
17 me make this proposal, that Mr. Stone, I assume
18 you would agree with this. That if the Admiral's
19 viewpoint is correct and the staff's viewpoint is
20 correct, that we can, that this statement is
21 accurate, do you have any problem with it?

22 MR. STONE: Yes.

1 CHAIR HOLTZMAN: Even if it legally
2 can be done.

3 MR. STONE: Yes.

4 CHAIR HOLTZMAN: Now what is your
5 problem?

6 MR. STONE: My problem is with the
7 word report. I have no problem saying as a
8 result of this deliberation, the JPP adopted,
9 assuming this is legal, the Subcommittee's
10 recommendations with modifications.

11 I was not there for most of their
12 report, I had no hand in writing it, I wasn't
13 allowed to edit it, and therefore I'm not going
14 to adopt it.

15 CHAIR HOLTZMAN: You're not allowed,
16 none of us is allowed to edit it.

17 MR. STONE: Agreed, agreed. So
18 therefore, I don't believe. But the
19 recommendations are different. We did modify
20 them, and so I have no problem with that.

21 CHAIR HOLTZMAN: No, we issued our own
22 recommendations, which were the recommendations

1 as modified.

2 MR. STONE: Correct.

3 CHAIR HOLTZMAN: We modified their
4 recommendations.

5 MR. STONE: Yes. And I take this
6 summary here to be our report.

7 CHAIR HOLTZMAN: All right, well --

8 MR. STONE: Not that we, it says in
9 the last couple words that the Subcommittee's
10 report constitutes the substance of the JPP's
11 report. No, that's not what we did. We wrote
12 our own report and --

13 CHAIR HOLTZMAN: Let's wait to get a
14 clarification of this point, and we'll postpone
15 this --

16 MR. STONE: Okay.

17 CHAIR HOLTZMAN: Further discussion of
18 this till we get that. Is that appropriate, or
19 did people want to vote on this?

20 JUDGE JONES: No, I would only say
21 that whether we adopt them or not, I'd like to
22 see them part of our, you know.

1 MR. STONE: Right. And I left --

2 JUDGE JONES: Adopted for the purpose
3 of going, you know, being attached.

4 MR. STONE: And I absolutely let that
5 --

6 CHAIR HOLTZMAN: Let's see if we can
7 further clarification --

8 MR. STONE: That's not an issue.

9 CHAIR HOLTZMAN: And postpone this
10 issue. Okay, we're up to three on page two, near
11 the bottom.

12 MR. STONE: Right. I changed the
13 language in point three, both here and it shows
14 up I think somewhere else too, where it says,
15 Staff judge advocate may be unwilling to provide.
16 I think that is unnecessarily speculative and
17 unnecessarily disparaging.

18 I think they're just, what we're
19 saying is they will have less incentive to
20 provide the complete and candid written
21 assessment. I think most of them are still going
22 to do it, so I wouldn't want to say they're

1 unwilling. I think they follow what they're
2 supposed to do.

3 But I think they'll have less
4 incentive maybe to be complete. And that doesn't
5 attack them, it talks about we're looking at
6 incentives and process. The other is attacking
7 them, as people.

8 CHAIR HOLTZMAN: Is there any comment
9 on this?

10 VADM TRACEY: I would read that
11 exactly the reverse. I liked the language as it
12 was originally.

13 CHAIR HOLTZMAN: Any other comment?

14 JUDGE JONES: I prefer the language as
15 it is.

16 CHAIR HOLTZMAN: All right. Those in
17 favor of Mr. Stone's proposal on item three say
18 aye.

19 MR. STONE: Aye.

20 CHAIR HOLTZMAN: Those opposed say no.

21 (Chorus of no.)

22 CHAIR HOLTZMAN: No's have it, it's

1 not accepted. Item four.

2 MR. STONE: Item four, let's see, did
3 we just change that in the other one? I think we
4 might have. Yeah, we did. It's now been
5 changed, it no longer reads this way.

6 CHAIR HOLTZMAN: Yeah, the weakness,
7 right.

8 MS. SAUNDERS: Even based on weak
9 evidence is, the ending.

10 MR. STONE: Yeah, so the changes that
11 I have near the end of the sentence have been
12 adopted. So the question is whether or not we
13 need to put some counsel, the word some in front
14 of counsel.

15 CHAIR HOLTZMAN: Any discussion of
16 that?

17 MR. STONE: And I think that's because
18 the wide variety of the summaries that we got
19 about the interviews said that that almost
20 exclusively came from defense counsel. So I
21 didn't say just defense counsel or most defense
22 counsel, or whatever. I just said some counsel,

1 so that they knew that it's not a universal view.
2 Because some disagree.

3 VADM TRACEY: I don't have any
4 objection to that.

5 CHAIR HOLTZMAN: Well, I'm not sure
6 that that's accurate. Because I don't think it
7 was only -- I mean, it's true I was only at four
8 installations. But I do not believe that that
9 statement that you just made, that this is
10 primarily defense counsel.

11 VADM TRACEY: But that's not what the
12 edit does. It just changes it to some counsel,
13 it doesn't make it defense counsel only. Just
14 some counsel.

15 CHAIR HOLTZMAN: Right, but what
16 concerns me is that what's propelling me -- Mr.
17 Stone's suggestion is that then people reading
18 this could say, well, that's probably just
19 defense counsel, I don't know.

20 VADM TRACEY: I think the Subcommittee
21 members heard that from trial counsel and others
22 as well, that it was this perception.

1 CHAIR HOLTZMAN: Well, can we say
2 something? I would feel more comfortable if we
3 said some trial counsel and defense counsel. So
4 to make it clear that it's not just defense
5 counsel that's complaining.

6 VADM TRACEY: I'm good with that.

7 CHAIR HOLTZMAN: Any --

8 JUDGE JONES: I think we should make
9 that clear.

10 MR. STONE: If you want to say some
11 trial and defense counsel, that's okay. Because
12 I know it's some. It actually harks back to the
13 comment we all agreed on before about dropping
14 the word universal. That comes from the same
15 place.

16 CHAIR HOLTZMAN: Well, I think the
17 number's more than some. But anyhow, I'll go
18 along with that. Okay, any objection to the
19 changes proposed in number four, as amended?

20 JUDGE JONES: No.

21 CHAIR HOLTZMAN: Hearing no objection
22 to that, it's accepted. Item five.

1 MR. STONE: Okay, in item five, I
2 reviewed the testimony that we had here and I
3 reviewed the summary. And I think what the trial
4 counsel were complaining about, and I wasn't sure
5 this was the right word, was lack, was sometimes
6 lacked the type of access.

7 They were saying they were getting
8 telephone access, or conference call, or even
9 Skype access. But they wanted in-person access.
10 That's why they wanted people not moved, that's
11 why they wanted more travel dollars for those
12 people, that's why they wanted to slow down the
13 transfers.

14 They wanted to see these people face
15 by face, they felt it would be different. So I
16 was trying to convey that. And also on the next
17 line, in order to best prepare the victims for
18 trial.

19 They weren't saying they couldn't
20 prepare them, but they were saying they weren't
21 able to prepare them in the way they would like.
22 So I didn't want words that made it sound like

1 these were absolutes. I was just --

2 JUDGE JONES: Well --

3 MR. STONE: The feeling is there, but
4 I was looking to --

5 JUDGE JONES: In terms of the type of
6 though, you're right. They certainly made those
7 comments that you just ran through.

8 But they also complained they weren't
9 being able to do interviews when they wanted to,
10 or as many as they wanted to, forgetting about
11 whether it was in-person or by phone or any other
12 way. So I think it should just remain access.

13 PROF. TAYLOR: Well, it seems to me
14 when I read that that when you add the qualifier
15 that they believe is necessary, it certainly
16 implies what you said, Mr. Stone. That they
17 believe is necessary, that is, more personal
18 access and less phone access, perhaps.

19 CHAIR HOLTZMAN: Yeah, I don't think
20 you need, I don't think the type of really adds
21 anything. I think Mr. Taylor made a good point
22 here. I mean.

1 MR. STONE: I guess based on these
2 last three comments, I have no problem saying
3 trial counsel sometimes lack the frequency and
4 type of access that they believe is necessary.
5 I'd like to convey more here than it conveys at
6 the moment.

7 I just think it sounds like they're
8 being shut out. They're not being shut out, but
9 I understand it's not what they want.

10 CHAIR HOLTZMAN: You want to say
11 something about the breadth of access, is that a
12 better word?

13 MR. STONE: The what of access?

14 CHAIR HOLTZMAN: Breadth?

15 MR. STONE: The breadth, that's fine
16 too. I said I'm not wedded to particular words,
17 I just want to make it clear it's not complete
18 access that they're not getting. I'm fine with
19 the breadth of access.

20 VADM TRACEY: Sufficient access.

21 CHAIR HOLTZMAN: Oh, sufficient, okay.

22 MR. STONE: The breadth or what?

1 CHAIR HOLTZMAN: Sufficient rather
2 than the breadth.

3 MR. STONE: Okay, okay.

4 CHAIR HOLTZMAN: I think I'll go with
5 sufficient.

6 JUDGE JONES: Yeah, me too.

7 MR. STONE: Okay, sufficient, that's
8 fine.

9 CHAIR HOLTZMAN: Could we revisit the
10 point four. I'm sorry, I'm just troubled by the
11 word some, because I think if you look at, some
12 suggests a few. I don't think that that
13 accurately conveys, to use the word I just used
14 before, the breadth or the generality.

15 I agree with you, Mr. Stone, when you
16 picked out the word universal that that was, or
17 maybe it was Mr. Taylor, that that was a bad
18 choice of words. I mean, it wasn't universal, it
19 wasn't every single person.

20 But it was more than just, you know,
21 one person on this panel, one person on that
22 panel, one person in this installation, one

1 person in that installation. It was a very
2 widespread point of view. So I think some
3 minimizes that and is an unfair characterization.

4 I don't know how we can, you know, I'm
5 not feeling alert enough at this moment to give
6 another word for that, but.

7 MS. SAUNDERS: I know that the
8 Subcommittee members, in discussing this issue,
9 conveyed their surprise at the number of people
10 that they heard this from.

11 CHAIR HOLTZMAN: Right.

12 MS. SAUNDERS: Both trial and defense
13 counsel.

14 VADM TRACEY: Many trial and defense
15 counsel?

16 MR. SPRANCE: Numerous.

17 VADM TRACEY: Many.

18 PROF. TAYLOR: Yeah, I guess I just
19 have to wonder if it's just trial and defense
20 counsel, because my guess is that SJAs are
21 feeling the same pressure. Because it's not, so
22 it's not just a question of trial and defense

1 counsel, which I think even widens the aperture.

2 JUDGE JONES: Right.

3 PROF. TAYLOR: Of counsel who are
4 understanding this.

5 JUDGE JONES: So what's your
6 suggestion, Mr. Taylor?

7 MR. STONE: Many counsel? Just say
8 many counsel?

9 PROF. TAYLOR: Well, since I was okay
10 with the original version, we're talking about
11 something --

12 JUDGE JONES: You're not going to bid
13 against yourself.

14 PROF. TAYLOR: I was against
15 universal. I don't think we can say that, that
16 all. But I think we can say, I would be
17 comfortable saying most, based on what I've heard
18 from the Subcommittee members.

19 MR. STONE: Well, based on that
20 though, if we change, if we do put something in
21 other than some, then I think along with that, we
22 have to say perceive the convening authorities

1 may feel pressured. Because I read those
2 summaries very carefully, and I actually took
3 account of what was being said.

4 And a lot of the people there said I
5 don't know if they feel pressured, but I'm
6 worried that they feel pressured. Or I think
7 they may feel pressured. In other words, this
8 goes back to exactly what the large number were
9 concerned about, that that was an issue hanging
10 out there, but not that they felt it affected a
11 lot of people.

12 But it still troubled them, that they
13 might feel pressured. So if you want to put in
14 something other than some, then it should say
15 blank counsel perceived the convening authorities
16 may feel pressured.

17 VADM TRACEY: What if we just went
18 back to the original construct, counsel perceived
19 that convening authorities feel pressured?

20 PROF. TAYLOR: It seems to me, Mr.
21 Stone --

22 MR. STONE: I could leave it that way

1 if you want to leave it that way. Because when I
2 made this change, I didn't have Mr. Taylor's
3 correction that we've accepted in mind. If you
4 want to go back to what is originally said and
5 leave number four that way, I can live with that.

6 PROF. TAYLOR: Well, I think the idea
7 of perceive automatically says it's not
8 necessarily factually supportable. But it's
9 certainly their perception.

10 CHAIR HOLTZMAN: Okay, so anyway,
11 we're okay with four as it stands.

12 MR. STONE: With Mr. Taylor's
13 corrections.

14 CHAIR HOLTZMAN: Right, with Mr.
15 Taylor's original correction, right.

16 MR. STONE: All right.

17 CHAIR HOLTZMAN: Okay. And we've done
18 five, so we're up to six.

19 MR. STONE: Well, no, we didn't get to
20 do we accept lack of sufficient access?

21 CHAIR HOLTZMAN: Yeah, right, we
22 agreed to --

1 MR. STONE: Did we do that?

2 CHAIR HOLTZMAN: Is anybody opposed to
3 sufficient access?

4 (No audible response.)

5 CHAIR HOLTZMAN: No.

6 MR. STONE: And what about the word
7 best prepare?

8 CHAIR HOLTZMAN: Anybody opposed to
9 best prepare?

10 VADM TRACEY: It's a split infinitive.
11 Other than that --

12 CHAIR HOLTZMAN: Right, well, going
13 there is a lot of corrections to make.

14 PROF. TAYLOR: Got the grammar czar.

15 CHAIR HOLTZMAN: That's for sure.

16 Anybody have a problem with best, adding the word
17 best?

18 (No audible response.)

19 CHAIR HOLTZMAN: No problem, so
20 that's adopted. So number six.

21 MR. STONE: Okay, number six was about
22 training fatigue. I added the word some, because

1 we didn't collect numbers, and that was not as
2 universal among those interview summaries as some
3 of the other things we've spoken about. It
4 showed up in some panels, but most panels didn't
5 talk about training fatigue.

6 So I just thought that I didn't want
7 to throw out there that we thought all the
8 training stinks and everybody has training
9 fatigue. I think it's enough to say among some
10 military members.

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

13 JUDGE JONES: No.

14 CHAIR HOLTZMAN: No objection, that's
15 adopted. Then number seven.

16 MR. STONE: Okay. Increase is likely.
17 The prosecutors find it difficult to expedite a
18 transfer. This really goes back to number, what
19 we just said in number five. And I guess it used
20 to say to adequately consult prior to trial with
21 victims who have been transferred to faraway
22 locations.

1 And I wanted to change it to say
2 difficult to consult prior to trial in person
3 with victims. Because again, this goes to the
4 complaint was, yeah, they can get them on the
5 phone, yeah, they may even be able to Skype them.
6 But I'm not looking in their face and they're not
7 looking in my face.

8 And it's not the same kind of a
9 conversation where I can get an informal clue
10 because they're tapping their foot or, you know,
11 like crazy and I think that I want to pursue it.
12 I can't get that kind of feedback. So I thought
13 that was, they were talking about difficult to
14 consult prior to trial in person.

15 They didn't have funds to bring the
16 victims in, and they didn't have funds for the
17 prosecutors to go travel to talk to people they
18 already knew were going to be named as witnesses.
19 They don't get those kinds of funds.

20 CHAIR HOLTZMAN: I'm not sure though.
21 I mean, I take your point, Mr. Stone. But I'm
22 not sure that it was only the talking to them in

1 person that was the concern. That maybe that
2 they couldn't talk to them at all.

3 Once they were away, people just
4 didn't want to talk. You know, they said adios.
5 I'm here in San Diego and, ha ha, I'm not talking
6 to you about that. So I think that may have been
7 the problem. That was my impression, at least --

8 JUDGE JONES: That was --

9 CHAIR HOLTZMAN: At installations I
10 was at, that that was the concern. So I would, I
11 think that the original language captures that
12 more accurately.

13 MR. STONE: I guess my response to
14 that is this bullet is talking about the current
15 policy on expedited transfer, not generally the
16 difficulty of getting victims to cooperate. But
17 the expedited transfer policy and what that does,
18 which is moves them away so they can't be spoken
19 in person.

20 So if we're going to talk about
21 expedited transfer, I think we have to focus a
22 little more narrowly than their general problem,

1 which is that there are victims who don't want to
2 talk to them, whether they're local or moved
3 away.

4 MS. SAUNDERS: I think the
5 Subcommittee did hear information at some
6 installations that sometimes what they've
7 encountered is that when victims receive an
8 expedited transfer and go to another location,
9 they become less willing to cooperate with the
10 prosecution of the case.

11 CHAIR HOLTZMAN: I think that's
12 exactly the point that this refers to.

13 MR. STONE: Well, that's cooperate,
14 not difficult to consult. That's not difficult
15 to consult.

16 CHAIR HOLTZMAN: Okay, so then maybe
17 change it to difficult to obtain cooperation of
18 the victim prior to trial. Or just put victims
19 who've been transferred to faraway locations
20 prior to trial. If you want to consult, you need
21 cooperation.

22 MR. STONE: We got that entirely from

1 the Subcommittee. There wasn't a single person
2 from any of the military Services who spoke about
3 that. What the military Services people told us
4 when they came here was that the policy on
5 expedited transfer of sexual assault victims was
6 the most important change that's been made to the
7 system.

8 And I can't see criticizing that
9 policy without ever having had representatives of
10 the military Services, and especially of the
11 victims' counsel, victims' assistance personnel,
12 etc., here for us to see if in fact they thought
13 it resulted in cooperation.

14 Because this one doesn't say there's
15 a perception that blah, blah, blah. This one
16 says the current policy increases the likelihood.
17 This is a more definitive statement based on
18 stuff we've never heard and the military Services
19 never got to respond to, and we have no numbers
20 on.

21 PROF. TAYLOR: Well, I would just go
22 back to the original Subcommittee report, and, in

1 their finding of a problem, they talked about,
2 and this is a quote, "The current policy on
3 expedited transfer of sexual assault victims can
4 make it difficult for investigators and
5 prosecutors to adequately consult with victims
6 prior to trial when victims have been transferred
7 to far-away locations."

8 MR. STONE: I'm fine with that.

9 PROF. TAYLOR: So that's precisely
10 what they found.

11 MR. STONE: I'll take that language.
12 Can make it more difficult. That's fine.

13 CHAIR HOLTZMAN: This says increases
14 the likelihood that prosecutors will find it
15 difficult. It's saying the same thing, Mr.
16 Stone.

17 MR. STONE: No, I don't think so.

18 CHAIR HOLTZMAN: Likelihood means
19 possibility. Can also reflect a possibility.
20 They're exactly the same.

21 MR. STONE: You want to put the word
22 can in here? Can increase the likelihood?

1 That's what I'm saying. That is not an absolute.
2 This one is an absolute.

3 CHAIR HOLTZMAN: Increases the
4 likelihood to increase the possibility is not an
5 absolute.

6 VADM TRACEY: Do we know why we can't
7 adopt the Subcommittee language?

8 MR. STONE: Yes, I'm fine with the
9 Subcommittee language.

10 CHAIR HOLTZMAN: And what is the
11 Subcommittee language?

12 PROF. TAYLOR: This is on page 2 of
13 the executive summary, "The current policy on
14 expedited transfer of sexual assault victims can
15 make it more difficult for investigators and
16 prosecutors to adequately consult with victims
17 prior to trial when victims have been transferred
18 to far-away locations." So this adds
19 investigators to the equation. We're directing
20 this only to prosecutors.

21 MR. STONE: Then I guess my proposal
22 then is to take that language. I think that

1 language is what they said.

2 CHAIR HOLTZMAN: Is there any
3 objection to that?

4 JUDGE JONES: No.

5 CHAIR HOLTZMAN: Okay.

6 VADM TRACEY: No.

7 CHAIR HOLTZMAN: No objection. Then
8 it's adopted. Okay. These recent judicial
9 developments we're postponing.

10 MR. STONE: Right. That whole thing
11 we're going to wait for a bullet.

12 VADM TRACEY: But we're moving it from
13 here, right?

14 MR. STONE: Yes.

15 CHAIR HOLTZMAN: Yes.

16 MR. STONE: Okay. So we jump all the
17 way down to findings and recommendations.

18 CHAIR HOLTZMAN: Now we're at the
19 bottom of page 4, correct?

20 MR. STONE: Yes. Okay. My first
21 correction is in describing what the
22 Subcommittee's attention was during every site

1 visit. It says specific examples, and I put
2 albeit unnamed and undated examples because the
3 summaries do not ever, even when they say, oh, I
4 had an example of that and another one says I
5 have an example, no one has ever given a case
6 name, they never said I have three examples and I
7 had them in the last five weeks, they never said
8 here's the name of the victim. We were not able
9 to follow up. It doesn't mean that we're not
10 saying that there weren't examples. We're just
11 saying that those were summarized matters and
12 we're being clear about it because, if they were
13 named and dated examples, we probably should have
14 followed up here and called those people because
15 those people wouldn't be the counsel talking to
16 us, they would be the victims in the case and/or
17 maybe the perpetrators.

18 JUDGE JONES: Well, I think the reason
19 there was a subcommittee is because the Panel
20 couldn't possibly track down every issue and
21 every item by having even more presentations and
22 interviewing more people than we already did. I

1 think the point of this subcommittee, too, is to
2 get information that then could be followed up
3 and was a lead in a further investigation into
4 how the military is doing. We're not saying this
5 is the bible. It's useful information so that
6 this whole inquiry can go forward.

7 So I don't really, I don't think we
8 necessarily need to put in albeit unnamed and
9 undated examples. If you want to say by
10 examples, that's fine. I think the language is
11 fine the way it is.

12 MR. STONE: I think then we should
13 just cross out "was supported by specific
14 examples." Just cross it out. Brought to the
15 Subcommittee's attention during every
16 installation visit and also contextualize, blah,
17 blah, blah, blah, blah. Like you say, if we're
18 going to have examples and not follow them up,
19 then we have to explain why and set specific
20 examples and we didn't follow them up because we
21 didn't have time or personnel. We have to have
22 some explanation of why we didn't follow them up.

1 CHAIR HOLTZMAN: No, we don't have to.
2 We don't have to follow up on anything that the
3 Subcommittee reports. It's not an obligation of
4 ours. It's simply not.

5 MR. STONE: I guess I disagree with
6 that.

7 CHAIR HOLTZMAN: Okay. But in any
8 case, I think there's also a problem that, I
9 mean, just to follow up with what Judge Jones
10 said, these people wanted to, part of the reason
11 the summaries are as vague as they are is because
12 there's a requirement and promise to the people
13 who spoke to the Subcommittee of anonymity. And
14 the more you identify, the more you break the
15 promise of that anonymity and create problems.

16 So I don't think there's -- all we're
17 saying is that the Subcommittee told us that what
18 they were saying was supported by specific
19 examples. That's all we're saying here. We
20 could disbelieve the Subcommittee. I guess we're
21 allowed to disbelieve them, but I don't know on
22 what basis we would choose to disbelieve them.

1 PROF. TAYLOR: So I would like to
2 chime in with just a couple of observations. One
3 is that I do think that this language, although
4 unintentional, as Mr. Stone stated, does stand to
5 cast doubt on the credibility of the Subcommittee
6 report, and I think that's something we don't
7 want to do because it's pretty well established
8 in the public policy field that you have
9 quantitative analysis and qualitative analysis.
10 And it would not be correct to say that just
11 because this is based on what we would call
12 qualitative data gathering that it's any less
13 credible or should command less attention than
14 something that's more quantifiable. So I was
15 comfortable with this as stated because I didn't
16 think that all the issues need to be further
17 investigated. I think what the Subcommittee did
18 was to conduct investigations, although they did
19 it qualitatively with anonymous research and
20 sources, rather than something that, chapter and
21 verse, somebody can go back and verify, which
22 would be more of a quantitative method.

1 MR. STONE: See, we say in the last
2 sentence of that paragraph, "Taken together,
3 these considerations suggest that the issues
4 could be systemic and should be investigated,"
5 oh, I put investigated further. I guess it said
6 addressed. Well --

7 PROF. TAYLOR: See, I don't think we
8 need another investigation. I think that's what
9 the Subcommittee did. I think they've got the
10 issues identified, and what we now need to focus
11 our attention on is ways to address the issues
12 that they've identified, rather than having
13 another investigation, if you get what I mean.

14 MR. STONE: I thought that's what we
15 were telling the next panel that there were
16 certain things we wanted them to go out and do in
17 our recommendations. A couple of them, we told
18 them specifically to go out and do this and go
19 out and do that. The Defense Sexual Assault
20 Prevention Response Office should blah, blah,
21 blah, blah, blah, go out and do this, go out and
22 do that.

1 CHAIR HOLTZMAN: This is just a
2 preliminary discussion of the findings and
3 recommendations. It says that the views and --
4 it is a qualified, it is a qualifier to begin
5 with. It says, "Recognize that the views of the
6 individuals who participated in site visits may
7 depend in some measure of the military Service."
8 So it's already saying that it's dealing with a
9 statistical objections that you had to begin
10 with, so now we've dealt with the statistical
11 objections by talking that this reflects personal
12 points of view.

13 On the other hand, we then go on to
14 say that it was brought to the attention at every
15 installation site so that it suggests it could be
16 systemic. Why are we qualifying this? It's not
17 necessary. I think we've already qualified and
18 we're giving some background in saying that,
19 because of the fact that these were found at,
20 whatever it says, all the sites, every
21 installation site visit, that these issues could
22 be systemic and should be addressed.

1 This is the background of it, and I
2 don't know how many more times it needs to be
3 qualified and how many more times it needs to be
4 sliced and diced and told that it's not credible.
5 That's really what I think all of your, all of
6 these suggestions are. I don't think we need to
7 have albeit unnamed and undated, I don't think we
8 need to have the matters -- some of them we make
9 a recommendation they should be further
10 investigated or be further monitored, but we
11 point to these problems because it may be not
12 only that they should be further monitored but
13 maybe the Secretary of Defense is going to want
14 to take some action in connection with it and
15 brings it to the Secretary's attention. It just
16 says further addressed or addressed. I really
17 think it's unnecessary.

18 That's my opinion, but people may
19 disagree, and we'll just take a vote on it now.

20 MR. STONE: Fine. I'll just say that
21 the last sentence that you just pointed out as
22 the summary sentence is itself inconsistent as it

1 stands. If the considerations suggest that the
2 issues could be systemic, then you do have to
3 flesh them out more before you address them
4 because you're only suggesting it could be, not
5 that they are systemic.

6 And then Recommendation 54, we're
7 asking the DAC-IPAD to conduct military
8 installation site visits and further research to
9 determine whether blah, blah, blah, blah, blah.
10 They should also determine what effect blah,
11 blah, blah, in 54. And in 57, we say the same
12 thing. The Secretary of Defense and DAC-IPAD
13 continue to gather data and etcetera, etcetera.

14 Well, I mean, I think that's right
15 that this stuff suggests the issues could be
16 systemic, but that means, number one, they have
17 to be investigated further because we just have a
18 suggestion, and they're not going to be able to
19 investigate the examples that we got that we
20 could pass them our materials because we didn't
21 get any details. They're going to have to go out
22 and collect new examples. We're not withholding

1 them from them. We don't have them to give them.

2 CHAIR HOLTZMAN: Okay. I think all
3 the issues --

4 MR. STONE: That's where they're
5 coming from.

6 CHAIR HOLTZMAN: -- have been
7 discussed on this. Those in favor of Mr. Stone's
8 suggestion in red in the last paragraph on page
9 4, say aye.

10 MR. STONE: Aye.

11 CHAIR HOLTZMAN: Those opposed?

12 (Chorus of no's.)

13 CHAIR HOLTZMAN: The amendment by Mr.
14 Stone, the suggestions are not adopted. Page 5.
15 Are these your suggestions? Is that your
16 suggestion, the nine recommendations? Or is this
17 --

18 MR. STONE: No, no, no.

19 CHAIR HOLTZMAN: Okay. So we're up to
20 page 6.

21 MR. STONE: We're up to page 6.

22 CHAIR HOLTZMAN: Okay.

1 MR. STONE: Let's see. Did we already
2 conform this with Mr. Taylor's discussion before?
3 He took care of this and I can ignore my mine on
4 the top.

5 CHAIR HOLTZMAN: You mean in Bullet 2?

6 MR. STONE: Yes, Bullet 2.

7 CHAIR HOLTZMAN: Okay.

8 MR. STONE: So then we're down to --

9 CHAIR HOLTZMAN: Okay. So Bullet 2 is
10 resolved by Mr. Taylor's amendment. Okay. Now
11 we're up to bullet --

12 MR. STONE: Five.

13 CHAIR HOLTZMAN: -- 2, 3, 4.

14 MR. STONE: Oh, okay, right. Bullet
15 4. This, again, goes to the content of the
16 summaries, which I went through and tallied, and
17 I thought the word often was not the right word.
18 If you don't want to use sometimes, you can
19 suggest some other words. If you want to say may
20 and leave out all the times, may refer. I mean,
21 I don't know what to say there, but the summaries
22 did not show that the convening authorities often

1 do it. It showed that it happens.

2 CHAIR HOLTZMAN: So your first
3 suggestion is to put the word sometimes instead
4 of often?

5 MR. STONE: That's right.

6 CHAIR HOLTZMAN: And what about just
7 striking often and sometimes and just have it
8 refer cases?

9 MR. STONE: Well, I guess I'd like to
10 see what others think. I'm thinking about that.
11 Just say refer cases? I don't know.

12 VADM TRACEY: How about the convening
13 authorities refer charges in some sexual assault
14 cases, even when Article 32 preliminary hearing .
15 . .

16 CHAIR HOLTZMAN: Ms. Saunders, what is
17 your sense of the frequency issue from the
18 Subcommittee report? Judge Jones, maybe you want
19 to answer that. How do you feel about this,
20 Judge Jones?

21 JUDGE JONES: I think I would accept
22 -- look, I went to one and then I reviewed the

1 others a while ago. I think it was quite
2 frequent that at least somebody in the room who
3 knew told us this, but I can't tell you what
4 frequency. I didn't go back and count.

5 MS. SAUNDERS: We do have something in
6 the Subcommittee report, let me just find it for
7 a moment, where there was an actual count. That
8 was done by the staff using the fiscal year 2015
9 cases that we had obtained from Services.

10 PROF. TAYLOR: I think it might be on
11 page 8 and 9.

12 MS. SAUNDERS: Okay, thank you. Yes,
13 here we go. Starting on page eight, data on
14 Article 32 recommendations and convening
15 authority referral decisions, out of 416 sexual
16 assault cases that went to general court-martial
17 in fiscal year 2015, 54 cases involved an Article
18 32 investigating officer or preliminary hearing
19 officer recommending against referring one or
20 more sexual assault charges to court-martial and
21 the convening authority electing to refer the
22 charge despite that recommendation. So 54 of

1 those cases.

2 MR. STONE: So it's like one out of
3 eight.

4 PROF. TAYLOR: Right.

5 MS. SAUNDERS: I know one of the
6 Subcommittee members thought that was quite high,
7 and I think she spoke of her concern when they
8 presented this report. That was Dean Schenck.

9 CHAIR HOLTZMAN: Thought what was
10 high?

11 MS. SAUNDERS: The number at 54.
12 Right. That 54 of the cases in which the Article
13 32 officer --

14 CHAIR HOLTZMAN: Okay. Well, so then
15 I think sometimes is an accurate -- would you say
16 so, Judge Jones?

17 JUDGE JONES: Sure. I can accept
18 that.

19 MR. STONE: Okay. And I stopped the
20 sentence may not be referred because we didn't
21 have data on exactly what reason, and it doesn't
22 really matter which reason. It's just that they

1 did it, so I didn't want to characterize why they
2 did it because that got into some stuff we didn't
3 know. Maybe it was always because they thought
4 there was no probable cause or maybe it was
5 because it was always because they thought there
6 was a low likelihood of conviction.

7 MS. SAUNDERS: In reviewing the
8 Article 32 reports from those cases, the numbers
9 that we just discussed, it seemed to be a mix of
10 either where the 32 officer was recommending it
11 not be referred either because there was no
12 probable cause or because there's a low
13 likelihood of conviction. I don't have exact
14 numbers, one versus the other, but that seemed to
15 be the general --

16 CHAIR HOLTZMAN: Right. That's your
17 report and analysis of the data. What does the
18 Subcommittee say in terms of what they were told?
19 Do we have that in their report?

20 MS. SAUNDERS: Right. Going back to
21 -- I mean, we do have in the Subcommittee report
22 that they heard on the installation site visits

1 that they heard that, and I would have to see
2 what the number is, if it's frequently or often
3 or how they characterized it, but --

4 CHAIR HOLTZMAN: We're talking about
5 the reason, the last sentence.

6 MR. STONE: I mean, did they tally the
7 reasons?

8 MS. SAUNDERS: I don't know if they
9 tallied it, Mr. Stone. But they did take away
10 from talking with defense counsel and trial
11 counsel that convening authorities, on occasion
12 at least, did not take the advice of the Article
13 32 preliminary hearing officer.

14 VADM TRACEY: We don't need it. Their
15 reasons would be that there was not a charge,
16 that the individual was -- I mean, so those would
17 be even more egregious.

18 MS. SAUNDERS: Right. And there's no
19 jurisdiction, nor -- right. I don't recall that
20 ever being raised. I think the counsel --

21 CHAIR HOLTZMAN: Are you okay with
22 that then?

1 JUDGE JONES: Yes.

2 CHAIR HOLTZMAN: All right. So we
3 accept Mr. Stone's suggestion on Bullet 4.

4 MR. STONE: Okay. Look to the next
5 bullet.

6 CHAIR HOLTZMAN: Yes. Bullet 5.

7 MR. STONE: I think we took that out
8 of somewhere else that we didn't know, we had no
9 idea whether senior and experienced officers were
10 more likely to offer an opinion based solely on
11 the strength of the case. And so I thought we
12 were putting something back in here that
13 elsewhere we've already decided that we don't
14 know the answer to that and that, therefore, it's
15 not really necessary. We're saying should be
16 examined to determine whether seniority,
17 experience is a factor. In other words, I don't
18 think we need to go beyond that. That's what we
19 agree is something that should be looked at.

20 MS. SAUNDERS: I believe this came out
21 of the last hearing where the Panel met and I
22 think, in fact this may have been your

1 suggestion, Vice Admiral Tracey, that you thought
2 that more senior and experienced officers serving
3 in this role may be more likely to offer the
4 convening authority an opinion based on the
5 strength of the case.

6 VADM TRACEY: I didn't have a problem
7 with this formulation because all it says is that
8 we believe that it could be a benefit, that it's
9 not saying that anybody testified.

10 MS. SAUNDERS: Right. I think that
11 was based more on the Panel's deliberation.

12 CHAIR HOLTZMAN: Are you still
13 advocating that change, Mr. Stone?

14 MR. STONE: I think it's unnecessary,
15 and I think it detracts from what's in front of
16 it because we're saying and I think we should say
17 that we don't have evidence to know but we do
18 think it's something that should be looked at.
19 That's all. I don't like to throw it on the
20 waters where we just have an observation. It may
21 be a logical observation, but we don't have
22 anything for sure that we're basing it on. So, I

1 mean, since we're looking to see that followed
2 up, I still think that it detracts from it to say
3 what we believe when those are our logical
4 beliefs. There's no evidence for them that was
5 presented to anybody. So, yes, I just think --

6 CHAIR HOLTZMAN: Okay. So let's --

7 MR. STONE: -- stop with what we know.

8 CHAIR HOLTZMAN: All right. And,
9 Admiral, your view? What's your opinion?

10 VADM TRACEY: I don't know that we
11 need it. I just don't find it objectionable.

12 CHAIR HOLTZMAN: Judge Jones?

13 JUDGE JONES: I have a note here on
14 this particular session about haven't we said
15 this before. I don't know where, but I agree
16 with it. I don't think we --

17 VADM TRACEY: So the first sentence,
18 actually it says that we believe you should look
19 at whether seniority or experience level. So to
20 that point, you're nearly repeating the same
21 thought.

22 JUDGE JONES: Yes, I don't think we

1 need it.

2 CHAIR HOLTZMAN: All right. So
3 without any objection, Mr. Stone's recommendation
4 is agreed to. Okay. Now we're up to page 7.

5 MR. STONE: I was thinking we should
6 skip this whole page until after lunch when we
7 see what the new bullet is because we have to get
8 a new bullet on that one.

9 CHAIR HOLTZMAN: Right. Okay. Up to
10 page eight.

11 MR. STONE: Oh, no, seven, we're not
12 using should. Okay. The bottom of seven, we're
13 going to delete shoulds everywhere. I put some
14 in, but you don't think we need them. Okay. So
15 I'm on my page 8 on that top bullet.

16 CHAIR HOLTZMAN: We have a
17 formulation. Is that Mr. Taylor's formulation?
18 Do you see his formulation? You have something
19 about the weakness of the evidence.

20 MR. STONE: Yes. Even based on weak
21 evidence here it said.

22 CHAIR HOLTZMAN: All right. So you're

1 taking out the strength. So you --

2 MR. STONE: If you want to put his
3 formulation even based on weak evidence, that's
4 okay. Yes, I can accept what he just said.

5 PROF. TAYLOR: Okay. I got you.

6 CHAIR HOLTZMAN: All right. So that's
7 Mr. Taylor's formulation that goes in there
8 instead. Okay. Now we're in box 55.

9 MR. STONE: Box 55.

10 CHAIR HOLTZMAN: Recommendation 55.
11 Sorry. Is that you, or is that the staff?

12 MR. STONE: This is me, and this --

13 CHAIR HOLTZMAN: Well, it should
14 initially -- forget that one. Now you'd just
15 like to encourage --

16 MR. STONE: Oh, this one, that's
17 right. This one still says -- oh, there's two
18 shoulds in there. Should review it, should be
19 amended.

20 CHAIR HOLTZMAN: It's only the first
21 sentence.

22 MR. STONE: It's only the first one?

1 CHAIR HOLTZMAN: Yes, the first
2 sentence that doesn't have should. The rest of
3 them can say should.

4 MR. STONE: And this is the same as my
5 prior concern on my page 2, item 3, where I
6 wanted to say the staff judge advocate will have
7 less incentive, rather than saying that we're
8 going to pressure him to do something wrong. So
9 I wanted to say here a review should consider
10 whether such a change would encourage the staff
11 judge advocate to provide more fully-developed
12 advice. I mean, it doesn't really enable him.

13 CHAIR HOLTZMAN: I have no objection
14 to that. Does anybody have any objection to
15 that?

16 JUDGE JONES: No.

17 VADM TRACEY: No.

18 CHAIR HOLTZMAN: Okay. So that's
19 accepted. So on to page 9.

20 MR. STONE: Okay.

21 CHAIR HOLTZMAN: Bullet 2. We're up
22 to Bullet 2 on page 9.

1 MR. STONE: Yes, I'm trying to decide
2 whether we already did some stuff to this before.
3 Let me look back at it. I thought we did some
4 stuff to Recommendation 56. I don't want to re-
5 do stuff we have done. Yes, we've done quite a
6 bit of stuff. Okay, right. We decided that the
7 language already, we voted the revisions appear
8 to have created a perception in the actual
9 recommendation, and this is not noted on here but
10 it's in light of what we just said. The
11 Secretary of Defense -- the last sentence of the
12 recommendation says, "The Secretary of Defense
13 should develop procedures to mitigate this
14 perception." I think based on what we just saw
15 in the cases that I read you, including that in
16 the Howell case, since 2014, they have developed
17 stuff that we should say the Secretary of Defense
18 should develop additional procedures to mitigate
19 this perception, that we shouldn't suggest that
20 the Secretary of Defense has been doing nothing.

21 CHAIR HOLTZMAN: Well, my response to
22 that suggestion is that we're talking about the

1 perception of undue pressure resulting from the
2 fact that you have to refer decisions to higher-
3 ups. That may not be -- and so I don't know that
4 the Secretary of Defense has developed any
5 procedures with regard to that, and that's what
6 we're just -- I mean, it's very focused in that
7 sense and any other things that create a
8 perception of undue command influence. But it's
9 just focused on the issue of the referrals, I
10 mean the review issue.

11 MR. STONE: I guess, since we are
12 talking about that there were Congress review and
13 consider revising at the beginning of that
14 recommendation, provisions in the NDAA's and blah,
15 blah, blah, blah, I don't --

16 CHAIR HOLTZMAN: It says -- let me
17 just finish that. It said because these
18 provisions, meaning the review provisions, of the
19 convening authority's actions, because these
20 provisions appear to create a perception of undue
21 pressure because of the --

22 MR. STONE: On convening authorities,

1 yes.

2 CHAIR HOLTZMAN: Yes, to refer such
3 cases. The Secretary of Defense should develop
4 procedures to mitigate this perception is very
5 narrow dealing with these provisions. That's how
6 I read that recommendation.

7 MR. STONE: Okay. And I would add
8 additional because, if he's done none, then
9 additional works. If he's done some, additional
10 still works. But if he's done some procedures
11 which we did not explore or give him a chance to
12 explain and we're telling him develop procedures,
13 I think that that's, it's presumptuous on our
14 part. We did not go into whether the non-
15 referral decisions, whether there are some
16 procedures to mitigate that. So I think the word
17 additional is an appropriate clarification that
18 we're not saying we've examined everything that's
19 out there.

20 VADM TRACEY: My recollection of how
21 this recommendation evolved was our view was that
22 the congressional direction had been implemented

1 in a way that only advances review of cases that
2 are not referred. By itself, that creates a
3 perception that the preference is that they be
4 referred. If we're only going to ask about cases
5 that are not referred, that must mean that
6 referral is a good thing. So what we wanted was
7 for the Secretary to look at whether there was a
8 different way to implement what the Congress had
9 already done that would make that less of a risk.

10 CHAIR HOLTZMAN: Right. And so we're
11 not talking about in general what they're doing.
12 We're talking about those specific NDAA
13 provisions that create this perception of a one-
14 sidedness. So other things that don't relate to
15 the one-sidedness are irrelevant to that. That's
16 why I think additional really is not appropriate
17 in that circumstance.

18 MR. STONE: Here's my hypothetical of
19 why I think it should say additional. Because if
20 we are and the Secretary of Defense is collecting
21 numbers and putting them out in an annual
22 statistical analysis or report, annual report on

1 these things, he is doing something to mitigate
2 the perception. We just think providing the
3 numbers, the raw data, is not enough. He's not
4 doing nothing. He's at least counting them.

5 VADM TRACEY: If he is not reviewing
6 cases that are referred, and we have no evidence
7 that he is reviewing cases that are referred,
8 then he is allowing the perception that the only
9 right answer is to refer the cases. Otherwise,
10 somebody checks your homework. Then that is --
11 this was about whether there was a different way
12 to comply with congressional direction than the
13 one that was chosen.

14 CHAIR HOLTZMAN: Right. That's all it
15 is. All right. So now we --

16 MR. STONE: Can we put that language
17 in here? Should consider whether there is a
18 different way to comply that will mitigate this
19 perception. That, to me, would say what you're
20 wanting to say, and I wouldn't be confused, among
21 others.

22 JUDGE JONES: I mean, at the

1 beginning, what we're really talking about is
2 recommending Congress review and consider
3 revising. So, I mean, that's very separate from
4 then asking the Secretary of Defense to do
5 something about the perception.

6 MR. STONE: Yes.

7 CHAIR HOLTZMAN: Well, I think, unless
8 there's any further comment, I think we probably
9 should vote on this. All those in favor of Mr.
10 Stone's suggestions, say aye.

11 MR. STONE: Aye.

12 CHAIR HOLTZMAN: Those opposed?

13 (Chorus of no's.)

14 CHAIR HOLTZMAN: No's have it. The
15 suggestion is not agreed to. Let's go to Bullet
16 2. Is that where we are, Bullet 2 --

17 MR. STONE: Yes, Bullet 2.

18 CHAIR HOLTZMAN: -- page 9.

19 MR. STONE: I clarified the first
20 sentence because this is not data that went to
21 Dr. Spohn, and I want to separate it from data
22 that did. It doesn't mean that we're not relying

1 on it. It just says unofficial data recalled by
2 individual military officials because they were
3 not, it was not data that we got from designated
4 representatives in the statistical department,
5 regarding their service's review of disposition
6 decisions, blah, blah, blah, blah, blah, since
7 the provisions enacted reflect no instances. I
8 just want it to be clear that this was not the
9 statistical data we got. We said to them did you
10 remember, how many of these do you remember and
11 how many do you remember, and they said, well, I
12 don't remember any of them and another one said I
13 remember one out of eight and another one said I
14 don't remember any, but we didn't have --

15 MS. SAUNDERS: I should clarify that,
16 Mr. Stone. That was not from the site visits.
17 That was a --

18 MR. STONE: No, no, I know.

19 MS. SAUNDERS: -- request for
20 information that we sent to the Services.

21 MR. STONE: I know, I know. But it
22 was not the site visits.

1 MS. SAUNDERS: I think it was based on
2 numbers and information that they keep.

3 CHAIR HOLTZMAN: So it's not
4 unofficial data?

5 MR. STONE: You think that's official
6 data?

7 CHAIR HOLTZMAN: That the Services
8 provided to us?

9 MS. SAUNDERS: We asked them the
10 number of cases that met these criteria, and they
11 provided that to us since these statutes were
12 enacted.

13 MR. STONE: I thought that data, which
14 was listed on a sheet, said this agency recalled,
15 no, they recalled, no, nobody recalled. I
16 thought that's what that said.

17 MS. SAUNDERS: We have that in the
18 Subcommittee report.

19 MR. STONE: Could only recall one,
20 blah, blah, blah.

21 MS. SAUNDERS: No. If you have the
22 RFI, we do cite to that and a review of

1 disposition decisions. So on the Subcommittee
2 report, on page 12, they do talk, responding to
3 the JPP's Subcommittee's request for information
4 on the number of times these have been invoked,
5 the Services provided the following. And then it
6 say the Services reported that, since this
7 particular date, there have been zero instances
8 in which the Service Secretary reviewed. So
9 these were the numbers that were provided by the
10 Services --

11 CHAIR HOLTZMAN: So it's official
12 data.

13 MS. SAUNDERS: Right.

14 CHAIR HOLTZMAN: I don't think you can
15 say unofficial data.

16 MS. SAUNDERS: I did not get the sense
17 that this was a recollection by them, that this
18 was information that they kept in due course of
19 business.

20 MR. STONE: Fine. Based on that, I'll
21 drop the beginning, but I still think we should
22 say reflect no instances. They were recalling.

1 They didn't have a data system that they drew
2 that from. They were asking, as I recall, their
3 various people. It may have been an official
4 request, but I know they didn't say our data
5 system shows this many cases and that. We don't
6 think there were these, we don't think -- nobody
7 recalls this.

8 CHAIR HOLTZMAN: I'm unclear as to
9 what the original text says here. The original
10 text says show instances.

11 MR. STONE: Show no instances.

12 CHAIR HOLTZMAN: That's the original
13 text?

14 MR. STONE: Yes. And I'm just, I
15 would soften it and say reflect no instances.

16 CHAIR HOLTZMAN: So all you're doing
17 is changing the word show to reflect?

18 MR. STONE: Yes, that's all.

19 CHAIR HOLTZMAN: Is there any
20 objection to that?

21 JUDGE JONES: No.

22 CHAIR HOLTZMAN: Okay. Without

1 objection, it's accepted.

2 MR. STONE: Next bullet. I think we,
3 again, we have this word universally that we took
4 out before. And then on the next line we have
5 strength of the evidence, which we changed to the
6 other language, the weakness of the evidence.

7 JUDGE JONES: Right.

8 MR. STONE: And then that just leaves
9 the last sentence there, they perceive the
10 commanders would rather refer cases to trial than
11 deal with the potential adverse effects of not
12 referring the cases, such as career setbacks,
13 media scrutiny, and elevated review of non-
14 referral decisions. At least in the summaries
15 that I saw, it says they perceive that
16 commanders. I didn't think we got much feedback
17 from commanders, and I didn't think, I think
18 those are the logical things, but I didn't think
19 they said that. And so I thought we made our
20 point in the first sentence, and we didn't need
21 to start talking about commanders and what's
22 logical, which we didn't hear from more than six

1 people and I don't think we heard that as listed
2 here because I have that summary with me.

3 CHAIR HOLTZMAN: But, Mr. Stone, this
4 doesn't refer to commanders. It refers to the
5 trial and defense counsel and what they said and
6 what their perception is.

7 MR. STONE: Of commanders, right.

8 CHAIR HOLTZMAN: Of commanders. So
9 what a commander says is not the point here. The
10 point is what trial and defense counsel says, and
11 I think that that's an accurate, I mean, unless
12 the staff corrects me, I think that's an accurate
13 reflection of what we heard from the trial and
14 defense counsel as to why there was this
15 perception of pressure.

16 MR. STONE: I think it's speculation,
17 but that's why I --

18 CHAIR HOLTZMAN: Yes, for the trial
19 and defense counsel. I think that they --

20 MR. STONE: I don't think it's needed.
21 I think it takes us into the realm beyond what we
22 need to say.

1 PROF. TAYLOR: I would just point out,
2 though, that the Subcommittee report corroborates
3 that to some extent because on page 14, for
4 example, when asked what, if any, pressure on
5 commanders to handle sexual assault cases, a
6 certain commander replied he felt the need to do
7 something immediately or face harm to his career.
8 So there's some corroboration for this
9 perception.

10 CHAIR HOLTZMAN: Even from a
11 commander.

12 PROF. TAYLOR: From a commander.

13 CHAIR HOLTZMAN: Right. But the
14 bullet refers to trial and defense counsel, what
15 they perceive. Okay. So let's vote on this.
16 Those in favor of removing the last sentence of
17 Bullet Number 3 on page 9 say aye.

18 MR. STONE: Aye.

19 CHAIR HOLTZMAN: Those opposed.

20 (Chorus of no's.)

21 CHAIR HOLTZMAN: No's have it. Not
22 agreed to. Okay. I think the should on

1 Recommendation 57 is not, you're not advancing
2 that anymore, right?

3 MR. STONE: No, and not in 58 either
4 or 59.

5 CHAIR HOLTZMAN: All right. So on
6 page ten, we're up to page ten now. Okay. Page
7 ten, the first change is in Recommendation 59; am
8 I correct? Or is that not yours? It reads
9 continue to. Is that you or is that the staff?

10 MS. SAUNDERS: That is Mr. Stone.

11 CHAIR HOLTZMAN: Mr. Stone, are you --
12 okay. So we're in Recommendation 59. Let me ask
13 you all a question. Should we break now, or
14 should we just go to the end? This might be --

15 MR. STONE: You want to break?

16 PROF. TAYLOR: We're almost there.

17 CHAIR HOLTZMAN: All right.

18 MR. STONE: Wait. What did we decide?
19 Go to the end?

20 CHAIR HOLTZMAN: Yes. You struck
21 continue to.

22 MR. STONE: Yes, because that implies

1 that we have data about what's going on today,
2 which we don't need to say. We just have to say
3 that they should monitor whether misperceptions
4 regarding alcohol consumption and consent affect
5 court-martial panel members. That's all. It's
6 the same thought without suggesting we already
7 have data and made findings that we know this is
8 happening. I mean, because we didn't say
9 potentially continue to, blah, blah, blah, blah,
10 blah. I just didn't want to say more than we
11 know, and continue says more than we know.

12 CHAIR HOLTZMAN: All right. Any
13 discussion? Okay. Those in favor, say aye.

14 MR. STONE: Aye.

15 CHAIR HOLTZMAN: Opposed.

16 (Chorus of no's.)

17 CHAIR HOLTZMAN: The no's have it.
18 It's not agreed to. Let's go to the next bullet.

19 MR. STONE: The next bullet about that
20 the SAPR training has been bad I only saw in
21 summary from defense counsel. I don't think that
22 was in anything from trial counsel, and so,

1 therefore, I thought that particular one ought to
2 be clarified about where it came from because
3 we're criticizing a particular kind of training
4 and they're saying it's not fair to us. I mean,
5 that conveys to the people doing SAPR training
6 what we think they ought to be concerned about,
7 and they reported their perceptions, as we said,
8 in a million other places; and, therefore, I just
9 wanted that to be consistent.

10 And, actually, if you look at the next
11 bullet, the same thing is true. The SAPR people
12 did not think that the one means no consent is
13 the way they train people and they didn't think
14 it was affecting them, but the defense counsel
15 indicated they still hear misconceptions. That's
16 legitimate for defense counsel to say, but it
17 identifies where the criticism is coming from and
18 if they make a correction to whom they should
19 realize they need to correct it.

20 PROF. TAYLOR: So on page 19 of the
21 Subcommittee report, the first sentence on this
22 topic says this, "Most sexual assault response

1 coordinators and victim advocates who spoke with
2 Subcommittee members acknowledged that
3 misperceptions persist throughout the military
4 regarding the consumption of alcohol and lack of
5 consent, specifically that the consumption of any
6 alcohol amounts to making a person incapable of
7 consenting to sexual activity." So it seems to
8 me that this is a wide, more widely held view
9 than just defense counsel based on this, if I'm
10 reading this correctly.

11 MR. STONE: Well, you're reading that
12 correctly, but that's why I asked for and I got
13 the summaries of the site visits and I went
14 through the site visits. Now, which one is
15 exactly right, I don't know. If you want to
16 leave it all counsel, if you're comfortable with
17 that report. I thought it actually would help
18 SAPR members to know where the criticism is
19 coming from and how to correct it but . . .

20 CHAIR HOLTZMAN: Well, certainly in
21 the second bullet, that would not be accurate
22 based on what Mr. Taylor just read because it

1 wasn't defense counsel because it's everybody, I
2 mean it's the coordinators and others.

3 PROF. TAYLOR: Well, just to continue
4 briefly, if I may. The second paragraph says,
5 "Commanders who spoke to the Subcommittee
6 consistently expressed concerns about the
7 frequency, describing it as time-consuming and
8 potentially counter-productive. In the view of
9 some practitioners, SAPR training has become so
10 pervasive that it affects the judgment and
11 selection of potential court members," and then
12 it goes out to talk about counsel in the Army.

13 Now, it does, in the next paragraph,
14 say a defense counsel stated, you know, so it's
15 clear that defense counsel are included within
16 that group of people who think that this is a
17 problem, but I think it's a problem in general.

18 MR. STONE: Right. But our lines here
19 don't say defense counsel. You're right, that
20 one does. So somewhere I was trying to get that
21 notion in here.

22 VADM TRACEY: What notion?

1 MR. STONE: I don't know whether you
2 want it in that bullet or in the next bullet, but
3 it seems to me -- in the next bullet, you've got
4 SAPR telling the Subcommittee they do not train
5 military members that one beer means no consent
6 or use variations of that slogan. So I'm trying
7 to identify what you just pointed out from the
8 Subcommittee report.

9 CHAIR HOLTZMAN: Yes, but I think Mr.
10 Taylor, in defense of Mr. Taylor, no defense
11 needed from me, but, in any case, what he was
12 saying is that it's a widespread view that they
13 hear misperceptions about alcohol use and
14 impairment from court-martial panel members.
15 It's not only defense counsel. Well, I guess
16 this is from court-martial panel members but that
17 the problem is not, the perception of the problem
18 is not limited to defense counsel, and I think
19 it's misleading to suggest that the perception of
20 this problem is limited to defense counsel.
21 That's my concern.

22 PROF. TAYLOR: Mine, as well.

1 JUDGE JONES: So --

2 MR. STONE: I guess I made those two
3 comments primarily because the words their
4 perceptions was not in the first bullet. If I
5 have, if we had the word their perceptions in the
6 first bullet, I have less problem dropping
7 defense before the word counsel in both the first
8 and the second bullet.

9 CHAIR HOLTZMAN: Does anybody have an
10 objection to using the word perception?

11 VADM TRACEY: No.

12 JUDGE JONES: No.

13 CHAIR HOLTZMAN: So that's accepted.
14 So your proposal of defense counsel is dropped --

15 MR. STONE: I'll drop it in the first
16 and second bullet.

17 CHAIR HOLTZMAN: -- and the term their
18 perceptions is added. Okay. We're up to the
19 second to last bullet.

20 MR. STONE: Right. This goes back to
21 what I said before. You've got a total of seven
22 commanders who spoke to the Subcommittee out of

1 two-hundred and whatever it was people, 250
2 people or something. So I don't want to just say
3 commanders who spoke to the Subcommittee
4 consistently expressed concerns about blah, blah,
5 blah, blah, blah, and training fatigue because it
6 was a tiny number. So somehow that needs to be
7 modified. I guess we could say commanders who
8 spoke to the Subcommittee expressed concerns and
9 laved out consistently or if you want to, you
10 know, or the few commanders who spoke, but
11 something to make it clear that we don't know
12 that all the commanders who spoke to the
13 Committee and a lot of them spoke as an
14 introductory statement, the vast majority, and
15 didn't make any statement about this. It was a
16 welcoming speech, which I understand.

17 CHAIR HOLTZMAN: Well, I have no
18 problem with taking out the word consistently. I
19 mean, I think expressed is fine.

20 JUDGE JONES: I'm fine with that.

21 CHAIR HOLTZMAN: But I am unhappy with
22 the few commanders. Let's say the commanders who

1 spoke to the Subcommittee.

2 JUDGE JONES: Yes. And we took out
3 few before, so, for no other reason than
4 consistency, I don't think we should start saying
5 few or numbers, putting numbers in here, other
6 than the 280.

7 CHAIR HOLTZMAN: Okay. Mr. Stone, are
8 you accepting that or do we have to vote on it?

9 MR. STONE: I'd still like a vote
10 because I think seven out of 280, unless you
11 clarify that somewhere, is a misperception and
12 I'm not wanting to mislead anybody.

13 CHAIR HOLTZMAN: All right. So the
14 first proposal by Mr. Stone is to add the words
15 the few in front of commanders. Those in favor,
16 say aye.

17 MR. STONE: Aye.

18 CHAIR HOLTZMAN: Those opposed?

19 (Chorus of no's.)

20 CHAIR HOLTZMAN: The no's have it.
21 The second -- are you okay if we take out the
22 word consistently?

1 MR. STONE: Yes, yes.

2 CHAIR HOLTZMAN: Anybody opposed to
3 taking out consistently?

4 JUDGE JONES: No.

5 CHAIR HOLTZMAN: So that's accepted.
6 Okay. I think we're up to the last bullet on
7 page 10; am I correct?

8 MR. STONE: Yes. The last bullet on
9 page 10, once again, is talking about a case not
10 described here, it doesn't describe what else the
11 Navy, Marine Corps Court of Criminal Appeals has
12 done in that case or before that case or after
13 that case. And if we're going to start doing
14 legal discussions, then I'm going to want to add
15 a lot of stuff that makes it very specific and
16 accurate, as well as putting in the citation
17 which is not there.

18 VADM TRACEY: Where did this reference
19 come from?

20 MS. SAUNDERS: This is, I believe,
21 cited in the Subcommittee report. I can
22 certainly add a footnote here, as well, that

1 there is a citation in there and it just -- let
2 me find it in here -- the court just found that
3 there was an erroneous jury instruction on the
4 term impairment in a sexual assault case, and
5 they just found that many of the members who sat
6 as panel members on that case were under the
7 impression that any amount of alcohol may
8 constitute inability to consent.

9 VADM TRACEY: How did the Subcommittee
10 come to consider this?

11 MS. SAUNDERS: It was just research
12 from the staff that was presented to them.

13 MR. STONE: Did they look to see how
14 many other cases affirmed convictions where that
15 claim was made and they found that there was no
16 confusion?

17 MS. SAUNDERS: No, Mr. Stone, they
18 didn't. I think they were just highlighting what
19 the report found --

20 JUDGE JONES: The fact that it is
21 still a problem.

22 MS. SAUNDERS: That it's still a

1 problem, even in this case.

2 MR. STONE: Do we know if the case was
3 taken by the Court of Appeals of the Armed
4 Forces, that there's a further decision in the
5 case?

6 MS. SAUNDERS: I am not sure. I would
7 have to look at that. This case came out in
8 September of 2016.

9 MR. STONE: Right. We, as a panel,
10 decided last time when I cited and I wanted to
11 cite a unanimous U.S. Supreme Court case that we
12 were a policy body and not a legal body and we
13 aren't going to be citing cases when we thought
14 there was a policy that needed to be handled
15 correctly. And for the reasons when we talk
16 about the other cases, the same thing, I think,
17 applies here. If we're going to get into the
18 case, I, for one, first of all, I'm going to read
19 it. I'm not going to cite a case that we haven't
20 attached and nobody has read here and we haven't
21 heard from the prosecutors and defense counsel or
22 even the Service's prosecutors and defense

1 counsel as to whether this is a typical case, an
2 outlier, was it published or unpublished. It
3 gives an indication of how important the
4 particular Service thought it was. So I --

5 MS. SAUNDERS: This is cited in the
6 Subcommittee report on page 19 and then it
7 continues on to page 20. And it simply stands
8 for the proposition that, in this case, a lot of
9 the panel members were counted, the training they
10 had received from SAPR personnel and their
11 impressions that versions of one drink equals
12 inability to consent.

13 JUDGE JONES: It's cited for the fact
14 that -- not for any legal proposition or whether
15 the case was handled correctly as a matter of
16 law. It has nothing to do with the law.

17 MS. SAUNDERS: And, in fact, in
18 Footnote 110 of the Subcommittee report, they
19 discuss some of the comments that they heard from
20 some of the panel members. If you did have any
21 form of impairment you can't have consent, you
22 need sober consent for the brief. These are all

1 comments that were made by the panel members in
2 that case.

3 MR. STONE: Right. But if that's one
4 judge who doesn't know the law and improperly
5 instructs the jury in this case, it doesn't
6 represent the ongoing problem.

7 JUDGE JONES: Mr. Stone, we're talking
8 about facts that some jurors basically said this
9 is what they thought they were taught in SAPR.
10 It has nothing to do with an incorrect
11 instruction, and all we're doing is trying to say
12 there may still be a problem. That's it.

13 MR. STONE: We're citing a case
14 without its citation here, without having read
15 it, without having heard from the people
16 involved, and without even knowing if it's been
17 reversed. That's why I move to strike it.

18 CHAIR HOLTZMAN: It could be reversed
19 on the law. We're talking about the facts. It
20 seems impossible that an appellate court would
21 say that the factual statements that were taken
22 by the jurors are incorrect. On what basis could

1 an appellate court possibly make such a decision?
2 We're just talking about the facts of what the
3 jurors themselves or the panel members said.
4 They said this is what we were told. Were they -
5 - so that's all. We're not signing for any
6 proposition of law. We're not saying that the
7 judge handled that properly, didn't handle it
8 properly, it should have been reversed, shouldn't
9 have been. I mean, what can a prosecutor tell
10 you about or a defense counsel tell you about
11 what the experience was of these jurors? That's
12 all we're focusing on, so it seems -- okay. I
13 think we --

14 MR. STONE: I strike cases that I
15 haven't read. I don't cite cases I haven't read
16 either, and I think it's irresponsible to do so.

17 MS. SAUNDERS: The footnote is in the,
18 or the citation is in the Subcommittee report.
19 I'd be happy to add it here.

20 MR. STONE: No, I want the opinion,
21 not the cite, if you don't mind.

22 MS. SAUNDERS: I'd be happy to give

1 you that information.

2 MR. STONE: Okay. And the subsequent
3 history of it.

4 CHAIR HOLTZMAN: Okay. I think,
5 meanwhile, I think Mr. Stone can have that if he
6 wants it, but I think we are ready to vote on
7 this. Those in favor of removing the last bullet
8 on page ten, say aye.

9 (Chorus of ayes.)

10 VADM TRACEY: Those removing it?

11 CHAIR HOLTZMAN: Yes, removing it.

12 VADM TRACEY: Sorry. I'm opposed to
13 removing it.

14 CHAIR HOLTZMAN: Okay. Those opposed
15 to removing it, say -- all right. Those in favor
16 of removing this bullet, say aye.

17 MR. STONE: Aye.

18 CHAIR HOLTZMAN: Those opposed say no.

19 (Chorus of no's.)

20 CHAIR HOLTZMAN: The no's have it.
21 The amendment is rejected. Okay. Do we have --
22 I don't know what the purple is. Mr. Stone, is

1 that the staff?

2 MR. STONE: No, no, no, no, that was

3 --

4 MS. SAUNDERS: Those were Mr. Stone's
5 comments. We were not able to fit them all on
6 the printed pages, so we --

7 CHAIR HOLTZMAN: Oh, oh, okay, fine.
8 So those aren't amendments.

9 MS. SAUNDERS: Right.

10 MR. STONE: Right. And those simply
11 have, we jumped and we'll get back after lunch to
12 53.

13 CHAIR HOLTZMAN: Okay. So we're
14 finished, except for the review of those two
15 pages, what you're going to write up about that.

16 MS. SAUNDERS: For the two bullets.
17 My only question I have on page 7 is, Mr. Stone,
18 you had crossed out the bullet about the American
19 Bar Association's Criminal Justice Standards.
20 Did you still want that to be crossed out or --

21 MR. STONE: Well, it depends. I want
22 to see what we do on the other bullet.

1 CHAIR HOLTZMAN: All right. So page
2 7 --

3 MR. STONE: I've got to see what the
4 other bullet says.

5 CHAIR HOLTZMAN: Right. So page 7 is
6 being held in abeyance.

7 MS. SAUNDERS: Okay.

8 CHAIR HOLTZMAN: Is that correct?

9 MR. STONE: Yes.

10 CHAIR HOLTZMAN: All right. Thank
11 you. We made a lot of progress, and so I guess
12 we'll take a break for lunch now.

13 CAPT TIDESWELL: We're scheduled for
14 45 minutes.

15 CHAIR HOLTZMAN: Oh, okay. Well, far
16 be it for me to --

17 JUDGE JONES: You haven't seen us eat.
18 We can do faster than that.

19 (Whereupon, the above-entitled matter
20 went off the record at 12:17 p.m. and resumed at
21 1:06 p.m.)

22 CHAIR HOLTZMAN: Oh, Mr. Taylor's

1 here. Okay. I think we should, we're up to the
2 data --

3 CAPT TIDESWELL: Ms. Holtzman, if I
4 may, Ms. Saunders is in her office feverishly
5 working away. She's not finished, so I thought
6 we would stay on the agenda and perhaps start and
7 open with the data piece.

8 CHAIR HOLTZMAN: Okay. So who's going
9 to -- oh, sorry. Ms. Peters.

10 MS. PETERS: Okay. Members of the
11 Panel, good afternoon. At Tab 6 of your read-
12 ahead materials, you have the updated copy of the
13 court-martial data report. The purpose of this
14 session is to obtain the Panel's final approval
15 of the language changes that you voted on and
16 approved at the last meeting, and also we
17 received some additional edits from the members
18 in between the last meeting and today. Those are
19 going to be reflected in yellow highlight in this
20 report, and what I would recommend, ma'am, is
21 that we start with, these are primarily edits to
22 the findings supporting the recommendations and

1 one change that was made to one of the
2 recommendations itself.

3 From there, edits were made to the
4 body of the report just to conform to the
5 language of those changes. So we could start
6 with page three of the report that contains the
7 recommendations of the findings.

8 CHAIR HOLTZMAN: So do you want to
9 read the change that you're recommending?

10 MS. PETERS: Yes, ma'am. The first
11 change is in the bullet that's highlighted in
12 yellow on page three. This falls right under,
13 immediately under Recommendation 52. I would
14 just note that, while the staff is concurrently
15 drafting multiple reports, these numbers,
16 tentatively, will overlap with the Panel concerns
17 report, but we will amend that as we determine
18 the order of production, obviously. They will
19 not overlap. For ease of reference today, if we
20 could just refer to them as 52, 53, and 54 to
21 stay on the same page.

22 CHAIR HOLTZMAN: Okay.

1 MS. PETERS: The edit that the staff
2 would like to draft your attention to is the
3 second sentence in Bullet 1. Would you like me
4 to read it aloud?

5 CHAIR HOLTZMAN: Yes, please.

6 MS. PETERS: It says that -- the
7 purpose of this, by the way, was to explain what
8 a document-based data collection system was. And
9 the language added says, "The JPP's document-
10 based approach to data collection involves
11 obtaining relevant case documents from the
12 military services (for example the charge sheet,
13 report of results of trial) and recording the
14 relevant case history data into a centralized
15 database for analysis."

16 CHAIR HOLTZMAN: Is there any
17 objection to that change? Any discussion,
18 objection? Approved.

19 MR. STONE: I have yellow on page two.
20 Did we jump that?

21 MS. PETERS: Yes, sir, we do. I was
22 suggesting, subject to your decision that,

1 because that change merely corresponds to
2 language that's consistent with the
3 recommendations and findings, if you change
4 something up here we'll have to make a
5 corresponding change over there.

6 CHAIR HOLTZMAN: Okay. Page 4.

7 MS. PETERS: The next edit is at page
8 4. At the top of page 4, there is a bullet. It
9 technically supports Recommendation 53 regarding
10 systems required to be produced under Article
11 140a, Code of Military Justice. So the first
12 bullet at the top of page 4 that falls under the
13 recommendation, simply change the words military
14 justice practitioners to military justice
15 personnel, and instead of saying that they should
16 be responsible for providing the information
17 collected that they should be, it has been
18 changed to they should be involved in providing
19 the information collected, pursuant to Article
20 140a.

21 CHAIR HOLTZMAN: Okay. Is there any
22 objection to this change?

1 (No audible response.)

2 CHAIR HOLTZMAN: Hearing none, it's
3 approved. Next.

4 MS. PETERS: Yes, ma'am. The next two
5 bullets below that one are highlighted because
6 they are new, and this reflects language or ideas
7 and recommendations that were provided by the
8 Panel Members and voted on at the last meeting,
9 but this is the actual language the staff is
10 proposing to fulfill that change.

11 So the first would read, "DoD SAPRO
12 should rely solely on the Article 140 data for
13 its sexual assault case adjudication data when
14 developing the DoD SAPRO annual report to
15 Congress."

16 CHAIR HOLTZMAN: Any objection to
17 that?

18 MR. STONE: I have a concern, and I
19 want to see what the Panel thinks. After the
20 words Article 140a data, which we know is not
21 data they collected but we're forcing them to
22 use, do we want to say, comma, including any

1 supplementation they require? Because, I mean,
2 maybe they have slightly different data that the
3 Article 140a rule will say, no, no, no, we don't
4 collect that or that's not important to us or
5 you're looking at that from a slightly different
6 perspective. So do we want to make it clear that
7 they can footnote or add to the 140a data?
8 They've got to use it, but, if they need
9 something that's not in there to explain what
10 they're doing, they could supplement it? I feel
11 like, otherwise, we might be locking the door on
12 them and then they'll complain later, well, I
13 couldn't say this and I couldn't say that because
14 you wouldn't let me go beyond and add to that
15 data in an extra table.

16 JUDGE JONES: What would it be? I
17 mean, this is pretty narrow. 140a is for sexual
18 assault adjudication data. What kind of thing
19 are you thinking of? I mean, SAPRO's annual
20 reports will go way beyond just adjudication
21 data, I assume.

22 MR. STONE: I know. And I --

1 JUDGE JONES: But the way beyond won't
2 be in 140a, or am I missing something here?

3 MR. STONE: Well, because it says here
4 should rely solely that I want to just give them
5 an escape hatch so they can write their report.

6 VADM TRACEY: Tell me what source of
7 data would you want them to use.

8 MR. STONE: I don't know. I have no
9 idea what they'll decide when they look at their
10 data. They may decide they don't need to
11 supplement it, but they could well say, well, you
12 know, that's the Article 140a prosecution data
13 footnote. In addition, we had, I don't know, 30
14 reports to us that came roundabout that, blah,
15 blah, blah, blah, that didn't fit in that
16 thing or we had 30 reports that we can't
17 reconcile with the 140a data.

18 I don't know, but I didn't want to
19 tell them they can't put it in anywhere. I want
20 to at least somehow have a little supplementation
21 thing. Does that make some sense, Ms. Peters?

22 JUDGE JONES: I mean, I think the

1 point of this is that we don't want to gather
2 individual blocks of data from each service, and
3 so it's meant to say we're not looking at any
4 individual data from any service, we are only
5 looking at 140a, so get it into 140a. Is that
6 the point of this?

7 MS. PETERS: Yes, yes, ma'am.

8 MS. ROZELL: I understand where you're
9 coming from, Mr. Stone. SAPRO is a victim-based
10 organization, and the adjudication of 140a is
11 not. So I understand where you're coming from.

12 MR. STONE: I mean, I want them to be
13 able to look at the footnote and say we also saw.
14 That's why I said supplementation. In other
15 words, not instead of.

16 VADM TRACEY: 140a is the source of
17 only adjudicated data. If there's information on
18 cases that were not adjudicated, then there's
19 nothing about this language that prohibits them
20 from supplementing.

21 JUDGE JONES: Right. That's how I
22 read it.

1 VADM TRACEY: You don't want SAPRO
2 making up their version of what the adjudication
3 statistics were.

4 CHAIR HOLTZMAN: Right. We're just
5 saying, with regard to sexual assault case
6 adjudication data, that's it. Anything else they
7 want to talk about in the SAPRO report, God bless
8 them. But on this, they have to rely on Article
9 140a data.

10 All right. Ready to vote?

11 MR. STONE: Well, I guess my question
12 to everybody is does anybody think they need that
13 escape hatch, the presenters or the staff? If
14 nobody thinks -- I'm just raising that question.
15 If nobody thinks they need that escape hatch,
16 then it doesn't even need a vote. I'm sitting on
17 the fence here.

18 MS. ROZELL: I think when they go to
19 develop the 140a database that they would take
20 into consideration all the key points that are
21 reported in SAPRO, SAPRO's every report to
22 Congress.

1 MS. PETERS: The experience of the
2 staff and the information we had that was
3 supportive of this was that there are multiple
4 different systems that do different things in
5 different ways and that, if SAPRO were to
6 continue business as usual as running a separate
7 but parallel system with the methodology that is
8 opaque and potentially questionable, and this
9 would bring transparency, reliability, and
10 uniformity to the way SAPRO presents its sex
11 assault adjudication data to the public and
12 bifurcating that in any way would bring me back
13 to the original problem I think the Panel is
14 trying to address in its recommendation.

15 MR. STONE: Will the 140a data include
16 all the administrative punishments and all the
17 separation instead of punishments in some of this
18 alternative stuff? Because that strikes me as
19 something they might say they don't even want us
20 to tell you that we thought there was another ten
21 percent again of those cases which were resolved
22 by other than adjudication means, but they're

1 really adjudicated, in effect, they're
2 adjudicated data.

3 I don't know. I'm just asking that
4 question because I hate to tell somebody that
5 they can't drop a footnote and try and supplement
6 something on something that we're trying to look
7 ahead and guess at.

8 MS. PETERS: Yes, sir. I think any
9 case where a prosecution has commenced would be
10 captured in an adjudication database --

11 MR. STONE: Right.

12 MS. PETERS: -- regardless of the way
13 it's resolved. Separately, if it's not in 140a,
14 I don't believe the intention is to limit the
15 source of information that SAPRO has. They can
16 still report the resolution of that case, whether
17 it's in 140a or not, because it's a case that
18 they've been tracking since a report was filed.
19 I don't think the language of this supports that
20 they're just saying, there's additional problems
21 when SAPRO begins collecting and interpreting
22 legal adjudication information, which is now

1 going to be housed under this 140a system, so we
2 just take it all from their shelf.

3 MR. STONE: So your bottom line is you
4 don't think they need an escape clause?

5 MS. PETERS: No, sir.

6 MR. STONE: And, Ms. Rozell, what
7 would you do?

8 MS. ROZELL: I agree. I agree with
9 Meghan.

10 MR. STONE: Okay.

11 MS. ROZELL: I think that, because the
12 140a data collection system will be, should be
13 administered by legal personnel, then I think
14 that it will be much more accurate than this
15 analysis.

16 MR. STONE: I agree. I just didn't
17 know if there was something else --

18 PROF. TAYLOR: Mr. Stone, the reason
19 I don't think this is a problem is because DoD
20 has not actually implemented this yet. So in
21 designing it, one would think they would include
22 all the different aspects that you're thinking

1 about. One would think.

2 MR. STONE: I just know when there has
3 been a data collection issue and we have to use
4 it later, somehow somebody says, wait, wait,
5 wait, we need this footnote over here, nobody
6 thought about X, Y, and Z, and we drop a footnote
7 somewhere. That's all. Or sometimes you thought
8 about it, but the equipment you have won't
9 collect it or the system you have in place or the
10 questionnaire or whatever, you can't get people
11 to collect it. And so I just was going to leave
12 a little escape hatch, but not if nobody thinks
13 we need to.

14 CHAIR HOLTZMAN: Right.

15 MR. STONE: I just throw in the --

16 CHAIR HOLTZMAN: I think that's where
17 we are, so let's go on to the next bullet,
18 please.

19 MS. PETERS: Yes, ma'am. That was an
20 approved, ma'am? I just want to make sure I
21 heard.

22 CHAIR HOLTZMAN: Yes, it's approved.

1 MS. PETERS: Okay. The final bullet
2 says, "To the extent possible, DoD should avoid
3 developing a source of data under Article 140a
4 that does not communicate with other sources of
5 data within the Department of Defense, such as
6 DoD SAPRO's sexual assault incident database." I
7 think this is to address a concern raised by
8 Admiral Tracey at the last meeting about, and
9 other panel members, about the interoperability
10 of multiple DoD systems.

11 CHAIR HOLTZMAN: So I hate to raise
12 this, but why are we saying to the extent
13 possible? Why don't we just say DoD should
14 avoid?

15 MS. PETERS: There is no particular
16 reason, other than to assume we don't know all
17 eventualities, but it may just be, I see the
18 point that it's surplus. There was no
19 substantive reason to have that in there.

20 CHAIR HOLTZMAN: Anybody have an
21 objection to taking that --

22 JUDGE JONES: No.

1 CHAIR HOLTZMAN: Okay. Otherwise, any
2 objection to including the third bullet with that
3 amendment? Hearing none, it's approved.

4 MR. STONE: Wait, wait, what was the
5 amendment exactly?

6 CHAIR HOLTZMAN: It takes out to the
7 extent possible.

8 MR. STONE: Oh.

9 CHAIR HOLTZMAN: Because we have DoD
10 should.

11 MR. STONE: Well, on the next line
12 then where it says that does not communicate
13 with, do you want to say all of the sources of
14 data within DoD? You have other, but maybe you
15 want to say all other.

16 CHAIR HOLTZMAN: No. Okay. Are we
17 okay with Bullet 3?

18 JUDGE JONES: I am, yes.

19 MR. STONE: I'm okay.

20 CHAIR HOLTZMAN: So it's approved.
21 We're up to Recommendation 54, C.

22 MS. PETERS: Yes, ma'am. The changes

1 voted on at the last meeting are reflected in
2 yellow. The first is to add, under
3 Recommendation 54, Part C, that if a service
4 member is charged with a sexual assault offense
5 and pleads guilty --

6 CHAIR HOLTZMAN: Pleads not guilty.

7 MS. PETERS: Oh, excuse me. And
8 pleads not guilty. Thank you for correcting
9 that. And the second issue is that, I guess I
10 would continue that, if he pleads not guilty, the
11 probability that he or she will be convicted of a
12 sexual assault offense is low. And then after
13 the comma is language that was added at the last
14 meeting, "and the probability that he or she will
15 be convicted of any offense, i.e. the probability
16 that he or she will be convicted of either a sex
17 or a non-sex offense, is high."

18 CHAIR HOLTZMAN: Any objection to this
19 language? Hearing none --

20 MS. PETERS: May I raise an issue for
21 the Panel's awareness?

22 CHAIR HOLTZMAN: Yes.

1 MS. PETERS: As to this, the concerns
2 or the --

3 CHAIR HOLTZMAN: You don't have to
4 explain it if there's no objection here. Is
5 there something you want to explain?

6 MS. PETERS: Yes, ma'am. The cases in
7 which, when I reviewed the transcript, the cases
8 in which a person pleads not guilty is one set
9 of, is one type of conviction rate. Another set
10 is what you referred to, Mr. Stone, when we, when
11 you proposed your language, which is the second
12 part of the edit that says the probability that
13 he or she will be convicted of any offense is
14 high, you referred to a 70-percent statistic. I
15 just want to clarify that the 70-percent overall
16 conviction rate applies to all cases referred to
17 trial and includes guilty pleas.

18 So if we're going to base the second
19 edit on cases including guilty pleas, we can't
20 also say that if you're charged and you plead not
21 guilty your conviction rate is high. The actual
22 conviction rate for contested cases in which

1 someone is pleading not guilty is 57 percent, not
2 70 percent.

3 CHAIR HOLTZMAN: So how would you
4 change this, please?

5 MS. PETERS: The suggestion is to
6 either add the actual statistics that marry up
7 with this language. Instead of saying low or
8 high, we would substitute it with an actual
9 figure, or remove 54C altogether with the
10 understanding that it doesn't substantively
11 really change the focus or purpose or intent of
12 Recommendation 54.

13 MR. STONE: Well, what are the two
14 numbers you put in? The second one is that a
15 high would be 57 percent, and what would it be
16 for low?

17 MS. PETERS: Right. It is on page 29.
18 Thirty-six percent.

19 MR. STONE: Okay. I'm always in favor
20 of the numbers if we've got them. Much better
21 than characterizing --

22 CHAIR HOLTZMAN: But the numbers are

1 not consistent. The first number only includes
2 conviction after trial; am I correct? And the
3 second number includes guilty pleas.

4 MR. STONE: No, that is 57.

5 MS. PETERS: As drafted, that's the
6 issue with this language. The statistics that
7 marry up --

8 CHAIR HOLTZMAN: Right. So that's
9 what I'm saying, that you're comparing apples and
10 oranges here.

11 MR. STONE: No, she just gave us the
12 right number. In other words, if we put 70
13 percent as the second number, it would be apples
14 and oranges. But 57 percent is apples and
15 apples.

16 CHAIR HOLTZMAN: Fifty-seven percent
17 does not include guilty pleas.

18 MS. PETERS: Correct.

19 CHAIR HOLTZMAN: Okay.

20 VADM TRACEY: But it does include
21 convicted of contact offenses and non-sex
22 offenses.

1 CHAIR HOLTZMAN: Right, right, okay.
2 So any objection to adding those numbers --

3 VADM TRACEY: I'm sorry. I'm not sure
4 that's the right number. If you plead not
5 guilty, the probability that he or she will be
6 convicted of a sexual assault offense.

7 MS. PETERS: Because if any sexual
8 assault offenses, you have to add in the two
9 percent, so it becomes 38 percent.

10 CHAIR HOLTZMAN: What's the two
11 percent for?

12 MS. PETERS: Two percent is --

13 VADM TRACEY: Contact and --

14 CHAIR HOLTZMAN: Oh, I see. I also
15 suggest, by the way, that you take out, you don't
16 need the probability in the parens. You don't
17 need to repeat the probability. You can just
18 simply say i.e. either a sex or a non-sex
19 offense.

20 MS. PETERS: Yes, ma'am. So strike
21 all the language between the comma and either.
22 Okay.

1 CHAIR HOLTZMAN: Admiral, are you okay
2 or --

3 VADM TRACEY: What does it say now?
4 I'm not sure I understand --

5 CHAIR HOLTZMAN: What it's going to
6 say now is the probability, the second part of
7 this --

8 VADM TRACEY: All the numbers.

9 CHAIR HOLTZMAN: Okay. Go ahead,
10 Meghan, please.

11 MS. PETERS: It would read as follows,
12 "If the Service member is charged with a sexual
13 assault offense and pleads not guilty, the
14 probability that he or she will be convicted of
15 a sexual assault offense is 38 percent and the
16 probability that he or she will be convicted of
17 any offense is 57 percent."

18 CHAIR HOLTZMAN: Well, that's not
19 exactly it. Any offense, parens, i.e. either a
20 sex or non --

21 MS. PETERS: Either a sex or a non-sex
22 offense. Yes, ma'am.

1 CHAIR HOLTZMAN: Close paren.

2 VADM TRACEY: Okay. The 38 is the sum
3 of people accused of penetrative offenses as the
4 most serious offense who are convicted of a
5 penetrative offense or a contact offense?

6 MS. PETERS: Yes, ma'am.

7 MR. STONE: I'm sorry. Which table is
8 that one?

9 MS. PETERS: This is on page 30, Table
10 5.

11 MR. STONE: Table 5.

12 CHAIR HOLTZMAN: Page 30?

13 MS. PETERS: The reason the staff was
14 suggesting to pull from that particular column is
15 it seems the case, the type of offense breakdown
16 is heavily weighted in the penetrative offense
17 column and that's where the vast majority of the
18 cases reside. And for simplicity's sake, you
19 pick a representative number to include in a
20 bullet where you're trying to be concise was the
21 staff's thought process when suggesting a
22 particular statistic.

1 In addition, I think we were referring
2 to the 70 percent, I think that aligned with
3 penetrative cases, as well, so in my mind I was
4 trying to do the same thing.

5 MR. STONE: Oh, you mean so the number
6 should be 66 percent, not 57? Is that the idea?

7 CHAIR HOLTZMAN: Not really because
8 it's, partly it's -- the 66 percent is just for
9 contact.

10 MR. STONE: Right.

11 CHAIR HOLTZMAN: And you do have a
12 combined statistic?

13 MS. PETERS: I can easily tabulate
14 one, but I don't believe it's a straight-up
15 average of the two because of the high number of
16 penetrative cases. But we could do it that way
17 if you'd like.

18 MR. STONE: Okay.

19 CHAIR HOLTZMAN: So, yes, can you
20 calculate the statistic?

21 MS. PETERS: Yes, ma'am.

22 CHAIR HOLTZMAN: Okay. That would be

1 great. So based on the, I mean, with the
2 calculation to be added, do we adopt this
3 language, yellow reading "and pleads not guilty"
4 and then "and the probability that he or she will
5 be convicted of any offense (i.e. either a sex or
6 a non-sex offense) is X percent," the X to be --

7 MS. PETERS: Yes, ma'am.

8 CHAIR HOLTZMAN: -- provided by the
9 staff. Any objection to that?

10 (No audible response.)

11 CHAIR HOLTZMAN: Okay. Hearing none,
12 it's adopted. Okay. Then I think our next
13 amendment --

14 MS. PETERS: Ma'am, I could highlight
15 where the body of the report or the executive
16 summary have been edited to conform to the
17 language that you've adopted in the findings and
18 recommendations. And beyond that, there are some
19 minor edits towards the end of the report, but if
20 you'd like to just go over here on --

21 CHAIR HOLTZMAN: Oh, on page 14?
22 That's just a conforming edit?

1 MS. PETERS: Yes, ma'am, and page 2 of
2 the executive summary, as well.

3 CHAIR HOLTZMAN: And page 2 of the
4 executive summary. Okay. All right. Do we have
5 any objections to these two amendments, pages, I
6 guess it's 10 -- I'm sorry. No, it's not 10.
7 Where are those pages?

8 MS. ROZELL: Fourteen.

9 CHAIR HOLTZMAN: What?

10 MS. ROZELL: Fourteen.

11 CHAIR HOLTZMAN: Fourteen and two.

12 Any objection to those changes?

13 (No audible response.)

14 CHAIR HOLTZMAN: Okay. What else do
15 we have? Is that it?

16 MS. PETERS: No, ma'am, there is one
17 minor, it was a staff edit on page 21. Just to
18 make you aware that on the table, on the second
19 column, there's a highlighted -- it had said DoD
20 active duty population. That would be inaccurate
21 if you factor in the Coast Guard is not part of
22 DoD so just amended it to total active duty

1 population.

2 CHAIR HOLTZMAN: Okay.

3 VADM TRACEY: But I'm still struggling
4 with this data. So are the National Guard and
5 reserves, activated National Guard and reserves
6 in the numbers in the first column?

7 MS. PETERS: I didn't read a footnote
8 or any citation that spoke specifically to that.

9 VADM TRACEY: But I'm trying to be
10 sure that we're not flagging the Army as having
11 an extraordinary number of these when, in fact,
12 it's how big they are by comparison to everybody
13 else that's driving the number, and their number
14 includes something of the National Guard and
15 something of the Army Reserve and Air National
16 Guard of some content is in the Air Force's
17 number but --

18 MS. PETERS: Yes, ma'am.

19 VADM TRACEY: A DMDC report is usually
20 pretty precise.

21 MS. PETERS: Yes, yes, it is. And I
22 read this to be the active duty population only

1 and that reserve population and National Guard is
2 broken out, it definitely broken out separately.
3 I thought you were referring to whether somebody
4 had been counted if they were mobilized.

5 VADM TRACEY: I am asking. If people
6 who are subject to the UCMJ, people who've been
7 mobilized, so if the active duty number for the
8 Army is only regular Army, then we run this
9 stating the denominator for them because they've
10 got certainly activated Guard and reserve
11 personnel right now.

12 MS. PETERS: That's the potential of

13 --

14 VADM TRACEY: Can you just clear up
15 what that actually, what that data actually is?

16 MS. PETERS: I can do that; yes,
17 ma'am.

18 CHAIR HOLTZMAN: And when you clear
19 up, will you communicate that to us?

20 MS. PETERS: Yes, ma'am.

21 CHAIR HOLTZMAN: Okay, great.

22 MR. STONE: And I'd like to confirm

1 that's an important clarification because when I
2 went to that course down in Charlottesville,
3 training SVCs and VLCs, there were a bunch of
4 reserve people there. And they said we don't,
5 you know, we're not so large that we have our own
6 training program, so we come to this one, and
7 they must have filled up 20 seats.

8 MS. PETERS: Okay.

9 CHAIR HOLTZMAN: The next edit is on
10 page 41.

11 MS. PETERS: Yes, ma'am. The first
12 edit on page 41 comes in at the bottom of the
13 second paragraph. It was, I think, the staff
14 changed the word of to on, the minor --

15 CHAIR HOLTZMAN: That grammar still
16 doesn't work. You need the underlying causes of
17 or influences on.

18 MS. PETERS: Yes, ma'am. So adding --

19 CHAIR HOLTZMAN: Anyone object to
20 that? We're just talking grammar. Okay. And
21 then there's a typo in the next paragraph. It
22 should be for instead of or.

1 MS. PETERS: Yes, ma'am.

2 CHAIR HOLTZMAN: Okay. So any
3 objections to these changes on page 41?

4 (No audible response.)

5 CHAIR HOLTZMAN: Hearing none, they're
6 adopted. Okay. Last paragraph.

7 MS. PETERS: Yes, ma'am. On page --

8 VADM TRACEY: Page 41 in the note 78,
9 maybe it's just a word missing, the first line of
10 note 78, had higher rates of case attrition.

11 MS. PETERS: Yes, ma'am.

12 PROF. TAYLOR: Good catch.

13 CHAIR HOLTZMAN: Page 42.

14 MS. PETERS: Yes, ma'am. The last
15 paragraph, the only full paragraph on page 42,
16 the first edit is intended to conform to the
17 language of Recommendation 54C, so it will read
18 to include the statistics that you all just voted
19 to approve.

20 CHAIR HOLTZMAN: And then changing the
21 parenthetical.

22 MS. PETERS: Yes, ma'am.

1 MR. STONE: In other words, you're
2 going to conform that.

3 CHAIR HOLTZMAN: Yes, okay. Any
4 objection to that?

5 (No audible response.)

6 CHAIR HOLTZMAN: Hearing none,
7 adopted. Then --

8 MS. PETERS: Yes, ma'am. We had a few
9 additional edits provided by Mr. Taylor. It
10 begins with eliminating, I think, the word that
11 right below the highlighted yellow, and it
12 changes, I think, the language in the middle of
13 the paragraph to the success rate, instead of
14 saying the chances or the probability of
15 approving that a sexual assault offense occurred
16 is rare it would read the success rate in proving
17 that a sexual assault offense occurred is low.
18 So I think those are the two edits meant to
19 reflect the success rate is low.

20 CHAIR HOLTZMAN: Three edits, that,
21 the success rate, and rare to low. Any
22 objection?

1 (No audible response.)

2 CHAIR HOLTZMAN: Hearing none,
3 adopted. I don't think that we have anymore.
4 That's it.

5 MS. PETERS: Yes, ma'am.

6 CHAIR HOLTZMAN: Okay. So aside from
7 your communicating the statistics, that's it.
8 We've approved this report. Captain, is that
9 correct?

10 CAPT TIDESWELL: Yes, ma'am.

11 CHAIR HOLTZMAN: Do we have to take a
12 formal vote on approving the report?

13 CAPT TIDESWELL: We could just do a
14 little quick one.

15 CHAIR HOLTZMAN: Okay. So subject to
16 receiving the conviction, the new tabulation of
17 the statistics that Ms. Peters promised us, all
18 in favor of approving this report say aye.

19 (Chorus of ayes.)

20 CHAIR HOLTZMAN: Opposed?

21 (No audible response.)

22 CHAIR HOLTZMAN: Hearing no

1 opposition, it's adopted. Okay. Two down.

2 Well, sort of.

3 CAPT TIDESWELL: Terri Saunders is
4 hitting print. It will be ready in five minutes.
5 I am not able to locate Ms. Friel --

6 CHAIR HOLTZMAN: Oh, okay.

7 CAPT TIDESWELL: -- investigations.
8 The other option would be to launch into the
9 final report. So I think the options are wait
10 five minutes and we'll get the printed copies
11 from Terri or we launch into the final report.

12 MR. STONE: We have very few --

13 CHAIR HOLTZMAN: Well, some people
14 might want to read this, the new opinion, so
15 maybe we want to take the time to do that.

16 MR. STONE: If you want to. I was
17 going to go through sexual assault investigations
18 first to get that one out of the way. There's
19 very little changes.

20 CHAIR HOLTZMAN: Yes, where is the
21 section?

22 MR. STONE: Tab 7. There's almost

1 nothing.

2 CHAIR HOLTZMAN: We may wait until Ms.
3 Friel on that. If we have any questions about
4 it, right.

5 MR. STONE: I don't think there's any,
6 I mean, we made those changes.

7 CHAIR HOLTZMAN: Okay. So if people
8 want to read the new one, it's right in front of
9 us.

10 MR. STONE: That's Tab 7. We'll break
11 to read it, I guess.

12 (Whereupon, the above-entitled matter
13 went off the record at 1:36 p.m. and resumed at
14 1:53 p.m.)

15 CHAIR HOLTZMAN: Has everyone gone
16 through the materials? Mr. Stone, have you gone
17 through the materials?

18 MR. STONE: What?

19 CHAIR HOLTZMAN: Have you gone through
20 the materials?

21 MR. STONE: Yes, I have.

22 CHAIR HOLTZMAN: Okay. So let's

1 start, if it's okay with you, with the item on
2 the Newlan case on page 10 of Tab 3.

3 MR. STONE: Since I was the one who
4 objected, would you like me to tell you how I
5 would modify that?

6 CHAIR HOLTZMAN: Okay.

7 MR. STONE: Okay. I would start the
8 bullet by saying an unpublished blah, blah, blah,
9 blah, United States vs. Newlan, and the reason
10 I'd say that is because I don't want somebody to
11 start trying to go look for it and find out they
12 can't find it, so if you don't have a cite you
13 say that it's unpublished, which it is.

14 Now, the second sentence, I'm sorry to
15 say, is not accurate to my liking. It should say
16 the court noted because it didn't find. This was
17 not integral to its conclusions on the
18 instructions. This is in the introduction. The
19 court noted, and then it should say that members
20 of the, and it's not panel, it's venire. The
21 venire is many more people than the panel. And
22 if you look in the footnote, the footnote itself

1 shows they're quoting about a dozen people and
2 then later they say which three of them wound up
3 on the panel.

4 So it's many members of the venire
5 received, and now you've got to go continue the
6 yellow footnote onto the next page and it says
7 prevention training from SAPRO personnel that,
8 and then I quote what the footnote quotes in the
9 first paragraph of five. It says the same thing,
10 but I think it's more accurate. It says, quote,
11 "If there's any amount of alcohol involved, it's
12 better to be safe than sorry, so just assume that
13 you can't give consent or receive consent if
14 there's alcohol." That's what it says in that
15 footnote. Now, with those words I'm fine because
16 those words are all accurate. It's not
17 summarizing, it's quoting what the judge at the
18 first level said as to what he found from the
19 venire. It also doesn't overstate SAPRO in terms
20 of, it does say the trainings must have confused
21 them, but he said and he makes a finding that the
22 members described training that was focused on

1 prevention. So I don't want to take a slap at
2 SAPRO that's not warranted. I want to say it
3 received prevention training that, but the fact
4 is that prevention training is what they led
5 people to make other statements.

6 CHAIR HOLTZMAN: Okay. Just a
7 question. Are you contesting the accuracy of the
8 quotation contained in that bullet point, which
9 is if someone ingested any alcohol that
10 individual is no longer able legally to consent
11 to --

12 MR. STONE: That is not what the
13 footnote --

14 CHAIR HOLTZMAN: No, I know. But the
15 text of the opinion on page four, quoting the
16 text, not a footnote, says many of the venire
17 replied that they had been trained by sexual
18 assault response SAPRO personnel that, quote, "if
19 someone ingested any alcohol, that individual was
20 no longer able to legally consent."

21 MR. STONE: Okay. You said quote.
22 The opinion doesn't say quote, and it has a

1 footnote and the note here in our report doesn't
2 include the footnote. So I went to the footnote,
3 which explains what the summary is. So, yes,
4 it's a summary, it's not a quote.

5 CHAIR HOLTZMAN: It's not a quote?
6 You don't think, you don't consider that the
7 quotation that's in the bullet accurate?

8 MR. STONE: I think that it's a
9 summary of the quote that isn't highlighted in
10 the same footnote, or they wouldn't have included
11 it.

12 CHAIR HOLTZMAN: I don't understand
13 what the inaccuracy is of that. I'm just curious
14 because, as I read it, it says, quote, and I'm
15 reading the next to last sentence of the yellow
16 underlined paragraph, the last paragraph, not the
17 footnote but the last paragraph in the opinion on
18 page four starting on the next to last sentence,
19 quote, I'm going word for word, "if," that's the
20 same as the word in the bullet, "someone," same
21 as the word in the bullet, "ingested," same as
22 the word in the bullet, "any alcohol," same as

1 the bullet, "that," same, "that individual was no
2 longer able to legally consent." Do you consider
3 that to be an inaccurate quote?

4 MR. STONE: It's a summary with a
5 footnote because not one single person used those
6 words, so they tried to --

7 CHAIR HOLTZMAN: But this is a --

8 MR. STONE: -- summarize what a dozen
9 people had said by summarizing it.

10 CHAIR HOLTZMAN: Right. But it's what
11 the court said. This is an accurate quote of
12 what the court said. Am I correct?

13 MR. STONE: But the court footnote --

14 CHAIR HOLTZMAN: I'm just asking you
15 yes or no about that, Mr. Stone.

16 MR. STONE: I don't have to answer yes
17 or no. I'm not being cross examined by you.

18 CHAIR HOLTZMAN: I'm just trying to
19 understand what your point is.

20 MR. STONE: The footnote says that the
21 factfinder --

22 CHAIR HOLTZMAN: Okay.

1 MR. STONE: -- was the lower court
2 judge and they included what he said. It's not
3 so different, but it doesn't mis-describe what a
4 dozen people there are saying.

5 CHAIR HOLTZMAN: Okay. Anybody have
6 any other comments about this?

7 JUDGE JONES: I have to - I'm not
8 quite sure what we want to change. Would you
9 tell me again what your suggestions are?

10 MR. STONE: Sure, sure, that the last
11 sentence say, "The court noted that many members
12 of the venire received prevention training from
13 SAPR personnel that," and then I go to this quote
14 right here, "If there's any amount of alcohol
15 involved, it's better safe than to be sorry, so
16 just assume that you can't give consent or
17 receive consent if there's alcohol."

18 That's right from the record. That's
19 what the military judge concluded. That's a
20 quote of what the judge said at the first level.
21 It's not so different, but it's the words out of
22 the footnote that are being summarized above.

1 JUDGE JONES: Well, I mean, the
2 footnote has lots of quotes.

3 MR. STONE: Yes, it does. Yes, it
4 does, and this was the military judge's
5 conclusion. It says, "concluded." He is the
6 first level person and he's talking about this
7 SAPR training. It's just thoughts right here in
8 these two lines.

9 JUDGE JONES: Well, I think we need to
10 indicate that one, that many members of the panel
11 have received SAPR training, and are you good
12 with the second sentence or are you not even
13 objecting to the first part?

14 MR. STONE: I'm not objecting if we
15 put, "an unpublished," blah, blah, blah. I'm
16 fine right up to the period. I'm only wanting to
17 go back to, "The court noted that many members of
18 the venire, not the panel."

19 JUDGE JONES: That's fine. We've got
20 that.

21 CHAIR HOLTZMAN: Okay, is there
22 anybody that objects to that change?

1 JUDGE JONES: No.

2 MR. STONE: Okay, and I have on the
3 last line, "received."

4 CHAIR HOLTZMAN: Does anybody object
5 to that change, changing the word "panel" to
6 "venire"? Okay, go ahead.

7 MR. STONE: Okay, and then the last
8 two lines, "received," that's okay, and then I
9 jump to what the judge said here in the footnote
10 on page five. "Prevention training from SAPR
11 personnel that," which is still in there, and
12 then I go quote these two lines right here from
13 the top of the first paragraph on page five. "If
14 there's any amount of alcohol involved, it's
15 better safe than to be sorry, so just assume that
16 you can't give consent or receive consent if
17 there's alcohol," closed quote.

18 JUDGE JONES: Which page, five? As
19 long as it indicates that they found that many
20 members got the wrong idea from the SAPR
21 presentation.

22 MR. STONE: Correct, and they

1 absolutely, that's still in there. That's
2 absolutely in there.

3 JUDGE JONES: Well, I would still
4 prefer to pick out, you know, there's a couple
5 here that say virtually what this is. This is
6 right from the horse's mouth -

7 MR. STONE: Except they weren't on the
8 panel.

9 JUDGE JONES: - without being
10 disrespectful of our - well, it doesn't matter
11 whether they were in the panel.

12 MR. STONE: Right.

13 JUDGE JONES: We're getting
14 information from the venire. I would like to
15 make the point better by using a quote that came
16 directly from one of the panel members who had
17 been trained by SAPR because that's what we're
18 trying to show here as opposed to this long
19 conclusion by the judge or summary by the judge.

20 I think their words are better
21 evidence, and there's lots of them. There's one
22 guy who says, "If there is alcohol involved,

1 there is no consent." That's pretty easy for our
2 purposes here, and, "Once the victim has had one
3 drink, there's no longer a legal consent."

4 We don't have to say that that's all.
5 We can just say that the impression of it was,
6 "Two members of the venire were A and B," or
7 something along those lines, but I would prefer
8 to quote something one of them actually said.

9 MR. STONE: That's okay too.

10 JUDGE JONES: Okay, so maybe we could
11 just -

12 MR. STONE: If you want it, two of
13 those people were on the panel. You can go back
14 to the panel. One of those is the one you just
15 had, Master Sergeant D. That's one of the ones
16 you want to talk about, and another one is Major
17 T.

18 JUDGE JONES: Well, "If there is
19 alcohol involved, then there is no consent," and,
20 "once the victim has one drink." Sergeant M is
21 the closest to what we're talking about and what
22 we've always been concerned about with SAPR

1 training based on what we've heard from people,
2 you know, who have come in. That's the one
3 closest to, you know, it sounds like some people
4 either understood or misunderstood from SAPR
5 training.

6 MR. STONE: Which one are you
7 choosing?

8 JUDGE JONES: The last one, "Once the
9 victim has had one drink, there is no longer," -

10 MR. STONE: Master Sergeant D?

11 JUDGE JONES: Yes, Sergeant D.

12 MR. STONE: It's Master Sergeant D.

13 CHAIR HOLTZMAN: "If a person has one
14 drink of alcohol, they may be considered
15 impaired. Therefore, they may not be able to
16 give consent."

17 JUDGE JONES: Well, D is one, and M
18 just says it even more simply. "Once the victim
19 has had one drink, there is no longer a legal
20 consent." Either or both would be -

21 CHAIR HOLTZMAN: Where is M? I'm not
22 seeing where M is.

1 JUDGE JONES: M is the very last one.

2 MR. STONE: It's the very last one.

3 CHAIR HOLTZMAN: Oh.

4 MS. SAUNDERS: I will include the
5 citation in a footnote here, and also where that
6 opinion can be found which is on the website of
7 the court. So even though it's unpublished, it's
8 still publicly available.

9 CHAIR HOLTZMAN: Okay, well, that
10 would be good for the citation, yeah.

11 MR. STONE: I still want to know
12 whether the word, if we're going to include,
13 "received prevention training from SAPR," because
14 the judge is saying in the next paragraph on the
15 top of the next page that he thinks that these
16 people are summarizing their prevention training
17 and taking it over to the legal context.

18 That's what he's saying, and that they
19 were taught to be safe rather than sorry, and he
20 thinks that what they were taught to avoid the
21 problem they are inappropriately taking to the
22 legal context, and then he instructs them to

1 ignore that training because that's not part of
2 the legal standard.

3 I mean, I can totally understand them
4 walking out saying, "Oh, the easy thing that I
5 get from that is don't even have it. Don't try
6 and deal with anybody who has had one drink
7 because you're going to be in trouble." I mean,
8 that's what the judge is saying. That's the
9 first-line judge's conclusion about having the
10 training, so I would like to say you're seeking
11 to prevent something.

12 JUDGE JONES: I don't care.

13 VADM TRACEY: They get sexual assault
14 prevention and response training.

15 MR. STONE: Okay, that's okay. That's
16 good.

17 VADM TRACEY: They get prevention and
18 response training.

19 MR. STONE: That's fine.

20 VADM TRACEY: And the statement, I
21 think, in the document says that the emphasis of
22 that training is on prevention, so it's not

1 prevention training.

2 MR. STONE: Okay, prevention or
3 response. That's fine.

4 CHAIR HOLTZMAN: Well, why do we need
5 any of that? Why can't we just say, "received
6 training from SAPR personnel?" I think it's
7 fine.

8 MR. STONE: Because I think it
9 suggests without that explanation that they were
10 being told about the legal standard, and the
11 judge is saying, "No, they weren't being told
12 about the legal standard." They were being told
13 informally, "Hey, let's avoid all these
14 problems."

15 CHAIR HOLTZMAN: And where is the
16 judge saying that this is from the legal
17 standard?

18 MR. STONE: In the first paragraph of
19 page five.

20 CHAIR HOLTZMAN: "As a result," or are
21 you talking the footnote?

22 MR. STONE: The footnote, "Not all of

1 the members agreed with the information they
2 received at SAPR training."

3 JUDGE JONES: Where are you? Oh, in
4 the footnote.

5 MR. STONE: Yes, "Not all of the
6 members."

7 JUDGE JONES: Right.

8 MR. STONE: That's the venire, "agreed
9 with the information they received at SAPR
10 training, and the military judge concluded that
11 the members' remarks described training that was
12 focused on prevention," and I guess really it
13 should say, "prevention and response, e.g., if
14 there's any amount of alcohol involved, it's
15 better safe than to be sorry, so just assume that
16 you can't give consent or receive consent if
17 there's alcohol."

18 JUDGE JONES: I don't understand the
19 point you're trying to make though.

20 MR. STONE: I'm trying to make the
21 point that the SAPR training was not a training
22 for people who were going to be serving as

1 members on a panel, and we sort of suggest that
2 in our line that this was the preventive training
3 everybody gets. "Hey, there's dynamite over
4 here. Don't go near that place," as opposed to,
5 "Don't go near that place and strike a match."

6 JUDGE JONES: I think all they're
7 trying to say - We're trying to say there is
8 something called SAPR training which includes
9 prevention and response, and some people took
10 away from that the notion that one drink and the
11 person can't give consent. That's all we're
12 saying.

13 MR. STONE: Okay.

14 JUDGE JONES: We're not saying SAPR is
15 giving out legal advice. The judge may be
16 concerned that they're going to import it in
17 their decision-making what they learned in SAPR,
18 and that's why he had to ask the questions and he
19 had to inform them. I don't know what we're
20 quibbling over.

21 MR. STONE: I completely agree with -
22 I'll tell you. I completely agree with what you

1 just said which was that some people, and you
2 said this, "took away from that training." Yes,
3 that I completely agree with.

4 CHAIR HOLTZMAN: I don't think the
5 word "some" is accurate because actually if you
6 want to read - of course you don't agree with
7 what the appellate court said here, but the
8 appellate court says "Many of the venire
9 replied," not some, many.

10 MR. STONE: No, that took away from
11 that training is what I'm talking about. In
12 other words, as it reads now -

13 CHAIR HOLTZMAN: Right.

14 MR. STONE: - it's that SAPR training
15 was wrong, and what took away from that is saying
16 the way the SAPR training was interpreted, not
17 that the training was wrong, but that the
18 training may be not clear enough for the people
19 who were taking it. It doesn't mean it's wrong.
20 It just means they might not be sophisticated
21 enough to understand what they were being told.

22 CHAIR HOLTZMAN: Well, and then -

1 MR. STONE: So if you can somehow put
2 that in there -

3 CHAIR HOLTZMAN: Then it's a fault in
4 the training. I think the point is somebody has
5 to understand. The point we're making here
6 simply is that as a result of the training,
7 whether it was intentional, negligent, stupid, or
8 whatever the cause was, SAPR training is leaving
9 this impression which gets carried into the
10 courtroom, and that impression undermines the
11 fair administration of justice.

12 MR. STONE: No, I guess I'm going to
13 have to dissent from that. I thought we were
14 saying something completely different -

15 CHAIR HOLTZMAN: Well, that's what I
16 feel. Maybe I'm wrong.

17 MR. STONE: - because the judge made
18 clear it didn't get carried in the courtroom
19 because he instructed them against them and told
20 them they absolutely couldn't consider that when
21 he heard it. He went into detail. He found it,
22 and he made sure it wasn't considered.

1 CHAIR HOLTZMAN: Right.

2 MR. STONE: I thought you were saying
3 that the SAPR training just generally is no good
4 and ought to be fixed. If you're using this case
5 to show it gets taken into the courtroom and
6 used, then no, then I don't want the case cited
7 at all.

8 CHAIR HOLTZMAN: No, what happened?
9 They didn't bring this into the courtroom?

10 MR. STONE: The judge instructed them
11 not - read the next paragraph.

12 CHAIR HOLTZMAN: Right.

13 MR. STONE: "To address this issue,
14 the military judge instructed each of these
15 members substantially as follows."

16 CHAIR HOLTZMAN: Right.

17 JUDGE JONES: Okay, how about this?
18 "The court found that many members of the venire
19 received training from SAPR personnel that led
20 them to believe that," and then we put in if
21 someone had one drink, they can't consent.

22 MR. STONE: That's better.

1 CHAIR HOLTZMAN: Excuse me, they did
2 carry it into the courtroom.

3 PROF. TAYLOR: I was about to make the
4 same suggestion, "that led them to believe that,"
5 quote, and then whatever goes in that quote. I
6 was fine with what the Chair said, that is using
7 the judge's words, but at least if you put, "that
8 led them to believe that," it doesn't fault the
9 SAPR personnel who are providing the training.

10 CHAIR HOLTZMAN: Well, I do want to
11 fault the SAPR persons who are providing the
12 training because there is a problem. This could
13 be an unintended consequence. I'm assuming it's
14 an unintended consequence. If they are not aware
15 of the unintended consequence of their training,
16 then that is the problem that needs to be
17 addressed.

18 And yes, they do carry it into the
19 courtroom because the venire is sitting in the
20 courtroom, and that's a problem. Yes, you can
21 get a judge instruction, but that creates a
22 problem. Many people don't agree with the

1 judge's instruction, so, I mean, it does create a
2 problem.

3 So, my concern is that SAPR needs to
4 be aware that this is happening. That's all.
5 I'm not saying that they're maliciously doing
6 this, far from it, but the fact is that it's
7 happening. That's my concern, and I think that's
8 what the staff was trying to do.

9 And I think that the point of this is
10 that Recommendation 59, that the Department of
11 Defense Sexual Assault Prevention and Response
12 Program ensure that sexual assault training
13 provide accurate information to military members.

14 So, I mean, we are making a
15 recommendation to them because there is a problem
16 with the training. That's the whole point of
17 this. Maybe I missed something here, but there's
18 an inadequacy in the training. I'm not saying
19 it's deliberate.

20 MR. STONE: Mr. Taylor, the only
21 suggestion I make with respect to your comment
22 would be if it's going to start with, "the court

1 found," as opposed to, "the court noted," then
2 I'd have to say, "the trial court found," because
3 the appellate court didn't make the finding.

4 They just noted what had happened
5 below, but if you want to say, "The trial court
6 found that many members of the venire received
7 prevention and response training from SAPR
8 personnel that led them to believe that," blah,
9 blah, blah. I'm fine with that.

10 JUDGE JONES: What was your
11 suggestion, Mr. Taylor?

12 PROF. TAYLOR: Well, I take the
13 Chair's comments seriously. So what if you said,
14 "that resulted in their believing?" Because, I
15 mean, I do fault the SAPR training. I agree with
16 you on that, Madam Chair.

17 JUDGE JONES: Too many people got the
18 wrong idea, so it had to come up somewhere.

19 PROF. TAYLOR: Yeah, I agree with that
20 point, but if you said, "that resulted in the
21 belief that," would that make a difference?

22 CHAIR HOLTZMAN: Yes, I mean, in fact,

1 the judge, excuse me, but as I - maybe I'm
2 misreading this case, but the appellate court
3 found that the failure of the military judge to
4 instruct the panel that one drink doesn't mean
5 you can't consent was an error on page nine.

6 MR. STONE: But then you're going to
7 the court's instructions again, which you told me
8 we're not focused on. We're focused on the SAPR
9 training which is discussed in footnote nine.

10 CHAIR HOLTZMAN: Right, but this goes
11 to the point about what's carried into the
12 courtroom, and the fact that the judge failed to
13 correct it. I mean, you're saying the judge gave
14 them an instruction to disregard, but that wasn't
15 sufficient according to the appellate courts.

16 It wasn't enough to say, "Just
17 disregard what SAPR told you." I mean, the
18 appellate court said, "Gee, this is pretty
19 serious what they've been told, so you have to
20 explicitly say."

21 So it just reinforces the point I'm
22 making that the training, you couldn't just say,

1 "Oh, well, you know, you've gotten all this
2 inaccurate, or you've gotten all this training
3 which leads you to believe that one drink is
4 bad." The judge can't just say, "Disregard it,"
5 because it's so concrete, and so specific, and so
6 incorrect.

7 VADM TRACEY: So the recommendation,
8 "The court found that many members of the venire
9 panel received training from SAPR personnel that
10 led them to believe that"?

11 CHAIR HOLTZMAN: Right, and then it's
12 one of the quotes from the footnotes.

13 MR. STONE: Well, if you guys said,
14 "The trial court found that," or, "The court
15 noted," if you're going to continue to talk about
16 the appellate court, because it didn't make a
17 factual finding. It just repeated the finding.
18 So I can go either way to say, "the court noted,"
19 because it's appellate court. We'll say, "the
20 trial court found."

21 VADM TRACEY: Okay, "The trial court
22 found that many members of the venire panel."

1 CHAIR HOLTZMAN: You don't need
2 "panel" just venire.

3 MR. STONE: Venire.

4 VADM TRACEY: Okay.

5 MR. STONE: "Received prevention and
6 response training."

7 JUDGE JONES: Technicalities.

8 MR. STONE: That's the name of the
9 group that they bring in from which they choose
10 the panel.

11 VADM TRACEY: I'm just reading, "The
12 defense counsel queried the panel venire on how
13 they interpreted it." Okay, so, "The trial court
14 found that many members of the venire had
15 received training from SAPR personnel that led
16 them to believe that, 'If a person has one drink
17 of alcohol, or once the victim has had one drink,
18 there is no longer a legal consent.'" Is that
19 the quote we want to use?

20 CHAIR HOLTZMAN: I would prefer going
21 to the appellate court because the fact that we
22 cited trial court suggests -

1 VADM TRACEY: "If someone ingested any
2 alcohol, that individual is no longer able to
3 legally consent," is that what you want to use?
4 That's the quote that is in the body.

5 CHAIR HOLTZMAN: The problem with
6 referring to the trial court is that it suggests
7 that there is some disparity between the trial
8 court and the appellate court, so I'd prefer
9 saying, "The court noted."

10 VADM TRACEY: Okay, "The court noted
11 that many members of the venire received training
12 from SAPR personnel that led them to believe
13 that, 'If someone ingested any alcohol, that
14 individual is no longer able to legally
15 consent.'"

16 CHAIR HOLTZMAN: Well, they're going
17 to have a different quote because they want to
18 have a quote from the footnote.

19 MR. STONE: Well, if you take out the
20 quotation marks, you can leave it in there
21 because no individual person actually said that.

22 CHAIR HOLTZMAN: But the court said

1 it.

2 VADM TRACEY: We don't need the
3 quotes, right? We can, just as Mr. Stone
4 suggests, we can just leave the words?

5 MR. STONE: Yes, in other words, it's
6 a summary of what's quoted later. If you want it
7 as a summary, that's one thing.

8 CHAIR HOLTZMAN: But it's the exact
9 words of the court. I don't think you can use
10 the exact words of the quote without the use of
11 quotation marks around it.

12 MR. STONE: Then you should have
13 either, "footnote omitted," after it, or put the
14 footnote in. That's the way you do stuff when
15 you quote a sentence that has a footnote after
16 it.

17 CHAIR HOLTZMAN: Well, we don't have
18 to put quotes up to the end of the sentence.

19 MS. SAUNDERS: But you're correct
20 grammatically. If we're going to quote the
21 court, I think we would put that in quotation
22 marks.

1 CHAIR HOLTZMAN: But I think if you
2 want to quote - I thought, Barbara, you and Mr.
3 Stone had said that you wanted to quote the
4 actual footnote.

5 JUDGE JONES: I said that, but I
6 gather that I'm not opposed to using the cite
7 from the appellate court, but which do you want?

8 MR. STONE: I don't care as long as
9 either you take out the quotation marks, or you
10 say, "footnote omitted," or you go to the details
11 of what's in the footnote because that's a
12 summary. That's not what any single person
13 actually said. That's a summary.

14 Most of them said, "was no longer able
15 to consent," and didn't say, "legally consent,"
16 because they were giving you their casual
17 opinion. One of two said, "legally," but most of
18 them didn't say that. So, I mean, if you want to
19 use that as a summary because it also includes
20 some people who were not on the venire, don't put
21 it in quotes.

22 That doesn't mean it's not accurate.

1 It just means that if you're going to do it, the
2 court was careful to footnote it so you could see
3 which ones, which were, I think, a majority,
4 didn't say anything about "legally consent." It
5 said, "They couldn't consent."

6 And my guess is that's what caused the
7 trial judge to say, "This was prevention and
8 response training. They weren't getting trained
9 for the courtroom. They were getting trained for
10 how they interact on the base, but it looks like
11 there might be carryover, so I'm going to
12 instruct them to ignore all of that because we're
13 in a courtroom now. We're not in the barracks."

14 JUDGE JONES: All right, how do we
15 make the quote we're trying to make which is just
16 that they were trained by SAPRO and they ended up
17 with the impression that if there was alcohol
18 involved, then there's no consent, or one drink
19 and you can't consent? That's all we're trying
20 to do here.

21 CHAIR HOLTZMAN: I think you could
22 take the - I don't mean to misrepresent what your

1 concern is, Mr. Stone, but I think if we just
2 left the present language, change the word
3 "panel" to "venire" and put after or before the
4 quote, after the quote "footnote omitted" and
5 change the word "found" to "noted" and put
6 parenthesis "footnote omitted" after the word
7 "legally consent" in quotation marks, would that
8 solve the problem?

9 MR. STONE: If we have the language
10 that Admiral Tracey threw in, yes.

11 VADM TRACEY: "The training that led
12 the personnel to believe that."

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: Then I'm fine.

15 CHAIR HOLTZMAN: Do you read that
16 back? Do you have it? Yes, have a chance to
17 read it back.

18 MS. SAUNDERS: Okay, so it should read
19 now, "The court noted that many members of the
20 venire received training from SAPR personnel that
21 led them to believe that if someone" -

22 CHAIR HOLTZMAN: Quote.

1 MS. SAUNDERS: - quote, 'If someone
2 ingested any alcohol, that individual was no
3 longer able to legally consent,' closed quote,
4 parentheses, "(footnote omitted)." Does that
5 work?

6 CHAIR HOLTZMAN: Okay, any objection?

7 PROF. TAYLOR: No.

8 MR. STONE: No objection.

9 CHAIR HOLTZMAN: So that's adopted.
10 Okay, so is that - oh, no, that doesn't finish.
11 We have to go back to -

12 MS. SAUNDERS: We have - I handed out
13 two pieces of paper to you.

14 CHAIR HOLTZMAN: Right.

15 MS. SAUNDERS: And these are proposed
16 bullets for some of the recommendations.

17 CHAIR HOLTZMAN: Pages eight and ten,
18 right.

19 MS. SAUNDERS: Right, it depends. If
20 you want to refer to tab three, the pages are
21 slightly different, but on tab three,
22 recommendation 53 begins on page six and ends on

1 page seven.

2 CHAIR HOLTZMAN: Okay.

3 MS. SAUNDERS: And -

4 CHAIR HOLTZMAN: So that's page seven.

5 MS. SAUNDERS: Right, so the
6 highlighted, the first highlighted page with the
7 shorter material -

8 CHAIR HOLTZMAN: Right.

9 MS. SAUNDERS: - is proposed as -

10 CHAIR HOLTZMAN: On page number eight,
11 the handout page number?

12 MS. SAUNDERS: It is, and I'm sorry.

13 I took that from another -

14 CHAIR HOLTZMAN: No, that's all right.

15 MS. SAUNDERS: - document.

16 CHAIR HOLTZMAN: Don't worry about it,
17 and it relates to pages six and seven.

18 MS. SAUNDERS: I would propose this be
19 the second bullet under the recommendation. So
20 the first bullet would be the fiscal year 2017 -

21 CHAIR HOLTZMAN: Right.

22 MS. SAUNDERS: - NDAA, and then this

1 would be the second bullet.

2 CHAIR HOLTZMAN: Okay.

3 MS. SAUNDERS: And it would read, "On
4 July 11, 2017, the Joint Service Committee on
5 Military Justice published for public comment
6 proposed disposition guidance under Article 33
7 UCMJ. The JPP reviewed and assessed Sections 2.1
8 and 2.3 of the proposed guidance, and notes that
9 Section 2.1(h) is generally consistent with the
10 JPP proposed standard."

11 CHAIR HOLTZMAN: Any comment, Mr.
12 Stone? Do you have a comment about that?

13 MR. STONE: With that yellow bullet,
14 no.

15 CHAIR HOLTZMAN: Okay, the only thing,
16 should it say "noted" because we say "reviewed
17 and assessed," or is it and notes?

18 MR. STONE: What do you want to say,
19 "reviewed and noted," or, "noted?"

20 CHAIR HOLTZMAN: No, no, no, but the
21 "noted" is in the present tense.

22 MR. STONE: Oh, okay, okay.

1 VADM TRACEY: I do think that we have
2 not actually assessed, right?

3 MR. STONE: Yes.

4 CHAIR HOLTZMAN: Okay, so we're taking
5 out "assessed?"

6 VADM TRACEY: I think, "The JPP noted
7 that Sections 2.1 and 2.3 of the proposed
8 guidance, and notes that."

9 CHAIR HOLTZMAN: Well, you can repeat
10 that.

11 VADM TRACEY: Yes.

12 MR. STONE: Oh, so just put all -

13 VADM TRACEY: So "reviewed those
14 sections."

15 CHAIR HOLTZMAN: Yes, "reviewed," I
16 think "reviewed" is okay, and, "notes that."
17 Notes or noted, notes? Okay, fine. So take out
18 "assessed," and with that change, is there any
19 objection to that bullet point as it is? Hearing
20 none, that's adopted.

21 Okay, now is there something else that
22 we have to do on page seven?

1 MR. STONE: Yes.

2 CHAIR HOLTZMAN: Because this relates
3 to page seven.

4 MR. STONE: Yes, it relates to page
5 seven and tab -

6 MS. SAUNDERS: Three.

7 MR. STONE: - three, okay. Now, I had
8 a lot of stuff I wanted to put in in the second
9 bullet, but I don't need it because it's all in
10 the Joint Service Committee report, and I didn't
11 feel that the American Bar Association bullet
12 said it all, but that's also in the Joint
13 Service's report, so I'm fine now with that. And
14 now I move down to the last bullet.

15 CHAIR HOLTZMAN: Last bullet.

16 MR. STONE: And I only have a concern.
17 I would strike basically what amounts to pretty
18 much the last line after the words, "in making
19 disposition decisions." I mean, after that it
20 says, "such as the credibility of the victim and
21 the likelihood of obtaining a conviction at
22 trial."

1 Given all of the stuff we have before,
2 we don't need that, and there is absolutely
3 nothing in any of the standards that are referred
4 to above, any of them that talks about the
5 credibility of the victim.

6 We talk about the likelihood of
7 obtaining a conviction at trial, but I don't
8 think we need to say that again. So at a
9 minimum, I would strike the words "the
10 credibility of the victim and," but I don't think
11 you need anything after "disposition decisions."
12 And to the extent you say something, you're not
13 inconsistent with the Joint Service Committee
14 proposal.

15 CHAIR HOLTZMAN: Any comment? Why are
16 you taking out the words "at trial?" Oh, you
17 mean because it could be a plea?

18 MS. SAUNDERS: It's not. That's just
19 where the -

20 CHAIR HOLTZMAN: Okay, fine, all
21 right. Any comments?

22 VADM TRACEY: Did the - so weren't

1 there some comments on the credibility of the
2 victim as one of the factors?

3 CHAIR HOLTZMAN: I can't remember.

4 MR. STONE: No, credibility is not
5 mentioned.

6 CHAIR HOLTZMAN: Actually, I don't
7 have a problem with taking out credibility
8 because I don't recall, but maybe -

9 JUDGE JONES: I don't remember either
10 specifically.

11 CHAIR HOLTZMAN: So that -

12 JUDGE JONES: It's certainly a factor,
13 but there's lots of factors, so.

14 CHAIR HOLTZMAN: Right, and the
15 likelihood of obtaining conviction would include
16 the credibility of the victim, so.

17 JUDGE JONES: Yes, yes, okay.

18 PROF. TAYLOR: I have no problem with
19 deleting that.

20 CHAIR HOLTZMAN: Okay, so I have no
21 problem, so your suggestion about deleting the
22 credibility of the victim is adopted. And I

1 guess just reading this, this is - I'd like to
2 make another suggestion. We say, "The convening
3 authority should be allowed to take into
4 account." That's not really what we're talking
5 about that they "should be allowed to take into
6 account," that they, "should be required to take
7 into account."

8 MR. STONE: So "should take into
9 account."

10 CHAIR HOLTZMAN: Or "should take into
11 account," right.

12 PROF. TAYLOR: I agree with that.

13 VADM TRACEY: Yes.

14 CHAIR HOLTZMAN: So we strike out
15 "should be allowed," and we just have "to take
16 into account." Is there any objection?

17 MR. STONE: No, not the "to," "should
18 take."

19 CHAIR HOLTZMAN: Yes, "should take,"
20 right.

21 JUDGE JONES: And that what will it
22 read, "to take into account other factors in

1 making disposition decisions including the
2 likelihood of obtaining"?

3 CHAIR HOLTZMAN: Well, we can have
4 "such as the likelihood of obtaining a
5 conviction."

6 JUDGE JONES: Okay.

7 CHAIR HOLTZMAN: I mean, I don't have
8 to change that. Okay, so any objection to this
9 as it stands?

10 PROF. TAYLOR: None.

11 JUDGE JONES: No.

12 CHAIR HOLTZMAN: Okay, all right, so
13 now where are we, up to the second change on page
14 ten which relates to which of Mr. Stone's
15 changes?

16 MS. SAUNDERS: This comes under
17 recommendation 56 in tab three. This would be on
18 page nine.

19 CHAIR HOLTZMAN: Oh.

20 MS. SAUNDERS: This is a proposed
21 bullet that would go under recommendation 56.

22 CHAIR HOLTZMAN: Right.

1 MS. SAUNDERS: And this is replacing
2 the other material. It reads, "The JPP notes two
3 sexual assault courts-martial appellate cases
4 that received media attention, both of which came
5 to light following the Subcommittee's issuance of
6 its report that underscored the JPP's concerns
7 related to perceived pressure on convening
8 authorities. The first case, United States v.
9 Barry, involves an allegation by the convening
10 authority."

11 CHAIR HOLTZMAN: And the footnote
12 there would be a citation to the case, is that
13 correct?

14 MS. SAUNDERS: Right.

15 MR. STONE: But it isn't. That's not
16 a citation to the case.

17 CHAIR HOLTZMAN: But it will footnote.

18 MR. STONE: Well, there's 14 on that
19 page. I'll give you the cite. I have it.
20 There's an actual cite where people can find it.

21 MS. SAUNDERS: Oh, this is to the
22 actual - this is for the reconsideration granted

1 by CAAF.

2 MR. STONE: There's a cite to that
3 too.

4 MS. SAUNDERS: Okay.

5 MR. STONE: There's cites to all of
6 them.

7 MS. SAUNDERS: "Involves an allegation
8 by the convening authority that he felt pressure
9 to approve the findings of the case based on
10 political scrutiny regarding the military's
11 handling of sexual assault cases and comments
12 from senior military leadership.

13 "The convening authority stated that
14 even though he was convinced, he should
15 disapprove the findings in the case. He approved
16 the findings based on his consideration of the
17 Navy's interest in avoiding the perception that
18 military leaders were sweeping sexual assaults
19 under the rug.

20 "The second case, United States v.
21 Boyce, involved senior civilian and military
22 leaders reportedly giving the convening authority

1 an ultimatum to retire or be removed from his
2 position based on his failure to refer a separate
3 sexual assault case to court-martial."

4 CHAIR HOLTZMAN: I had a suggestion
5 about condensing the second sentence when you
6 first mention United States v. Barry because I
7 don't think the first description is necessary.

8 MS. SAUNDERS: Okay.

9 CHAIR HOLTZMAN: So I think it's
10 enough to say, "The first case, United States v.
11 Barry," and maybe the wording here isn't perfect,
12 "involves an allegation by the convening
13 authority that even though he was convinced he
14 should disapprove the findings in the case, he
15 approved the findings based on his
16 consideration."

17 In other words, take out "He felt
18 pressure," blah, blah, blah, because I don't know
19 that we need that, but if you disagree - it's
20 just a way of condensing it, but maybe the
21 pressure point is important.

22 MR. STONE: It's not an allegation -

1 CHAIR HOLTZMAN: Right.

2 MR. STONE: - by the convening
3 authority. It's an allegation by the defense
4 counsel. That's why they're having a hearing.

5 CHAIR HOLTZMAN: Well, you could have
6 a statement by the convening authority because it
7 was contained in a document.

8 MR. STONE: Well, it's not a
9 statement. It's an affidavit, and he hasn't
10 stated -

11 CHAIR HOLTZMAN: He's making the
12 statements in the affidavit.

13 JUDGE JONES: Right.

14 MR. STONE: At this point he hasn't
15 been cross examined, and as I say, he nowhere
16 says, "I did this because of the pressure." He
17 doesn't say that.

18 CHAIR HOLTZMAN: He doesn't say
19 "pressure," but he says what I'm just quoting.
20 I'm just saying take out the characterization of
21 what he did.

22 MR. STONE: Okay.

1 CHAIR HOLTZMAN: And just use the
2 quote. So it would be just simply - where is the
3 quote? Where does it start? "The convening
4 authority stated that even though he was
5 convinced he should disapprove the finding, he
6 approved the finding based on," quote. That's
7 where we pick up his quote.

8 So basically it's not characterizing
9 what - I mean, I guess we could quote more from
10 it, but basically I took out the stuff that he
11 felt pressure and so forth because I thought it
12 was redundant actually, but I don't know how the
13 rest of you feel. Maybe you think that's too
14 much of an excision.

15 JUDGE JONES: I would have left it in.

16 CHAIR HOLTZMAN: Okay, well, do you
17 want to leave it in?

18 JUDGE JONES: I think pressure is
19 important.

20 CHAIR HOLTZMAN: Okay.

21 MR. STONE: Okay, so tell me which
22 words you're dropping out first. "The first

1 case, United States v. Barry, involves an
2 allegation by the defense counsel that the
3 convening authority approved the findings of the
4 case based on the political scrutiny regarding
5 the military's handling of sexual assault cases."

6 Is that what you're saying?

7 CHAIR HOLTZMAN: Based on the pressure
8 he felt.

9 MR. STONE: No, no, no, he never says
10 the pressure he felt. He says, "the pressure
11 that was out there." He never said that they
12 applied it to him. There's no allegation that
13 anybody said anything to him. We're talking
14 about -

15 CHAIR HOLTZMAN: Well, I thought we
16 were talking about an allegation by defense
17 counsel. Isn't the defense counsel alleging that
18 he felt pressure? I mean, that you - well.

19 MR. STONE: Okay, "approved the
20 findings based on scrutiny and the comments from
21 senior," -

22 CHAIR HOLTZMAN: Well, you could -

1 MR. STONE: I think we could stop
2 right after "senior military leadership" and not
3 get into "stated" because he didn't state
4 anything or "under the rug." You've made your
5 point right there, I think, and it doesn't say
6 anything about what's going to be remanded.

7 CHAIR HOLTZMAN: Well, I think you
8 need to have the quote from the affidavit that he
9 submitted. I think that that's very important
10 because it said what was in his mind. That's my
11 view about that.

12 MR. STONE: Well, he hadn't stated it.
13 What do you want to say, "averred?" He didn't
14 state anything.

15 CHAIR HOLTZMAN: Well, if a
16 statement's contained in an affidavit, to me, I
17 think the English word "state" certainly includes
18 that, but that may be my limited understanding of
19 English.

20 JUDGE JONES: I'm not opposed to going
21 to his declaration and quoting it, then we don't
22 have to get involved in -

1 CHAIR HOLTZMAN: Right,
2 characterizations.

3 JUDGE JONES: The declaration from
4 this is from this case and involved in this case,
5 and then I think we should just take the quotes
6 from the convening authority's declaration.

7 CHAIR HOLTZMAN: Correct, that's what
8 I was trying to do, but I think you said it
9 better.

10 MR. STONE: And then you got to say -
11 what do you want to say, "The convening authority
12 has stated in a declaration"?

13 JUDGE JONES: I don't really care how
14 we say it, but I want it out of the declaration.

15 MR. STONE: Well, it's got to say
16 something like that.

17 JUDGE JONES: Well, of course.

18 MS. SAUNDERS: "The declaration from
19 the convening authority states," and then quote.

20 JUDGE JONES: Right.

21 MS. SAUNDERS: Okay.

22 JUDGE JONES: Yes.

1 CHAIR HOLTZMAN: Well, you can say,
2 "In the first case, United States v. Barry, the
3 convening authority," -

4 JUDGE JONES: "Submitted a
5 declaration."

6 CHAIR HOLTZMAN: - "submitted a
7 declaration that stated," colon, and then take
8 out the quote.

9 MR. STONE: Okay, so we're going to
10 drop most of what's in that sentence now and just
11 go, "In the first case, the United States v.
12 Barry, the convening authority stated in a
13 declaration."

14 PROF. TAYLOR: So are you proposing
15 now to leave out the phrase that I thought the
16 Chair earlier had in, but I may have misheard it,
17 "even though he was convinced," -

18 CHAIR HOLTZMAN: Yes.

19 PROF. TAYLOR: - "he should
20 disapprove."

21 CHAIR HOLTZMAN: Right.

22 PROF. TAYLOR: You're going to omit

1 that?

2 CHAIR HOLTZMAN: No.

3 PROF. TAYLOR: You're not?

4 CHAIR HOLTZMAN: That's a quote. It's
5 part of the quote.

6 MR. STONE: No, that's not part of the
7 quote.

8 CHAIR HOLTZMAN: Oh, it's not part of
9 the quote, oh.

10 PROF. TAYLOR: It is not part of the
11 quote.

12 MR. STONE: No.

13 PROF. TAYLOR: That's why I was
14 seeking clarification.

15 JUDGE JONES: Where is the quote?

16 CHAIR HOLTZMAN: Where is the
17 declaration again?

18 MS. SAUNDERS: It's on tab four.

19 VADM TRACEY: "Even though I was
20 convinced then and am convinced now that I should
21 have disapproved the findings," -

22 JUDGE JONES: I think it's all in the

1 declaration.

2 MR. STONE: In different places.

3 JUDGE JONES: Yes.

4 VADM TRACEY: - "military leaders were
5 sweeping sexual assaults under the rug."

6 PROF. TAYLOR: Yes, so I was looking
7 at what's actually in quotation marks.

8 CHAIR HOLTZMAN: Yes, so let's use
9 that whole quote that he has.

10 PROF. TAYLOR: Yes, I'm okay with
11 that.

12 VADM TRACEY: So I'll just use the
13 whole quote.

14 CHAIR HOLTZMAN: Where is that quote
15 contained?

16 VADM TRACEY: It's in tab four, page
17 two.

18 MR. STONE: It's on page two -

19 CHAIR HOLTZMAN: Oh, sorry.

20 MR. STONE: - of the second document
21 in tab four.

22 VADM TRACEY: It's in appendix one.

1 CHAIR HOLTZMAN: Right, right, thank
2 you.

3 JUDGE JONES: Everything that was in
4 your synopsis, Terri, can be taken out of this
5 and quoted. He even has the, "He wanted to avoid
6 the perception that leaders were sweeping sexual
7 assault under the rug." I mean, I think
8 everything that you took out is what I'd like to
9 see in there, but we should quote it right from
10 the declaration.

11 CHAIR HOLTZMAN: We could even include
12 the first sentence which is, "I perceived that if
13 I were to disapprove the findings the case, it
14 would adversely affect the Navy even though I was
15 convinced then and convinced now," if you wanted
16 that too. I don't mind that first sentence
17 either.

18 MR. STONE: Yes, I'd like that
19 sentence in there because that shows there was no
20 undue command influence, that he was talking
21 about how it would affect the Navy, not him
22 personally. That's exactly the point. That's

1 what's going to come out at the hearing. "I was
2 worried about the Navy generally. Nobody said
3 anything to me, but I was worried about the
4 Navy."

5 JUDGE JONES: None of us are worried
6 about the outcome of this case.

7 MR. STONE: I know, but every
8 convening authority was aware that there was
9 consternation about what the Navy was doing, and
10 that's exactly why in that case I cited before,
11 the Navy-Marine Corps took special action in the
12 Howell case to make sure they wouldn't continue
13 that way in 2014.

14 Now, some of these guys didn't get the
15 message. I mean, he says in the paragraph above,
16 "Would bring hate and discontent on the Navy from
17 the President," who was President Obama at the
18 time, "as well as senators," and he names some
19 senators, "hate and discontent." His mind was
20 really in the wrong place.

21 CHAIR HOLTZMAN: Well -

22 MR. STONE: I've never heard of a

1 judge saying, "I was worried it was going to
2 bring hate and discontent on the Navy."

3 CHAIR HOLTZMAN: But in terms of
4 pressure, in fact if you read the next paragraph,
5 paragraph eight, he has a conversation prior to
6 his action in this case. He meets with Vice
7 Admiral Nanette DeRenzi, then Judge Advocate
8 General of the Navy.

9 She mentioned, skipping down, every
10 three or four months, military commanders making
11 court-martial decisions that got questioned by
12 Congress and other political and military
13 leaders, including the president. "This
14 conversation reinforced my perception of the
15 political pressures the Navy faced at that time."

16 MR. STONE: That's right, and you need
17 that sentence again. It reinforced his own
18 perception. It didn't say, "It reinforced what
19 she told me," or, "It reinforced what anybody
20 else told me."

21 VADM TRACEY: I think that the quote
22 that we had is -

1 MR. STONE: He screwed up walking
2 around saying, "They're going to hate the Navy."
3 That's his perception.

4 VADM TRACEY: I think that the quote
5 that we have is sufficient for the purposes for
6 which we are citing these two cases.

7 CHAIR HOLTZMAN: Right, I'm just
8 saying that there is - his declaration does refer
9 to political pressure -

10 VADM TRACEY: Yes.

11 CHAIR HOLTZMAN: - and in fact uses
12 the word, and it's not only a pressure that's in
13 the air, but it's something that he felt because
14 it refers to "my perception."

15 MR. STONE: That's what that next case
16 called, that the Shea case calls undo influence
17 in the air. That's exactly what they call it, in
18 the air, not said to you directly, and that's
19 what they'll decide at this rehearing.

20 CHAIR HOLTZMAN: Right, but what the
21 legal standard is may not be what the standard is
22 that we want to see in the military and for a

1 standard of justice, two different things.

2 Anyway, so are we satisfied with that
3 change, with the quotes for dealing with the
4 first case of U.S. v. Barry? Anybody else have
5 any - Judge Jones, are you satisfied with it?

6 JUDGE JONES: Yes.

7 CHAIR HOLTZMAN: Okay, but what about
8 the second case? My concerns about that were I
9 don't know what "failure to report a separate
10 sexual assault case," what does separate refer
11 to? What were the reasons given for the
12 ultimatum?

13 MS. SAUNDERS: I was trying to avoid
14 it. It's rather convoluted because the - I was
15 trying to shorten it and obviously did not do so
16 very effectively. There was a separate case
17 called the United States v. Wright, and the
18 general at the time did not want to refer charges
19 in that sexual assault case on the advice of his
20 staff judge advocate.

21 He then received a call from the Chief
22 of Staff of the Air Force saying, you know, "The

1 Secretary of the Air Force has lost confidence in
2 you, and you either need to resign, or retire, or
3 she's going to remove you from this position."

4 CHAIR HOLTZMAN: Because you haven't -
5 she's lost confidence in you because you haven't
6 referred this case to a court-martial?

7 MS. SAUNDERS: Because he declined to
8 refer it. This is the same general that
9 previously had overturned the conviction on
10 another -

11 CHAIR HOLTZMAN: I'm trying to
12 understand. There has to be something that links
13 what happened in United States v. Boyce to -

14 MS. SAUNDERS: Right.

15 CHAIR HOLTZMAN: - put some kind of
16 pressure on him because of his failure to refer
17 the case.

18 MS. SAUNDERS: Right, but this is what
19 happened, so this was made based on the other -

20 CHAIR HOLTZMAN: Have we said,
21 "because of his failure to refer a case to court-
22 martial"? That would clarify it for me. That

1 was my concern.

2 MS. SAUNDERS: Okay, I just didn't
3 want to give the misleading impression that he
4 failed to refer this case to court-martial. It
5 was actually a different case.

6 CHAIR HOLTZMAN: Okay, "based on his
7 failure to refer."

8 MR. STONE: That's not the holding in
9 the case or the facts. That's the background.
10 The holding in the case was that there was only
11 an appearance of unlawful command influence, and
12 not any actual unlawful command influence.
13 That's the holding.

14 MS. SAUNDERS: But I -

15 MR. STONE: So you're citing the case
16 for something that is completely irrelevant.
17 It's the historical background and it's not any
18 of the holdings or any of the legal discussion.

19 MS. SAUNDERS: Ms. Holtzman just asked
20 me about why I used the wording that I did, and I
21 was trying to explain to her the procedural
22 background of the case and why this happened.

1 CHAIR HOLTZMAN: Okay, well, I would
2 be more comfortable - I would understand this
3 point better if it said, "Based on his failure,"
4 and it said, "because of his failure to refer,"
5 should be just a - why do we need a separate
6 sexual assault case to court-martial?

7 MS. SAUNDERS: Okay, so just remove
8 "separate?"

9 CHAIR HOLTZMAN: Yes.

10 MS. SAUNDERS: Okay.

11 CHAIR HOLTZMAN: If that's clear. To
12 me, it's just a clarifying on that.

13 MS. SAUNDERS: And I could clarify in
14 the footnote that this other case was U.S. v.
15 Wright if that would help.

16 CHAIR HOLTZMAN: Yes, fine, we can add
17 a footnote to that.

18 MR. STONE: Okay, I guess I'm going to
19 object to that because U.S. v. Wright has nothing
20 to do with the analysis, the discussion, or the
21 holding in U.S. v. Boyce. It's simply historical
22 background. It has nothing to do with the

1 outcome of the case.

2 If you want to cite United States v.
3 Wright, then maybe that's what you want to do,
4 but United States v. Boyce has nothing to do with
5 that case, and he absolutely didn't fail to refer
6 a sexual assault case to court-martial, which is
7 what you now want to say if you're not going to
8 say, "a separate case." It's a complete
9 misdescription of this case.

10 MS. SAUNDERS: If you look at the -

11 CHAIR HOLTZMAN: If you said
12 "describes" instead of "involves," is that a more
13 accurate statement about what United States v.
14 Boyce is about? Is it a description of what
15 happened in that?

16 JUDGE JONES: What is - I'm sorry. I
17 read this. What is inaccurate about this?

18 MR. STONE: What's inaccurate is, and
19 I wrote a whole memo that everybody got -

20 JUDGE JONES: The word "involves"
21 means "involves."

22 MR. STONE: But the case doesn't

1 involve an ultimatum to retire or be removed
2 based on a failure to refer.

3 VADM TRACEY: How about the media
4 coverage of the second case?

5 MR. STONE: That's a different case,
6 right, used before that involved that.

7 VADM TRACEY: How about "media
8 coverage of a second case, United States v.
9 Boyce, brings to light incidents involving senior
10 military leaders reportedly giving," yada, yada,
11 yada?

12 CHAIR HOLTZMAN: Wait a minute. Can
13 we go into Boyce for a second?

14 MS. SAUNDERS: I'm happy to explain
15 why Boyce is related to Wright if you're
16 interested.

17 CHAIR HOLTZMAN: Yes, why is Boyce
18 related to this issue? Does this issue come up
19 in that case, not as an issue? Does the court
20 refer to these facts in that case?

21 MS. SAUNDERS: It does.

22 CHAIR HOLTZMAN: In the opinion?

1 MS. SAUNDERS: It does.

2 CHAIR HOLTZMAN: Can we quote from the
3 court's opinion?

4 MS. SAUNDERS: I would have to see how
5 lengthy it is, but I can certainly do that. I
6 mean, but it's intricately tied, the Wright case
7 is intricately tied to the Boyce case in its
8 background, and that's why I cite to it, because
9 of his failure to refer charges in the Wright
10 case, that caused the Secretary of the Air Force
11 to lose confidence in his ability to lead -

12 CHAIR HOLTZMAN: Right.

13 MS. SAUNDERS: - for giving him the
14 ultimatum to either retire or she would remove
15 him from his position.

16 CHAIR HOLTZMAN: And what did he do?

17 MS. SAUNDERS: He decided to retire.

18 CHAIR HOLTZMAN: Right.

19 MS. SAUNDERS: And then unbeknownst to
20 anyone at a senior leadership level, he referred
21 charges in a sexual assault case of U.S. v. Boyce
22 several days -

1 MR. STONE: Are you going to put in
2 there what -

3 MS. SAUNDERS: If I may please finish,
4 he referred charges in U.S. v. Boyce several days
5 later. Then there was a motion.

6 CHAIR HOLTZMAN: Several days after he
7 was -

8 MS. SAUNDERS: After he made the
9 decision to retire.

10 CHAIR HOLTZMAN: Oh, but not after he
11 retired?

12 MS. SAUNDERS: No.

13 CHAIR HOLTZMAN: Before he retired?

14 MS. SAUNDERS: Before he retired, he
15 made the decision in his mind to retire.

16 CHAIR HOLTZMAN: Right.

17 MS. SAUNDERS: Later, he then referred
18 charges in the U.S. v. Boyce case, and then the
19 defense counsel raised a motion of unlawful
20 command influence based on this ultimatum in the
21 Wright case that was given to him.

22 CHAIR HOLTZMAN: Okay.

1 MS. SAUNDERS: And so the CAAF
2 analyzes it in this regard.

3 CHAIR HOLTZMAN: And what do they
4 conclude?

5 MS. SAUNDERS: They conclude that
6 there was apparent unlawful - while there was no
7 actual unlawful command influence, there was
8 apparent unlawful command influence.

9 MR. STONE: And there's no actual
10 unlawful command influence because it recites
11 that he made the decision to retire before there
12 was any statement in the press, "Do this or I'll
13 fire you, or retire."

14 MS. SAUNDERS: Correct.

15 MR. STONE: And everybody conceded
16 that there was absolutely no question there was
17 no unlawful command influence in the case and it
18 didn't affect the military.

19 And the only decision was whether
20 people outside the military, meaning the media,
21 would take this case incorrectly, and they
22 thought they would and they didn't like that, so

1 they said, "the public perception," which they
2 cite three different times, "is the standard,"
3 not anything that happened in the military or any
4 changes to military law.

5 CHAIR HOLTZMAN: So he was called by
6 the - he was never called by the Secretary of the
7 Army?

8 MS. SAUNDERS: The Chief of Staff of
9 the Air Force.

10 CHAIR HOLTZMAN: He was never called
11 by the Chief of Staff?

12 MS. SAUNDERS: He was called by the
13 Chief of Staff.

14 CHAIR HOLTZMAN: So the Chief of Staff
15 did tell him that he had to retire or resign
16 because he didn't refer this case?

17 MS. SAUNDERS: Right, he told him that
18 the Secretary of the Air Force had lost
19 confidence in his ability to lead and he had this
20 choice.

21 CHAIR HOLTZMAN: Can we quote this?
22 It seems pretty clear to me.

1 MS. SAUNDERS: I'll pull some quotes
2 out, absolutely.

3 CHAIR HOLTZMAN: Does that solve your
4 problem, Barbara?

5 JUDGE JONES: Yes.

6 CHAIR HOLTZMAN: Does that solve
7 everybody's problems? Do you want to see if you
8 can provide us the quotes before we -

9 MS. SAUNDERS: Oh, certainly.

10 CHAIR HOLTZMAN: - finish up today and
11 then maybe Mr. Stone would agree with it too? I
12 don't know.

13 MS. SAUNDERS: Absolutely.

14 CHAIR HOLTZMAN: Would that help you
15 if we quote it before?

16 MR. STONE: I'll look at it.

17 CHAIR HOLTZMAN: Okay.

18 MR. STONE: But I gave you a memo that
19 has seven reasons why this case stands for
20 exactly the opposite of what it's being cited for
21 here, that it shows how the military bends over
22 backwards when there's no unlawful command

1 influence and worries about people outside the
2 military getting the wrong impression, and goes
3 ahead and sends it back for a new trial because
4 it has no implications as to the guilt or
5 innocence of the person in the sexual assault
6 trial.

7 MS. SAUNDERS: And I can certainly -

8 MR. STONE: And they say that he
9 shouldn't get an unwarranted windfall and they're
10 sending it back, so this only has to do really
11 with the media, so I don't think it has anything
12 at all to do with either unlawful command
13 influence or in any way United States v. Barry or
14 even United States v. Wright, which he may have
15 been involved in, but has nothing whatsoever to
16 do with this case.

17 CHAIR HOLTZMAN: I don't know. It
18 seems to me when the Secretary of the Army calls
19 somebody -

20 MR. STONE: I can email the - I'll
21 email the Captain the copy and she can find out
22 and give you the citation.

1 CHAIR HOLTZMAN: Yes, I think I've got
2 it.

3 MR. STONE: Because the citation is
4 publicly available to everybody, and no decision,
5 I understand, has been made yet on whether or not
6 there should be a petition for certiorari in that
7 case. The case is not final, and the time to
8 petition for cert is still running.

9 CHAIR HOLTZMAN: Yes, but the cert is
10 not going to be granted in this case.

11 MR. STONE: Well, I'm not on the
12 Supreme Court, so I don't know.

13 CHAIR HOLTZMAN: But the chances are
14 like minus in this kind of case, okay.

15 MS. SAUNDERS: I'd be happy -

16 MR. STONE: I might add it's a four to
17 three decision. Three of the judges on the CAAF
18 disagreed with that holding. Five judges below
19 on the Military Court of Appeals disagreed with
20 the majority, and the original trial judge.

21 So you had nine judges who think the
22 outcome is wrong, and you've got four who think

1 it's right. So I think potentially, it's not a
2 silly case in terms of whether or not the Supreme
3 Court will be interested in it.

4 CHAIR HOLTZMAN: I don't see the
5 federal -

6 JUDGE JONES: I just want to say that
7 it doesn't matter how this case comes out, how it
8 came out originally, or what happens in the
9 future. It's a story that is perfect to
10 illustrate what we're talking about, which is
11 that there is real or perceived pressure, and I
12 mean, that's the point. These are illustrations,
13 not legal propositions.

14 MS. SAUNDERS: Yes, ma'am, and that's
15 why I included it, and I should have made that
16 more clear. I apologize.

17 CHAIR HOLTZMAN: Okay, so we're
18 finished with - based on - is there anything else
19 that we have to address in Mr. Stone's comments
20 aside from your rewriting page 10 and Mr. Stone's
21 comments on page three, in tab three? Is that
22 it?

1 MS. SAUNDERS: Unless you all have
2 anything else, I'll work on that.

3 CHAIR HOLTZMAN: Okay, going, going,
4 gone.

5 MS. SAUNDERS: Okay.

6 CHAIR HOLTZMAN: All right, so subject
7 to that, we are finished with this report. Okay,
8 so next we have?

9 CAPT TIDESWELL: It's the sexual
10 assault investigations report, ma'am. I would
11 recommend a five-minute break perhaps and we'll
12 get Ms. Friel on the phone.

13 CHAIR HOLTZMAN: Yes, let's do that.

14 CAPT TIDESWELL: Yes, ma'am.

15 CHAIR HOLTZMAN: All right.

16 (Whereupon, the above-entitled matter
17 went off the record at 2:52 p.m. and resumed at
18 3:07 p.m.)

19 CHAIR HOLTZMAN: Okay, Admiral Tracey
20 has come, so now the whole panel is here. Lisa
21 Friel is on the phone. She's a member of the
22 subcommittee and is prepared to provide - what do

1 we call her?

2 CAPT TIDESWELL: Subject matter
3 expert.

4 CHAIR HOLTZMAN: Subject matter
5 expert. That's what you are, Ms. Friel.

6 MS. FRIEL: Okay.

7 CHAIR HOLTZMAN: It's a hell of a
8 title, okay.

9 MS. FRIEL: It takes 30 something
10 years to get it.

11 CHAIR HOLTZMAN: Right, okay, so we're
12 on page five of tab seven.

13 MS. FRIEL: Got it.

14 CHAIR HOLTZMAN: Okay, and Mr. Stone
15 has a number of corrections or amendments to the
16 bullet points under Recommendation 50, so should
17 we start with bullet point number one?

18 MS. STONE: Well, why don't I just
19 introduce them a second?

20 CHAIR HOLTZMAN: Yes, sure.

21 MS. STONE: They actually are just a
22 reorganization. Stuff from some bullets was

1 moved to other bullets, etcetera. At the time we
2 discussed this, Admiral Tracey ticked off a
3 number of points and said, "We want to make point
4 one, two, three, and four," and I agreed that's
5 what we wanted to say.

6 And so then I went back and I tried to
7 sort of separate out the threads so each bullet
8 was a one, two, three, and four. And generally,
9 bullet one talks about, we're talking about
10 getting to cell phones is what we're talking
11 about in digital devices.

12 Bullet two talks about why we want to
13 get to the cell phones. Bullet three talks about
14 what the problems are that cause us to not get
15 the cell phones, and number four talks about the
16 current practice.

17 So bullet one was, "MCIO investigators
18 who have access to military search warrants have
19 nonetheless reported difficulties obtaining
20 cellular phones or other digital devices."
21 That's the issue. The second sentence I moved
22 down to the last bullet.

1 Then I went to the second bullet and
2 pointed out, and this is why we want them,
3 "Victims and defendants' cell phones may contain,
4 among their other contents, a wealth of evidence
5 such as photographs, text messages, or social
6 media information." I think we just lost
7 somebody.

8 CHAIR HOLTZMAN: Yes.

9 MS. STONE: Do you want me to wait or
10 go on?

11 CHAIR HOLTZMAN: Yes, just wait.

12 MS. FRIEL: Hello?

13 CAPT TIDESWELL: Ms. Friel, I'm sorry.

14 MS. FRIEL: Thank you.

15 CAPT TIDESWELL: Yes, ma'am.

16 MS. FRIEL: I was just emailing to
17 tell you it cut out. Thanks.

18 CAPT TIDESWELL: Yes, ma'am.

19 CHAIR HOLTZMAN: Okay, by the way, you
20 have page five in tab seven. You have the
21 recommendations.

22 MS. FRIEL: Yes, right in front of me.

1 CHAIR HOLTZMAN: Okay, good. Okay,
2 Mr. Stone, you may proceed.

3 MR. STONE: In the second bullet,
4 again I moved what was lined out in the second
5 line down to the fourth bullet. I didn't throw
6 it away. I just moved it down, and then I
7 clarified, which people wanted, that, "The
8 victims and defendants' cell phones may contain
9 photographs, text messages, social media
10 information which may aid investigators and
11 prosecutors to make their decisions about
12 investigating and charging sexual assault
13 crimes."

14 Then in the third bullet, I pretty
15 much left this one the same. "Victims' concerns
16 about providing cell phones," yada, yada, yada,
17 "and also victims' privacy concerns relating to
18 disclosure of vast amounts of personal,
19 confidential, or privileged diary-type
20 information typically contained on a smart
21 phone." I just described it with a little more
22 detail so people know what we're talking about.

1 It isn't just personal. It may be confidential.
2 It may be privileged.

3 Okay, then I go to the fourth one
4 which is sort of the meat of what's going on.
5 "Some SVCs and VLCs reported that as allowed by
6 current law, they advise clients that unless
7 there is a valid military search warrant for a
8 cell phone, victims just like defendants should
9 not voluntarily turn over their cell phones to
10 investigators if the victims wish to preserve
11 their privacy rights and privileges in the
12 information on their cell phone."

13 And that is what we tried to address
14 in the recommendation whose language we all
15 agreed to, that the Secretary of Defense should
16 remove any impediments, but those are why some of
17 them are not doing it and their reasons for not
18 doing it.

19 And then finally, the last bullet,
20 everything that I could find and learn told me
21 that in order to image and search a cell phone,
22 you need the following in order to image it, even

1 if your image is later going to just take certain
2 pieces of it.

3 So that's total speculation that those
4 techniques can minimize the legitimate concerns
5 about cell phone searches, because if the
6 legitimate concerns are privacy concerns, they've
7 got to have your cell phone in order to image it
8 even if they're only imaging the first half.

9 So I just thought that's speculating
10 about something. We don't need to speculate
11 about it, and I couldn't find anything that
12 supported that you could image part of a person's
13 phone without getting the phone, and so those
14 individuals are not going to want to turn it
15 over.

16 CHAIR HOLTZMAN: Okay, just to
17 accommodate Ms. Friel, Captain, is it correct
18 that the only special expertise with regard to
19 these points that she would have to offer is
20 related to the last bullet point, or am I wrong
21 about that?

22 CAPT TIDESWELL: No, I think you're

1 correct, ma'am, and it's also how we obtain the
2 evidence, what's possible technologically with
3 the cell phones, how long it might take. I think
4 we could leverage her expertise on how she's seen
5 it done in the civilian sector.

6 CHAIR HOLTZMAN: Okay.

7 CAPT TIDESWELL: I think those are the
8 types of issues.

9 CHAIR HOLTZMAN: So maybe we should
10 just address - so there's nothing aside from the
11 bullet point saying, "Modern forensic techniques
12 for imaging and searching cell phones can
13 minimize, if not eliminate, victims' legitimate
14 concerns about cell phone searches." That's the
15 only thing we need her guidance on?

16 MS. FRIEL: The only other thing is
17 that obviously you will all consider whether you
18 want to hear my views on this, but that I might
19 be able to offer some insight into, in my
20 experience, the effects of having to use a search
21 warrant to search -

22 CHAIR HOLTZMAN: Okay, fine.

1 MS. FRIEL: - what we would think of
2 as a prosecutor as our victim's phone.

3 CHAIR HOLTZMAN: Okay.

4 MS. FRIEL: I think there are certain
5 negative effects on your relationship with the
6 victim and your ability to get all the
7 information that you want.

8 CHAIR HOLTZMAN: Okay, so let's go
9 through the -

10 MS. FRIEL: So I'm willing to talk a
11 little about that too if anybody is interested.

12 CHAIR HOLTZMAN: Great, okay, so let's
13 start from the beginning so we can have the most
14 of your expertise, okay, the best use of your
15 expertise. Okay, so does anybody have any
16 comments with regard to the first bullet?

17 I guess my concern would be just
18 relating to exactly the point that Ms. Friel just
19 raised, which is suggesting that, "The MCIO
20 investigators who have access to military search
21 warrants have nonetheless reported difficulty."
22 It suggests that, you know, kind of like why are

1 they reporting difficulty? They've got these
2 search warrants, and so why aren't they using
3 them? Forget about the difficulties. Just go to
4 the search warrant.

5 I don't know if that was your
6 intention, Mr. Stone, in inserting that language,
7 but maybe, Ms. Friel, you could address the
8 problem, since this is something you just brought
9 up, of using the military search warrants.

10 MS. FRIEL: Yes, so I will say this,
11 I am by no means an expert on the difficulties in
12 getting a military search warrant, though I am
13 aware of some of them, and I'll say this.

14 There are clearly practical
15 limitations on investigators' abilities to get
16 search warrants depending on whether the person
17 is a civilian or military personnel, where they
18 are at the time they're possessing this thing
19 they want to search.

20 Are they on military property? Are
21 they off on civilian property? And so there are
22 some real practical difficulties, but let's

1 assume that all of the stars align for those
2 things and you could get a search warrant.

3 I think the amount of time that it
4 takes, and it certainly takes a certain amount of
5 time for an investigator to do this, in a world
6 where there are limited investigative resources
7 that are already strained.

8 So if there are other ways to
9 accomplish getting this necessary evidence that
10 would not further strain resources, it seems to
11 me that that makes sense, and certainly that's in
12 a civilian world why you ask for consent first
13 before you go through the rigamarole of trying to
14 get a search warrant.

15 So that's one thing I would bring up,
16 and I think to have the bullet the way it reads,
17 to just say who will have access to military
18 search warrants without a lot of explanation of
19 some of the things I just talked about is a
20 little misleading.

21 The other thing I'd point out is there
22 are timing issues with doing that. When you do a

1 typical interview of a victim, you start talking
2 to them chronologically beginning to end of what
3 happened here, and as you go through
4 chronologically, the fact that somebody texted
5 back and forth is going to come up in the
6 chronology of events.

7 And at the time it comes up, you say
8 to the person you're interviewing, "Pull out your
9 cell phone and bring that up, and let's go
10 through all this in chronological order." And
11 then you have the ability to say to them, "Oh,
12 you used these words. What did you mean by
13 that?" or, "So and so sent this back to you.
14 That doesn't make sense to me. What does that
15 mean by that?" and you continue on in a logical
16 chronological order.

17 I'm concerned that you lose the
18 ability to do that if we don't try to set up the
19 system where people are more apt to consent and
20 agree to let you see their text messages. And I
21 also am well aware that there is a big issue
22 about your ability to do a second or a third

1 interview.

2 In the civilian world, I can keep
3 having somebody come back again and again. That
4 is not practical in the world - in the military,
5 at least right now. So that concerns me about
6 this emphasis on, you know, why bother to try to
7 encourage victims to consent? Let's just use a
8 search warrant all the time.

9 The other thing I'd point out is to
10 get a search warrant, as we all know, you need to
11 have probable cause. So if the victim says to
12 you in your interview, "He texted me afterwards
13 and he said, 'I'm really sorry for raping you,'"
14 and obviously that's an exaggeration, but that
15 would give you probable cause to say, "Yes, there
16 is key evidence in this phone and I can get a
17 search warrant.

18 But oftentimes, the back and forth
19 exchange is not that explicit and not that
20 obviously relevant evidence, and your victim may
21 not realize that the back and forth exchanges
22 that he or she had with the alleged perpetrator

1 is actually relevant evidence and probative
2 evidence.

3 And I've had this come up in any
4 number of recent investigations I've just done
5 here at my job here at the NFL. Your victims are
6 not trained investigators, sexual assault
7 investigators, or sexual assault prosecutors.
8 They're not lawyers usually, and so they don't
9 recognize how something might be probative.

10 I'll give you an example. We got a
11 victim's phone. If you asked her, you know, what
12 was relevant in there that would have had to do
13 with the date of the incident, this particular
14 alleged perpetrator was denying they had any
15 relationship, "except we had sex every once in a
16 while, not my girlfriend, not anything more
17 serious," and it went to the nature of the
18 relationship and his credibility as well.

19 MS. FRIEL: We looked through all the
20 text messages. There were all kinds of text
21 messages in which he used the word girlfriend, in
22 which he said all kinds of things that proves,

1 one, he was lying about the nature of their
2 relationship, and two, were really relevant to
3 help us see what had happened during the
4 incident. So, that's the problem with your
5 search warrants, where you need probable cause.

6 I also want to go back to something we
7 talked about when I testified there the first
8 time and it's the nature of acquaintance sexual
9 assault. There is rarely, if ever, any witness
10 in the room when these things happen and the
11 defense is almost always consent.

12 And so, what we're trying to do in
13 that situation -- and also, there's rarely any
14 injury that proves that there was a lack of
15 consent. And so, what a prosecutor is always
16 trying to do is to come up with as much
17 consistent, corroborative evidence of,
18 oftentimes, things that happened before you got
19 in the room and things that happened after you
20 got in the room.

21 There is a wealth of that evidence in
22 someone's cell phone, that's just the nature of

1 how we communicate in today's world, how
2 voluminous the text messages are and how quickly
3 and how often we do them.

4 And so, you would use your text
5 messages to say, okay, I may not have direct
6 evidence of exactly lack of consent in that room,
7 but everything else he or she told me happened
8 between these people right up until you walked in
9 the room is totally consistent and I can prove it
10 with the text messages, any other evidence you
11 can get, and the same afterwards.

12 So, I don't want to see your
13 prosecutors limited in their ability to
14 corroborate these cases, because it's the best
15 thing you can do in an acquaintance case. I used
16 to say to my prosecutors all the time, do not let
17 your defense attorney get away with saying it's a
18 he said, she said case.

19 You have all kinds of other evidence,
20 even if it's not in the moment of the act, that
21 takes it out of he said, she said and
22 corroborates that case. So, you would lose a

1 really important part of it if we can't encourage
2 the victims to let the investigators see their
3 cell phone.

4 The other thing I think we also have to
5 realize is that, sometimes, the evidence in those
6 cell phones does contradict what a victim says.
7 And if that's not turned over to the investigator
8 or the prosecutor before trial, then no one's had
9 an opportunity to ask the victim for an
10 explanation of why does this apparently
11 contradict what you've told us.

12 I can tell you, oftentimes, in talking
13 that out with a victim, you've got a reasonable
14 explanation, one that you could use at trial if
15 the victim was prepared to testify to at trial.
16 But if the prosecutor doesn't know, then they
17 can't prepare the victim and talk to the victim
18 about it.

19 And I've seen this happen, the
20 victim's on the stand, they get hit with
21 something that they didn't expect to come out,
22 the prosecutor didn't know about it, and

1 certainly it can happen in text messages, and the
2 victim looks like a doe in the headlights.

3 And they might have had a reasonable
4 explanation, but in the shock of, oops, they
5 asked me that, and I don't have an opportunity to
6 talk this out in calmer surroundings with the
7 prosecutor and think about why I said that and
8 think about how I would articulate my
9 explanation, the case gets seriously damaged.

10 So, there's another issue with, if we
11 don't get people to agree to give us these text
12 messages. And the last one, I'd say is,
13 sometimes the evidence in the phone also
14 disproves the allegation. And I think that's
15 just as important as everything else.

16 And if that doesn't come out until the
17 witness is on the stand, because the accused's
18 attorney sat on it, understandably, tactically,
19 and said, I got all those text messages out of
20 the accused's phone, his or hers, and I'm going
21 to hit them with it at trial, that's my best way
22 to protect the accused, well, we've gone through

1 this whole thing, which is awful for your
2 resources, terrible for the alleged victim,
3 terrible for the alleged perpetrator, when an
4 effective and thorough investigation on the front
5 end could have obviated all of that.

6 So, my whole feeling is that you want
7 to look at what the impediments are, and the
8 Subcommittee certainly heard some of them and you
9 saw them in the report, the fear of the financial
10 loss, the fear that you won't have your phone for
11 a period of time, and then, the fear about
12 everything in it, and address those, what are
13 legitimate concerns.

14 So, to Mr. Stone's point about,
15 technically, how can you image the phone?
16 Someone can sit in a room with --

17 (Telephonic interference.)

18 MS. FRIEL: -- and in a period of hours
19 in their presence, make a full image of the
20 phone. They never have to lose --

21 CHAIR HOLTZMAN: Can you just tell Ms.
22 Friel that we just want to deal with the first

1 point? We'll deal with the second point later.

2 MS. FRIEL: Was it something I said?

3 (Laughter.)

4 CAPT TIDESWELL: No, ma'am. But if you
5 don't mind, the Panel would like to focus on that
6 first bullet that you see underneath the
7 recommendations.

8 CHAIR HOLTZMAN: Right. Let's get to
9 the technical issue about imaging when we finish
10 the first one. Is that okay?

11 MS. FRIEL: Okay.

12 CHAIR HOLTZMAN: I just --

13 MS. FRIEL: Okay.

14 CHAIR HOLTZMAN: -- want to do one
15 thing at a time.

16 MS. FRIEL: In the first bullet, the
17 way it's revised, with all due respect to Mr.
18 Stone, I agree with Ms. Holtzman that it makes it
19 sound like you can easily get a search warrant
20 and they're just not bothering to do it. And I
21 think there are lots of difficulties with getting
22 a search warrant.

1 And the last one I didn't mention is
2 that it puts you in a real adversarial position
3 as an investigator or prosecutor. You've
4 presumably asked the victim, do I have your
5 consent to look at your phone, to image your
6 phone, to get things out of your phone?

7 They have said, no, for whatever their
8 reasons are, and now you go get a search warrant
9 and say, okay, we're taking it from you anyway.
10 I don't think that's the atmosphere that we want
11 to create.

12 I think that's a difficult atmosphere
13 and I do think we can do more to have people
14 understand, one, how probative the evidence in
15 the phone is, and, two, that there are ways that
16 we can limit your legitimate concerns about
17 giving us an image of the phone and the things in
18 your phone.

19 CHAIR HOLTZMAN: Okay. I think that
20 was very helpful. Mr. Stone, do you want to --

21 MR. STONE: Yes.

22 CHAIR HOLTZMAN: -- argue and --

1 MR. STONE: Yes. Sticking just with
2 the first bullet --

3 CHAIR HOLTZMAN: Right.

4 MR. STONE: -- I have no problems
5 saying, MCIO investigators who have access to
6 military search warrants have nonetheless
7 reported practical and timing difficulties
8 obtaining warrants for cellular phones or other
9 digital devices.

10 I hope that incorporates -- was not
11 meant to overlook, that's exactly what the
12 difficulties are. They're practical, maybe
13 resources, it may be people, it may be whatever,
14 and timing difficulties, even if you have that,
15 you may not get it on the moment when you need it
16 or it may take you two days, even if you don't
17 need it at that moment.

18 So, if you want to say, practical and
19 timing difficulties obtaining warrants for
20 cellular phones or other devices, that's fine.
21 That was the purpose of that sentence, to explain
22 why we're saying more, that they can't always get

1 warrants.

2 And they don't -- and for practical
3 and timing reasons, they may not work for them.
4 That's the point of that sentence. So, if
5 somebody else has another suggestion to how to
6 clarify that that is what we're saying there,
7 that's fine, but I think that makes that point.

8 CHAIR HOLTZMAN: I guess my concern is
9 what Ms. Friel just alluded to, which is the
10 allusion to the military search warrants may not
11 really be necessary. I think you can clarify
12 that what we're talking about in Sentence 1, if
13 you say, reported difficulties in obtaining, in
14 voluntarily obtaining cell phones or other
15 digital devices, period, and leave out the whole
16 issue of search warrants.

17 I don't know that that -- that really
18 just complicates the matter. What we're talking
19 about is, the voluntary. I mean, we know that
20 you can get a search warrant in many cases. But
21 what we're talking about is the voluntary access
22 to cell phones and digital devices.

1 That would be my suggestion, adding
2 the word, voluntary, and leaving out the access
3 to military search warrants. But I don't know
4 how my colleagues feel about that.

5 MR. STONE: Well, if you're going to do
6 that, then you've got --

7 VADM TRACEY: I would recommend --
8 that's a good fix to the first sentence. I think
9 following it up with the fact that there are
10 practical and timing difficulties -- well, while
11 the opportunity exists to get military search
12 warrants, there are practical and timing
13 difficulties that they present and, in the end,
14 they create an adversarial relationship --

15 CHAIR HOLTZMAN: Right.

16 VADM TRACEY: -- between the
17 investigator and, ultimately, the prosecutor and
18 the victim, that may inhibit a --

19 CHAIR HOLTZMAN: An effective --

20 VADM TRACEY: -- an effective
21 prosecution.

22 CHAIR HOLTZMAN: Right, an effective

1 prosecution.

2 VADM TRACEY: So, I think capturing
3 both of those thoughts I think gets to your
4 concern. But I like the turning it around and
5 beginning with the point that the preference is
6 to get it voluntarily. There's lots of goodness
7 in getting it voluntarily.

8 CHAIR HOLTZMAN: Right.

9 JUDGE JONES: I agree.

10 CHAIR HOLTZMAN: Mr. Stone, how do you
11 feel about that?

12 MR. STONE: I'm fine, just come up with
13 words.

14 CHAIR HOLTZMAN: Okay. Well --

15 MR. STONE: As long as we don't -- I
16 don't want the people who get this to think,
17 didn't those guys know there were such things as
18 military search warrants?

19 VADM TRACEY: I'm with you. I think --

20 MR. STONE: Yes.

21 VADM TRACEY: -- that's wise. Yes.

22 MR. STONE: That's all

1 CHAIR HOLTZMAN: Fine, okay. So,
2 depending on the language --

3 MR. STONE: Yes, just somebody --

4 CHAIR HOLTZMAN: -- Meghan, do you have
5 it or do you need to write it down? Does
6 somebody have it?

7 MR. STONE: Ms. Peters, you got it?

8 MS. PETERS: I have --

9 CHAIR HOLTZMAN: So, let me --

10 MS. PETERS: -- probably 70 percent of
11 it --

12 CHAIR HOLTZMAN: Sorry, let's try --

13 MS. PETERS: -- but I think the --

14 CHAIR HOLTZMAN: -- it again.

15 MS. PETERS: -- difficulties or the
16 problems with --

17 CHAIR HOLTZMAN: Okay.

18 MS. PETERS: -- the warrant, to include
19 the adversarial relationship, is where I --

20 CHAIR HOLTZMAN: Okay.

21 VADM TRACEY: Okay. So, MCIO
22 investigators report having difficulty obtaining

1 --

2 CHAIR HOLTZMAN: Voluntarily obtaining.

3 VADM TRACEY: -- voluntarily obtaining
4 cellular phone or other digital devices from
5 victims. While the opportunity to obtain
6 military search warrants exists, there are
7 practical and timing difficulties that impede the
8 investigation.

9 CHAIR HOLTZMAN: That impede the
10 ability to obtain the search warrant.

11 VADM TRACEY: And the investigation.

12 CHAIR HOLTZMAN: Okay.

13 VADM TRACEY: Furthermore, obtaining
14 the access to the cellular phones and digital
15 devices involuntarily creates an adversarial --

16 MR. STONE: Can create, can create.

17 VADM TRACEY: -- can create an
18 adversarial relationship between investigators
19 and --

20 CHAIR HOLTZMAN: And the victim.

21 VADM TRACEY: -- ultimately prosecutors
22 and the victim --

1 CHAIR HOLTZMAN: Right. Inhibiting --

2 VADM TRACEY: -- inhibiting --

3 CHAIR HOLTZMAN: -- effective

4 prosecution.

5 CAPT TIDESWELL: -- effective

6 prosecution.

7 CHAIR HOLTZMAN: There probably is a
8 way of saying that in fewer words.

9 MS. PETERS: The last sentence, I am
10 still tripped up on. It's getting to the
11 adversarial relationship --

12 VADM TRACEY: Okay. So, where are you?

13 MS. PETERS: -- I'm sorry. I think I'm
14 the only one taking --

15 CHAIR HOLTZMAN: You are, okay.

16 VADM TRACEY: Where are you?

17 MS. PETERS: I am, after -- everything
18 after, that impedes the ability to obtain the
19 warrants and that may impede the investigation,
20 there are words to that affect. The next
21 sentence talked about --

22 VADM TRACEY: Furthermore --

1 CHAIR HOLTZMAN: Well, maybe we could
2 have the Court Reporter just read it back, how's
3 that?

4 CAPT TIDESWELL: Madam Court Reporter,
5 can you find it or --

6 COURT REPORTER: I have partial
7 sentences, but --

8 VADM TRACEY: Okay. Why don't we try
9 it again?

10 MS. PETERS: Yes, ma'am.

11 VADM TRACEY: Furthermore, obtaining
12 access to cellular phones or other digital
13 devices involuntarily may create an adversarial
14 relationship --

15 MR. STONE: Do you want to say
16 atmosphere?

17 VADM TRACEY: Atmosphere, I like that,
18 atmosphere between the victim and investigators
19 and, ultimately, the prosecutor, inhibiting
20 effective --

21 CHAIR HOLTZMAN: Prosecution of the
22 case.

1 MS. PETERS: Okay. I have it, thank
2 you.

3 CHAIR HOLTZMAN: Okay. The second
4 sentence there, as I gather, Mr. Stone, has been
5 -- that bullet has been transferred to someplace
6 else, so we don't have --

7 MR. STONE: Yes, the fourth bullet.

8 CHAIR HOLTZMAN: Okay. Fine. Okay.
9 Bullet 2.

10 MR. STONE: Yes. The victims' and
11 defendants' cell phones may contain -- and I'm
12 just describing the kinds of reasons we want them
13 -- among their other contents, a wealth of
14 evidence, such as photographs, text messages, or
15 social media information, which may aid
16 investigators and prosecutors to make their
17 decisions about investigating and charging sexual
18 assault crimes.

19 CHAIR HOLTZMAN: May I ask one
20 question? Why are we including defendants here?

21 MR. STONE: Because -- there's two
22 reasons. The first is, we're talking about a

1 policy on MCIOs getting tangible evidence and the
2 same rules, legal rules that apply to cell phones
3 from one person apply to cell phones from every
4 person. Getting them from a victim, they're
5 going to have the same rights in privacy that a
6 defendant would have.

7 And then, you also have the issue that
8 sometimes you may get the phone and decide that
9 the person is the defendant instead of the
10 victim. So, I think that -- we're talking about
11 getting phones, we're not talking about really
12 who they are from.

13 The investigators want them -- they
14 may be from passersby too. Passersby nowadays
15 pull out their phone and start taking a movie of
16 what's going on. I mean, even at a party, if
17 they -- they may want a picture of the party that
18 somebody else who threw the party gave, because
19 it shows the two who are complaining now that
20 there was or wasn't a rape and what they were
21 doing during a party, because they were taking
22 cell phone pictures. So, maybe you just want to

1 -- but I was trying --

2 CHAIR HOLTZMAN: Maybe just witnesses,
3 victims' and witnesses' cell phones may contain.
4 I just think getting into defendants is a whole
5 other ballgame here and what they're really
6 talking about, what the Subcommittee was talking
7 about is having the MCIOs doing a better job of
8 dealing with getting victims' cell phones and not
9 addressing the whole issue of defendants. I
10 mean, that's a -- am I wrong, Lisa, in that?

11 MS. FRIEL: No, that was exactly what
12 I would have said. What we were hearing about
13 and what the Subcommittee wrote as the issue that
14 they heard about in their site visits had to do
15 with victims' phones and no one else's. Whether
16 they have difficulties with other phones, I don't
17 know, but we didn't hear anything about it, we
18 only heard victims.

19 CHAIR HOLTZMAN: All right. So, maybe
20 just deal with victims. That would be my view.
21 But --

22 MR. STONE: Lisa, this is Victor Stone.

1 Didn't --

2 MS. FRIEL: Yes?

3 MR. STONE: -- the issue of them not
4 wanting to turn over their phones also relate to
5 the fact that the phones might have evidence of
6 fraternization that was a collateral violation or
7 underage drinking that was a collateral
8 violation?

9 MS. FRIEL: Definitely. It was
10 financial, it was loss of having it when you
11 needed it, and then there were privacy concerns,
12 and that would be the fourth one, yes, concerns
13 that there was information that could get them in
14 trouble.

15 MR. STONE: Right. And that's why it
16 turns out sometimes that they'll turn into a
17 defendant, because it --

18 VADM TRACEY: But then, Bullet 3 --

19 MR. STONE: -- turns out they were
20 fraternizing with a subordinate.

21 VADM TRACEY: Yes. And in Bullet 3
22 talk about self-incrimination.

1 CHAIR HOLTZMAN: But let's not put the
2 defendants.

3 VADM TRACEY: Yes.

4 CHAIR HOLTZMAN: My view is, defendants
5 doesn't belong right here in the -- talking about
6 victims. I think it relates to Bullet 3 and we
7 can put them in there, about self-incrimination -
8 -

9 MR. STONE: All right. You want to
10 strike victims and defendants and just say, cell
11 phones may contain?

12 JUDGE JONES: No. I would prefer to
13 leave it, because we're talking about victims
14 here.

15 CHAIR HOLTZMAN: Right.

16 CAPT TIDESWELL: The language in
17 Recommendation 50 is specific to sexual assault
18 victims, in the blue box, the actual
19 recommendation itself.

20 CHAIR HOLTZMAN: Right. Yes, so that
21 -- okay. Well, let's -- Mr. Stone, do you want
22 to vote on this or do you want to -- if you don't

1 agree, let's just have a vote on it.

2 MR. STONE: Well, I would just say,
3 cell phones, because they can wind up as
4 defendants if this stuff that incriminates them -
5 - a lot of the time, it's their underage
6 drinking.

7 VADM TRACEY: Yes, but they're going to
8 be --

9 CHAIR HOLTZMAN: Okay.

10 VADM TRACEY: -- obtained as a victim.

11 CHAIR HOLTZMAN: Right. So --

12 PROF. TAYLOR: If I could just --

13 CHAIR HOLTZMAN: Mr. Taylor?

14 PROF. TAYLOR: A friendly amendment and
15 that is to keep the words, in sexual assault
16 cases, in there, instead of deleting them,
17 because this is all about, as Captain Tideswell
18 says, sexual assault victims. It's not about
19 other victims.

20 CHAIR HOLTZMAN: Right. But before we
21 get to that, we're still on victims and
22 defendants --

1 PROF. TAYLOR: Okay.

2 CHAIR HOLTZMAN: -- in the first two
3 sentences.

4 PROF. TAYLOR: I thought maybe you'd
5 want to have the --

6 CHAIR HOLTZMAN: Mr. Taylor, you're
7 ahead of me.

8 PROF. TAYLOR: -- whole sentence at one
9 time. Thank you.

10 CHAIR HOLTZMAN: You're just way ahead
11 of me.

12 PROF. TAYLOR: Okay.

13 CHAIR HOLTZMAN: And then, maybe Mr.
14 Stone and everybody else here, just way ahead of
15 us, so let us catch up to you, one second. Okay.
16 So, Mr. Stone wants victims and defendants, those
17 in favor of that proposal, say aye.

18 MR. STONE: Aye.

19 CHAIR HOLTZMAN: Those opposed?

20 (Chorus of no's.)

21 CHAIR HOLTZMAN: The no's have it, the
22 amendment is not agreed to, so it will simply

1 say, victims' cell phones may contain. Then, we
2 have another amendment, among their other
3 contents --

4 MR. STONE: No, we have what he just
5 said, victims' cell phones in sexual assault
6 cases.

7 CHAIR HOLTZMAN: No, that's at the very
8 end. It's --

9 JUDGE JONES: It's a little later.

10 CHAIR HOLTZMAN: You struck it, it's
11 still way down. It's on the next line, Mr.
12 Stone, you see, in sexual assault cases, you
13 struck that out.

14 MR. STONE: Okay.

15 MS. PETERS: Ma'am, the original
16 language had it after the word evidence, it had -
17 -

18 CHAIR HOLTZMAN: Oh, okay.

19 MS. PETERS: -- in sexual assault --

20 CHAIR HOLTZMAN: Right.

21 MS. PETERS: -- and it just got moved
22 in the editing process. So --

1 CHAIR HOLTZMAN: So, where is it now?

2 MS. PETERS: I think, it was -- I don't
3 -- Mr. Stone, your edit did not intend to move it
4 to the end of the sentence, where it existed
5 beforehand was, cell phones may contain a wealth
6 of evidence in sexual assault cases, period.

7 CHAIR HOLTZMAN: Okay.

8 MR. STONE: Period, okay.

9 VADM TRACEY: So, the way that it has
10 been edited now actually, I think, addresses Mr.
11 Taylor's concern. It says, victims' cell phones
12 may contain, among their other contents, a wealth
13 of evidence -- then lists the examples -- which
14 may aid investigators and prosecutors in making
15 their decisions about investigating and charging
16 sexual assault crimes. Would that get your
17 sexual assault cases?

18 PROF. TAYLOR: No, I was just trying to
19 make it clear that this only applies to sexual
20 assault cases. And Mr. Stone had struck that.

21 VADM TRACEY: But I think it's at the
22 end of the paragraph now.

1 PROF. TAYLOR: Oh, I see what you're
2 saying.

3 CHAIR HOLTZMAN: Well, you could start
4 out by saying, in sexual assault cases, victims'
5 cell phones may contain, because I think the
6 point is, too, that in these cases, it may have
7 special relevance.

8 PROF. TAYLOR: Right. Okay. I'm fine
9 with that.

10 VADM TRACEY: Bear with me, I think the
11 sentence as Mr. Stone structured it actually is
12 important, it specifies for people who may not
13 have thought about it, what are the kinds of
14 things we're talking about and that in fact, we
15 need that information to aid investigators and
16 prosecutors in making their decisions about
17 charging, investigating and charging sexual
18 assault cases. So, you've got it, it's in a
19 place that --

20 PROF. TAYLOR: All right.

21 VADM TRACEY: -- lets you not have to
22 do surgery on the sentence again.

1 PROF. TAYLOR: Well, with all respect,
2 the way it was written the first time does that.
3 If you go to the original language, which we all
4 voted on and Mr. Stone abstained from last time,
5 it says, cell phones may contain a wealth of
6 evidence in sexual assault cases.

7 When a victim refuses to turn over
8 relevant evidence, such as photographs, text
9 messages, or social media information contained
10 in the victim's cell phone, investigators and
11 prosecutors make decisions about investigating
12 and charging without possessing all available
13 evidence. That was the original language that we
14 voted on last time. I think it's complete as it
15 is.

16 MR. STONE: Well, I wanted to take the
17 question about refusal and move it to the fourth
18 bullet, so they understand that the refusal is
19 not just an arbitrary or obstructive move, that
20 there's some -- I just wanted the refusal stuff
21 all moved into the fourth bullet.

22 So, that's why that line was moved

1 into the fourth bullet, because I wanted to
2 figure out how to say it and not yet get to the
3 refusal business. I just wanted to get to why
4 people want the cell phone.

5 JUDGE JONES: I think the original way
6 is fine, they're going to read the whole thing --

7 CHAIR HOLTZMAN: Me, too.

8 JUDGE JONES: -- anyway. So, we'll get
9 to it.

10 CHAIR HOLTZMAN: Me, too. All right.
11 So, Mr. Stone's, let's take the balance of Mr.
12 Stone's suggestions, which are spelled out there,
13 which you can see them, striking and the
14 materials contained in yellow, those in favor of
15 adopting those suggestions, say aye.

16 MR. STONE: Aye.

17 CHAIR HOLTZMAN: Those opposed?

18 (Chorus of no's.)

19 CHAIR HOLTZMAN: So, the original, I
20 guess the original language stands. The no's
21 have it. Okay. Bullet 3.

22 MR. STONE: Okay. Bullet 3 just

1 clarifies what we had before to make it clear
2 that the disclosure is going to include personal,
3 confidential, and privileged diary-type
4 information.

5 These aren't vague privacy concerns,
6 they're exactly what the Supreme Court spoke
7 about being privileged in unanimous opinion in
8 Riley v. California, 134 Supreme Court 2473, in
9 2014, where they unanimously said, those -- they
10 listed those as the kinds of issues that happen
11 on a smart phone.

12 And I think we needed to be a little
13 more specific, because in the next bullet, we're
14 going to talk about what does or doesn't happen.
15 So, it seems to me, people have to know that
16 those are what are involved, it isn't just
17 privacy concerns, it's personal, confidential,
18 and privileged material that can be on a cell
19 phone. I didn't quote the Supreme Court case,
20 because last time, when I said I wanted to --

21 CHAIR HOLTZMAN: Why don't --

22 MR. STONE: -- everybody said, let's

1 not quote a case.

2 CHAIR HOLTZMAN: Why are we taking out,
3 privacy concerns?

4 VADM TRACEY: We're not.

5 MR. STONE: No, privacy concerns is in.

6 CHAIR HOLTZMAN: Oh, so, also -- so,
7 the way it would read is, many victims -- center
8 on the financial loss to the victim when the
9 investigators retain the phone for forensic
10 analysis. Do we want to add, and also the loss
11 of the use of the phone, in that case?

12 MR. STONE: I assume that's part of the
13 financial loss, because --

14 CHAIR HOLTZMAN: Maybe not --

15 MR. STONE: -- they have to go get
16 another phone.

17 CHAIR HOLTZMAN: Well, okay, I don't
18 know. Is that, our subject matter expert, is
19 that the same thing? Were you following us?

20 MS. FRIEL: I'm sorry, can you say that
21 again?

22 CHAIR HOLTZMAN: In Bullet 3, it talks

1 about the financial loss to the victim when the
2 investigators retain the phone. I was saying --

3 MS. FRIEL: Right.

4 CHAIR HOLTZMAN: -- isn't there also
5 the concern you raised about not having the phone
6 available? And Mr. Stone's point is, that that's
7 subsumed under the financial loss. I'm just
8 asking --

9 MR. STONE: Because they're going to
10 have to run out and have to buy a phone, a
11 temporary phone at Walmart or one of these
12 limited phones, to take its place until they get
13 their phone back.

14 MS. FRIEL: I would have to say, I
15 didn't hear it put exactly that way and in my
16 experience, before we were able to do this this
17 fast and right in their presence, when we did
18 have to hold onto a phone for a couple of days,
19 let's say, they generally just didn't have a
20 phone for a few days.

21 So, that's the way I've heard it
22 explained, that I won't have a phone for a few

1 days. So, I don't think it's necessarily
2 subsumed in the financial loss.

3 CHAIR HOLTZMAN: Yes, it may also be
4 information that's on the phone. It's not only
5 the financial loss, but there may be information
6 on the phone that they won't have for a few days,
7 like --

8 MR. STONE: Their phone numbers, yes.

9 CHAIR HOLTZMAN: Yes, stuff like that.

10 MS. FRIEL: Right.

11 CHAIR HOLTZMAN: So, maybe we could --

12 MS. FRIEL: Contacts, et cetera.

13 CHAIR HOLTZMAN: So, maybe we could add
14 that point. Anybody have an objection to that?
15 I don't have the language here, but maybe Meghan
16 could give it to us.

17 MR. STONE: Call it, the information
18 loss? I don't know what else to say, the --

19 CHAIR HOLTZMAN: No. And also, the
20 victim's -- when investigators -- the financial
21 loss to the victim and the loss of the use of the
22 phone, when investigators retain the phone for

1 forensic analysis. That would be -- that sort of
2 --

3 MS. FRIEL: That works.

4 CHAIR HOLTZMAN: That works? Okay.

5 And also, the victim's privacy concerns relating
6 to disclosure of -- I agree with striking over --
7 the vast amount of the victim's personal,
8 confidential, and privileged -- I don't know what
9 diary-type personal information means. You also
10 have personal --

11 MR. STONE: Do you have a calendar on
12 your phone? Most people use it as a diary today.
13 Where they've been, who they've seen, and a lot
14 of them put in their evaluations in there too.
15 Went here, went there, the same thing that people
16 used to put in a diary. That's language --

17 CHAIR HOLTZMAN: Yes --

18 MR. STONE: -- right from the --

19 JUDGE JONES: Why don't we just --

20 MR. STONE: -- Supreme Court case.

21 JUDGE JONES: -- say, personal,
22 confidential, or privileged information?

1 CHAIR HOLTZMAN: Right.

2 MR. STONE: Okay. I thought that
3 explained what the privileged --

4 CHAIR HOLTZMAN: Yes, to me, it was
5 confusing.

6 MR. STONE: -- when you say, what's the
7 privileged? Well, it's a diary-type document
8 today.

9 JUDGE JONES: Unfortunately, you're
10 dealing with a bunch of people who aren't quite
11 sure what diary-type is.

12 CHAIR HOLTZMAN: Yes, like me.

13 MR. STONE: Okay.

14 CHAIR HOLTZMAN: I was -- I didn't know
15 --

16 MR. STONE: All right, just put
17 privileged.

18 CHAIR HOLTZMAN: -- what that meant.

19 JUDGE JONES: I'm joining you --

20 MR. STONE: I'm fine with --

21 JUDGE JONES: -- Ms. Holtzman.

22 MR. STONE: -- just privilege.

1 CHAIR HOLTZMAN: Okay, thank you. So,
2 with that change, striking diary-type --

3 MR. STONE: Yes.

4 CHAIR HOLTZMAN: -- do we -- any
5 objection to Mr. Stone's revisions in Bullet
6 Point 3? There are no objections, so that Bullet
7 Point 3 as amended is approved. All right.
8 Bullet Point 4. Wait a minute, where are we
9 going to put incriminating? Is that going to be
10 in Bullet Point 3?

11 VADM TRACEY: That would go in 3 if we
12 think we need to put it in there.

13 CHAIR HOLTZMAN: Well, do you want to
14 put, incriminating?

15 MR. STONE: We can put that in there.

16 CHAIR HOLTZMAN: Where would it go?

17 VADM TRACEY: So, it would go,
18 privileged, or self-incriminating information?

19 CHAIR HOLTZMAN: Yes, or potentially,
20 maybe not --

21 VADM TRACEY: Potentially.

22 MR. STONE: Okay.

1 CHAIR HOLTZMAN: Yes, or potentially
2 self-incriminating.

3 MR. STONE: Okay.

4 CHAIR HOLTZMAN: Okay. So, with that
5 amendment, that amendment is approved to Bullet
6 Point 3. Okay, Bullet Point 4, Mr. Stone?

7 MR. STONE: Okay. This is both setting
8 out and, at the same time, explaining that SVCs
9 and VLCs do tell the victims that there are risks
10 when they turn it over and why they tell them
11 there are risks.

12 They tell them -- SVCs and VLCs
13 reported that, as allowed by current law -- and
14 that, again, is the Supreme Court case Riley v.
15 California -- they advise clients that, unless
16 there is a valid military search warrant for a
17 cell phone, victims, just like defendants, should
18 not voluntarily turn over their cell phones to
19 investigators if the victims wish to preserve
20 their privacy rights and privileges in the
21 information on their cell phone.

22 So, that's what they -- actually, I

1 think they're probably obligated as SVCs and VLCs
2 to make that point, because that's their client
3 and they have to let them know that that could be
4 an issue. And that goes back to the bullet
5 above.

6 So, they might say to them, I don't
7 know if you have personal information and you're
8 worried about self-incrimination, I don't know if
9 you have confidential information that people
10 wouldn't ordinarily give, I don't know, maybe you
11 flunked this military training course, I don't
12 know if you have privileged information, like
13 stuff about your medical records, but I have to
14 tell you, if you turn it over, you're going to
15 waive that privilege.

16 So, therefore, they have to -- other
17 than if there's a warrant for it, then you're out
18 of luck, you've got to just turn it over. So, it
19 seems to me that that shows that it does happen,
20 that they do advise their clients, and even if
21 the client becomes a defendant, that's what
22 they're doing.

1 And that's part of the reason you're
2 suggesting that the Secretary remove any of the
3 impediments. But I don't know how they can not
4 advise their clients that way --

5 CHAIR HOLTZMAN: Right, but --

6 MR. STONE: -- and not do it.

7 CHAIR HOLTZMAN: Mr. Stone, just one
8 point from my --

9 MR. STONE: Sure.

10 CHAIR HOLTZMAN: -- point of view to
11 this, I understand that an SVC or VLC might want
12 to advise their client that they have a right not
13 to voluntarily turn it over, but I think they
14 also -- the point I think we're trying to make or
15 the Subcommittee was trying to make and JPP was
16 trying to make was that if they fail to turn it
17 over, there are consequences for the victim.

18 There are consequences for the victim
19 of turning it over and there are consequences of
20 not turning it over, and those consequences need
21 to be spelled out. Namely, the fact that the
22 case could be lost. So --

1 MR. STONE: I thought we just put that
2 in the extra language in the first bullet and the
3 second bullet, about the case being lost in the
4 first bullet and in the second bullet, it's going
5 to be --

6 CHAIR HOLTZMAN: Right.

7 MR. STONE: -- difficult for the
8 investigators and prosecutors to make their
9 decision about investigating and charging. If
10 you want to add another sentence that says it
11 again here, by all means, we can say, not
12 voluntarily turning it over, of course, also has
13 its risks, or something.

14 CHAIR HOLTZMAN: Right, but what --

15 MS. FRIEL: Can I -- I'm sorry to
16 interrupt.

17 CHAIR HOLTZMAN: Yes, Lisa, go ahead.

18 MS. FRIEL: I just had two thoughts on
19 what you're saying. One, Mr. Stone, I hear what
20 you're talking about, about what the Supreme
21 Court case said and things of that nature, but
22 the fourth bullet, what you wrote here, is not

1 something that the Subcommittee heard in their
2 site visits. That, in fact, this is what they
3 were doing. So, that goes beyond what the
4 Subcommittee's report was and the recommendation
5 was based on.

6 I also think there's a big difference
7 between telling somebody, okay, you have a right
8 to not do this, here are some of the reasons that
9 you should think about to not do it, here are
10 some of the reasons that you should do it.

11 The way you wrote it, you're saying
12 they should not voluntarily turn them over, I
13 think that's exactly the problem that the
14 military is having, is that it's weighted to
15 should not turn them over. And I think that's
16 hurting your cases.

17 MR. STONE: Well, whether it is or it
18 isn't, the victims have a right to counsel and,
19 while your Subcommittee may not have heard
20 testimony, we had panels before us where you were
21 not present and we as the JPP heard SVCs and VLCs
22 say that, yes, they have to advise their clients

1 about their self-incrimination rights and their
2 privilege waivers if they turn them over, and
3 confidential material.

4 So, we definitely heard evidence on
5 them and we're not writing the Subcommittee
6 report now, we're incorporating and going beyond
7 your Subcommittee report to address the problem
8 that the Subcommittee heard about.

9 And one of the things in addressing it
10 is, we have to acknowledge what is going on that
11 we have heard from the panels over the last three
12 years. Now, if we want to put, as was mentioned
13 here before, something that sounds more like --
14 that lays out the concerns, again, after that
15 that we already mentioned in 1 and 2, okay, then
16 maybe we can repeat they can or should also
17 advise their client that turning over -- but I
18 can't imagine they're not doing that, too.

19 They would be violating their
20 attorney-client responsibilities if they didn't
21 say to the client, here's the negatives, here's
22 the positives.

1 CHAIR HOLTZMAN: But the problem, Mr.
2 Stone, with that point that you're assuming, is
3 Bullet Point 5, which has been eliminated,
4 because some of them may not know about these
5 forensic techniques, so that when they're
6 advising their clients, they're not saying, hey,
7 we could solve the problem by these new
8 techniques of imaging and so forth.

9 So, that's why, in a way, maybe we
10 should go to -- I mean, as I read Bullet Point 4,
11 it's setting up Bullet Point 5, which is, okay,
12 here, the MCIOs need this information, it's
13 important for the prosecution of the case,
14 victims have these concerns about, legitimate
15 concerns about turning over the information, SVCs
16 are telling victims, yes, these are legitimate
17 concerns and you have rights, but, hey, people,
18 right out there, there are ways of solving this
19 problem.

20 And that, it seems to me -- so, this
21 whole thing, in a way, is kind of a lead up to
22 Bullet Point 5. Am I misreading this?

1 PROF. TAYLOR: Well --

2 CHAIR HOLTZMAN: So, I think we have to
3 maybe explain Bullet Point 5 or expand it, so
4 that that feeds into Point 4, which is, yes,
5 SVCs, I agree with you should be giving the
6 upsides and the downsides. But if they're not
7 sufficiently trained in the upsides, that is the
8 problem in this equation. Ms. Friel, am I
9 getting it correct?

10 MS. FRIEL: Yes.

11 CHAIR HOLTZMAN: Okay. Mr. Taylor, you
12 had something you wanted to say?

13 PROF. TAYLOR: Yes. I was just going
14 to agree with Ms. Friel, when she talked about
15 what the JPP Subcommittee actually heard, in
16 terms of what counsel actually do. Because, I
17 mean, my memory is not that clear that we had
18 crystal clear testimony that SVCs and VLCs would
19 say that they advised clients that, unless
20 there's a valid military search warrant for a
21 cell phone, just like defendants, they should not
22 voluntarily turn it over.

1 I just don't remember that level of
2 detail, as opposed to a more general statement
3 that we said in the first time, which was that
4 they do advise clients not to turn over their
5 cell phones in general, even when they're likely
6 to contain potential evidence.

7 So, I just wanted to support what Ms.
8 Friel said about that. But I also would say, and
9 I agree with what the Chair just said about the
10 thrust of this, again, we need to take out, just
11 like defendants, because this becomes --

12 CHAIR HOLTZMAN: Right.

13 PROF. TAYLOR: -- more of an argument,
14 an advocacy argument, than it does, in my
15 opinion, a statement of what we think ought to be
16 a good recommendation.

17 MR. STONE: So, what do you want it to
18 say? The whole bullet?

19 PROF. TAYLOR: Well, for one thing, I
20 would take out, as allowed by current law,
21 through, phone.

22 CHAIR HOLTZMAN: What about, they

1 advise clients?

2 PROF. TAYLOR: Yes. Reported that they
3 advise clients that they should not voluntarily
4 turn over their cell phones, if they wish to
5 preserve their privacy. Which, by the way, is
6 sort of the way we had it in the original
7 version.

8 CHAIR HOLTZMAN: But you would keep Mr.
9 Stone's last line, their privacy rights and
10 privileges?

11 PROF. TAYLOR: Well, I have no problem
12 with that one.

13 CHAIR HOLTZMAN: Yes. Well, how do you
14 feel about that, Mr. Stone?

15 MR. STONE: Well, originally, I was
16 okay with that, but I wanted to add, see Riley v.
17 California. I wanted to put in that there's a
18 Supreme Court unanimous decision, which pretty
19 rare these days, of 2014, which is pretty recent,
20 that says that they do have those -- if they want
21 to preserve privacy rights and privileges on cell
22 phones, they have to do it.

1 So, I'm okay with that, if you say,
2 see Riley v. California. I don't want the
3 Secretary of Defense to think we didn't have any
4 cognizance of the fact that there's problems
5 doing this. This is a tough thing to figure out.

6 CHAIR HOLTZMAN: Well, let's get the
7 bullet point -- can we just -- well, all right.
8 I mean, we could do two things. One is we could
9 discuss Point 5, which I think resolves many of
10 the concerns that you have. Or we could try to
11 vote on Point 4. So --

12 PROF. TAYLOR: I would say we go ahead
13 and talk about 5.

14 CHAIR HOLTZMAN: Okay. So, Ms. Friel,
15 you want to unburden your vast store of knowledge
16 to us, of your brain of that vast store of
17 knowledge, so we can be educated as to these
18 techniques, please?

19 MS. FRIEL: Sure. So, the technology
20 exists for a forensic examiner to sit in a room
21 with someone with their cell phone and in a
22 matter of hours, make a complete digital image of

1 that cell phone.

2 So, you don't have the financial loss
3 and you don't have the loss of not having it, for
4 more than a couple of hours. So, that's the
5 first thing I think people need to understand.

6 Now, one thing, though, that I thought
7 the way we phrased our recommendation didn't get
8 to, is there may be practical difficulties with
9 having the right type trained forensic examiner
10 come out and do that in a short period of time.

11 That's something that we're asking
12 people to look into. If you decide that's the
13 way to go, then how practically can you do that
14 in the military? But certainly that capability
15 exists and not just in law enforcement, I mean,
16 we're doing it here at a private organization, a
17 private business.

18 Two, you can, by agreeing to certain
19 search terms, limit what you're going to look at
20 in that vast amount of private information in
21 one's cell phone. And different branches are
22 using consent forms that actually set out what

1 they'll look for and they won't go beyond that.

2 I didn't see anything as detailed as
3 what we've been using, but you can sit there and
4 say, we're going to only look for the words hit,
5 strike, rape, sexual assault, you can list a
6 whole bunch of search terms that we generally do
7 by having the investigator, who's familiar with
8 the kind of subject matter, the kind of
9 investigation, with the digital expert, who
10 understands how the search is going to go about,
11 and they put together search terms.

12 And then, you could go back to a
13 victim and say, okay, we're going to agree,
14 you're going to sign that we can image the phone,
15 we can search it for these search terms and
16 that's all we're going to look for. Or you could
17 say, we're going to add photographs of injuries.

18 So, there are things you can do to
19 limit looking at everything on someone's cell
20 phone. You can agree in such a form, that the
21 military came up with a form that had the blanks
22 for what the search terms are, you will not go

1 beyond a search for what we've just agreed on in
2 writing.

3 And if you see the need later in the
4 investigation, because, and this has happened,
5 you realize there's a new word or a new name that
6 you need to search, then you have to go back to
7 the victim and her counsel and say, here's the
8 reason we would like to do another search, just
9 using this term or that term or this name.

10 CHAIR HOLTZMAN: And how do you ensure,
11 Lisa, that those are the only terms that are
12 being looked at and that people who have the cell
13 phone aren't looking at everything else?

14 MS. FRIEL: Because they'd be violating
15 an agreement and could get sued for doing that.
16 And I expect there would be military penalties
17 for doing that, if you were to go beyond the
18 limits of consent.

19 If somebody signs a consent to search
20 a physical place, if in the military, somebody
21 says, yes, you can search my bedroom and my
22 closet, but you can't search the entire house,

1 there are obviously repercussions if the military
2 police search the entire place. So, they would
3 seem to apply here as well.

4 CHAIR HOLTZMAN: And is that how it
5 works? I mean, I haven't been a prosecutor in
6 quite a while.

7 MR. STONE: You don't have any cases
8 that say that, do you? Because the case law I'm
9 aware of, including the Supreme Court, suggests
10 that, when you let somebody search your phone,
11 even if you only give them partial consent, the
12 defense counsel is going to have the right, for
13 completeness to say, as was suggested here, well,
14 you searched for these terms, but we're entitled
15 to have the whole phone searched, because we
16 think you didn't do those terms.

17 You didn't say, this, that, or the
18 other thing, so we want the rest of the phone to
19 be able to search it, because they might have --
20 this comes up in drug cases all the time, they
21 avoided using the name of the word cocaine and
22 instead they used popcorn.

1 MS. FRIEL: Right.

2 MR. STONE: And the only way we're
3 going to find out is by looking at the whole
4 phone. So, the first problem you have, and I
5 don't think there's any cases that I'm aware of,
6 maybe you are and I'd love to hear them, that say
7 that once you open that door, the defense counsel
8 will not have the right later, on completeness
9 grounds, to see the rest of the document, or in
10 this case the cell phone.

11 And as a result, once you waive your
12 privacy and self-incrimination interest, that's
13 what you're waiving. And if that search term
14 shows that you engaged in underage drinking at
15 the party, it's out there, you can't then claim
16 it again, you've waived it. And that's what the
17 issue is.

18 And unlike, I might add, the
19 circumstances you described before, the military
20 is very different in treating its victims. They
21 always are told they have their own counsel, when
22 they come to that interview with the investigator

1 or the prosecutor, they're entitled to come with
2 counsel.

3 They don't inadvertently decide not to
4 turn over their cell phone, they have the person
5 with them who's trained who says, we need a time
6 out, who drags them outside and says, here's the
7 pros and cons of what you've just been asked,
8 don't inadvertently think that you're going to
9 help yourself, you might be hurting yourself in
10 this case. I have to advise you and here's the
11 pros and cons.

12 So, they don't have that situation.
13 And they also are less likely, as a result of
14 having counsel right through the trial, to have
15 what you called the deer in the headlights
16 experience, because if their counsel is doing his
17 job, he says to them, by the way, everything on
18 your cell phone, which you can show me without
19 waiving your privilege and you ought to, may turn
20 out to be something on the defendant's phone that
21 he's then going to impeach you with.

22 So, why don't you give me your cell

1 phone, just like you would your diary, and let me
2 take a look and see if you're making a huge
3 mistake, because I can figure out very quickly
4 what they're going to impeach you with, and we
5 should moot court you on the kinds of questions
6 they're going to ask, that they got from this.

7 So, it's a very different
8 circumstance, because in civilian practice, you
9 don't automatically have a right to counsel from
10 the outset and even if you have the resources to
11 go hire one, you rarely get people with
12 experience as a victim's counsel in sexual
13 assault cases. And we've made sure in the
14 military that they get that.

15 So, some of those concerns you
16 expressed are a little different here. They're
17 constantly worrying, which the civilian counsel
18 aren't, about whether or not you should have used
19 alcohol on the base, whether or not there are
20 fraternization concerns.

21 Because in civilian practice, you know
22 that no prosecutor is going to go after you

1 because you're under 18 and you had a can of beer
2 and maybe you were having sex with your
3 neighbor's wife, that's not going to be an issue.

4 But in the military, your whole career
5 could be derailed by that, so the consequences
6 are much more serious. You have an ongoing
7 concern and there's lots of -- many other parts
8 of your life are regulated, your whole life is
9 regulated.

10 So, the results are that saying, we're
11 going to image a piece of your phone and we're
12 going to search for these words or others, I
13 think that there's no question, I'm not aware of
14 any cases, that you're not waiving your right.

15 And we could put in that, modern
16 forensic techniques to imaging and searching cell
17 phones can minimize, if not eliminate, victims'
18 financial concerns, but there's no question
19 they're still going to have privacy and privilege
20 and self-incrimination concerns that could derail
21 their entire career, the career that they went to
22 school for, if they went to a Service academy,

1 that they pursued at their military occupational
2 specialty, the whole thing is on the line.

3 That's one of the reasons we have such
4 difficulty with them coming forward, because a
5 lot of the times, they say, I'll keep my mouth
6 shut, because my whole career is going to change,
7 the morale, the people I work with, the people I
8 live with communally in the barracks.

9 And we had victims before us tell us,
10 even when their girlfriends, some of these were
11 women, even when their girlfriends knew they had
12 been raped and were sympathetic, afterwards,
13 their girlfriends wouldn't talk to them, because
14 they had -- reporting it and proceeding, even
15 getting a conviction destroyed the morale of the
16 entire unit.

17 Ultimately, the person who did it
18 wound up kicked out of the military, the unit was
19 broken up, they might have been moved. I mean,
20 there's these larger consequences for them that
21 are very different.

22 That's part of the reason they get

1 counsel and it's part of the reason that it's
2 going to be difficult for the Secretary to work
3 through Recommendation 50, but that doesn't mean
4 he shouldn't try.

5 VADM TRACEY: So, I think we had a
6 couple concerns. One is, we're not sure that the
7 military is paying attention to the fact that
8 there are technical capabilities that change this
9 dynamic a bit. They're not a full solution, but
10 they make the problem a little different from the
11 way that it's perceived.

12 I think there's a more fundamental
13 concern and that is, we think that neither
14 victims and, we believe, SVCs, really understand
15 how the MCIO could use this information to
16 formulate a better prosecution and that that's a
17 gap in the way -- we don't expect the victim to
18 understand that, but we don't think the SVC is
19 necessarily fully prepared to advise around the
20 power that could come from making that
21 information available.

22 CHAIR HOLTZMAN: Partially, it may be

1 because they don't -- they're not really aware of
2 these technical fixes.

3 VADM TRACEY: Correct.

4 CHAIR HOLTZMAN: So, for example, and
5 I take very seriously the concerns you raised
6 about the search of the phone, because I raised
7 that issue. But couldn't it, I mean, Lisa, I've
8 never been through this, but couldn't it be also
9 that the search terms could first be tested by
10 the SVC himself or herself?

11 So, if you put in the search term, I
12 don't know, Johnny, and it brings up that you
13 were drinking with Johnny, and you're on the base
14 or illegally, then the SVC could see that and
15 say, well, maybe we don't turn over this message
16 on 3:27 on June 3.

17 So, there are ways that you might be
18 able, if the SVC herself or himself took the
19 search terms and looked first, they may be able
20 to cleanse or make sure that --

21 MR. STONE: Spinning this out --

22 MS. FRIEL: They can't do that.

1 CHAIR HOLTZMAN: They can't?

2 MS. FRIEL: It's your forensic examiner
3 who can do that, who runs the search terms and
4 then, generally --

5 CHAIR HOLTZMAN: Okay. So, let's say
6 -- okay. So, wait, so the forensic --

7 MS. FRIEL: -- compiles digital files
8 that somebody else then takes a look at.

9 CHAIR HOLTZMAN: Okay. So, if the
10 search -- if the forensic examiner, who
11 presumably is a neutral party here, prints out
12 the results, can they go first to the Special
13 Victim's Counsel to review before they're turned
14 over to the prosecution, so that the forensic
15 examiner is, in a way, working for the SVC?

16 MR. STONE: Can the SVC veto and say,
17 no, I don't want to turn over and --

18 CHAIR HOLTZMAN: Yes.

19 MR. STONE: -- then, the forensic
20 examiner says to the investigator, I can't turn
21 it over to you? I think that would be a
22 conflict.

1 CHAIR HOLTZMAN: Well, it depends who

2 --

3 MR. STONE: The investigator's --

4 CHAIR HOLTZMAN: It depends who the
5 forensic person is hired by, doesn't it? I don't
6 know, I'm just asking --

7 MS. FRIEL: Well, you have military --

8 CHAIR HOLTZMAN: -- the question.

9 MS. FRIEL: -- forensic examiners,
10 military personnel who can do this. I don't know
11 how many, I don't know where they're based, but I
12 certainly know that you have military personnel
13 who do this. Whether you want to use some third
14 party outside the military --

15 CHAIR HOLTZMAN: No, but I'm talking
16 about --

17 MS. FRIEL: -- that's another question.
18 But I think all our conversation kind of leads
19 back to why the recommendation was written the
20 way it was. I think the basic point to get
21 across is, there is key evidence that really
22 helps an investigation and if it is a legitimate

1 claim, as most of them are, really helps a
2 prosecution.

3 And it seems that the investigators
4 and the prosecutors are not able to get their
5 hands on this information, as much as would be
6 helpful to these prosecutions. And so,
7 somebody's got to look at all the legitimate
8 things Mr. Stone and other people brought up, the
9 impediments and what kinds of things can you do
10 to make victims feel more comfortable turning
11 over what --

12 CHAIR HOLTZMAN: Right.

13 MS. FRIEL: -- is important evidence.
14 Because it's going to help your convictions.

15 CHAIR HOLTZMAN: Well, it seems to me
16 -- so, what you're saying is, really, that the
17 questions I'm asking you are really the questions
18 the Secretary of Defense ought to be asking,
19 which is, how can -- am I right, Admiral?

20 How can we utilize modern technology
21 to solve this problem? Maybe the Secretary of
22 Defense appoints an advisory committee just to

1 look at this issue, I don't know. But it seems
2 to me -- so, we can't really solve all the
3 points.

4 I think Mr. Stone has raised valid
5 issues about privacy, self-incrimination, and so
6 forth, but I think the thing that we're trying to
7 argue for here is that the techniques could
8 solve, if not all of these problems, some of
9 these problems, and they need to be looked at in
10 a serious and systematic way.

11 MR. STONE: Let me make a suggestion on
12 that last bullet that I think takes this into
13 account. Instead of striking it, what if the
14 beginning of that bullet just says, perhaps
15 modern forensic techniques for imaging and
16 searching cell phones can minimize, if not
17 eliminate, victims' concerns -- I would have said
18 financial concerns, but financial and practical,
19 but why don't we just say, victims' concerns
20 about cell phone searches?

21 By putting perhaps in there, we don't
22 know there's an actual technique, we don't know

1 if we have the examiners, we don't know if it's
2 going to get through the whole thing, but we're
3 raising what you want to raise. We're
4 highlighting that as something for the Secretary
5 of Defense to look at.

6 MS. FRIEL: What if you said, modern
7 forensic techniques and well-crafted consent
8 forms might, blah, blah, blah. Because I think
9 it's a combination of both.

10 MR. STONE: Well, then you've got say,
11 may minimize --

12 CHAIR HOLTZMAN: Yes, I don't have a
13 problem with that. And ought to be examined.
14 Right.

15 MR. STONE: Right, ought to be
16 examined, something like that.

17 MS. FRIEL: Yes.

18 CHAIR HOLTZMAN: Modern forensic
19 techniques for imaging and appropriate -- and
20 searching cell phones and --

21 MR. STONE: Well-crafted consent forms.

22 CHAIR HOLTZMAN: -- well-crafted

1 consent forms may minimize, if not eliminate,
2 victims' legitimate concerns about cell phone
3 searches and, therefore, should be --

4 VADM TRACEY: Explored.

5 CHAIR HOLTZMAN: -- explored --

6 MR. STONE: Period.

7 CHAIR HOLTZMAN: -- thoroughly
8 explored, seriously, systematically --

9 VADM TRACEY: Period.

10 CHAIR HOLTZMAN: Period? Okay. All
11 right. Well, so -- okay. So, we've done Bullet
12 5. Where are we on Bullet Point 4?

13 MR. STONE: Okay. You want less
14 verbiage and just --

15 CHAIR HOLTZMAN: Yes.

16 MR. STONE: -- have a reference to the
17 Supreme Court case?

18 CHAIR HOLTZMAN: I don't know that we
19 really --

20 MR. STONE: I mean, we have to have
21 some --

22 CHAIR HOLTZMAN: I don't think -- we

1 keep saying, their legitimate privacy rights, all
2 the way through here, I don't think that we're in
3 any way saying that they don't have them. I
4 don't think we're attacking that in any way,
5 shape, or form. I think we're -- I'm sorry, Mr.
6 Taylor, you have something?

7 PROF. TAYLOR: So, here's some proposed
8 language. Some SVCs and VLCs reported that they
9 advised clients that victims should not
10 voluntarily turn over their cell phones to
11 investigators if the victims wished to preserve
12 their privacy rights and privileged information
13 on their cell phone, even when they are likely to
14 contain potential evidence against an accused and
15 to provide useful information to prepare the
16 victim for future testimony that would enable a
17 successful prosecution.

18 CHAIR HOLTZMAN: I have no problem with
19 that, but does that get to the point? The point
20 that Mr. Stone wants to say is that the privacy
21 rights are like granite, they can't be taken away
22 and that we're not trying to -- he wants somehow

1 for us to imply here that we're not minimizing
2 these privacy rights.

3 And I don't know how we can -- I
4 thought we had made it very clear. We can say,
5 again, to preserve their legitimate and well-
6 established privacy rights and privileges. Does
7 that solve your problem, Mr. Stone?

8 MR. STONE: It might, yes.

9 CHAIR HOLTZMAN: Okay.

10 PROF. TAYLOR: Well, what I was trying
11 to do with these two additions --

12 CHAIR HOLTZMAN: I know, you were just
13 adding. I was addressing --

14 PROF. TAYLOR: Yes.

15 CHAIR HOLTZMAN: -- his point and
16 you've got this third point.

17 PROF. TAYLOR: Yes. It was to address
18 the two issues that we hadn't really --

19 CHAIR HOLTZMAN: Right.

20 PROF. TAYLOR: -- explicitly done,
21 which --

22 CHAIR HOLTZMAN: Right.

1 PROF. TAYLOR: -- is that the evidence
2 would be helpful against an accused and it will
3 prepare the --

4 CHAIR HOLTZMAN: Right.

5 PROF. TAYLOR: -- victim for
6 examination.

7 CHAIR HOLTZMAN: Right. Okay. Does
8 anybody have any problem with Mr. Taylor's
9 proposal? Hearing no objection, it's adopted.
10 Does any --

11 MR. STONE: With your language too?

12 CHAIR HOLTZMAN: Right. I was going to
13 get to that.

14 MR. STONE: Okay.

15 CHAIR HOLTZMAN: Yes. And then, the
16 proposal I made, which is, their legitimate and
17 well-established privacy rights --

18 MR. STONE: And privileges.

19 CHAIR HOLTZMAN: -- and privileges.

20 MR. STONE: Okay. I think we're done

21 --

22 CHAIR HOLTZMAN: We're done.

1 MR. STONE: -- with this
2 recommendation.

3 CHAIR HOLTZMAN: Lisa, thank you for
4 helping us walk through this and sharing with us
5 your expertise, you were very helpful. And --

6 MS. FRIEL: You're welcome, I'm glad it
7 was helpful.

8 CHAIR HOLTZMAN: -- if we hang up on
9 you, it's not because we're rude.

10 MS. FRIEL: Okay. Well, enjoy the rest
11 of your summer. Thanks so much.

12 CHAIR HOLTZMAN: Okay. I think we'll
13 take a ten minute break and figure out what we're
14 going to do next. What are we going to do next?

15 CAPT TIDESWELL: Yes, ma'am. Well, we
16 have two options. One is wine and cheese. Or
17 the other is, I believe Ms. Saunders has drafted
18 some additional language for --

19 CHAIR HOLTZMAN: How can we --

20 CAPT TIDESWELL: -- you to consider.

21 CHAIR HOLTZMAN: How can we keep her
22 waiting?

1 CAPT TIDESWELL: It's a tough call.

2 CHAIR HOLTZMAN: And I'm waiting with
3 baited breath to hear this.

4 JUDGE JONES: The question is, is her
5 additional language going to be better or worse
6 after the wine and cheese?

7 MS. SAUNDERS: Well, that's very true.

8 (Laughter.)

9 MS. SAUNDERS: That's a legitimate
10 point.

11 CHAIR HOLTZMAN: I think, let's just
12 take a little break now, that's okay.

13 MR. STONE: What, five minutes?

14 CHAIR HOLTZMAN: Yes.

15 (Whereupon, the above-entitled matter
16 went off the record at 4:16 p.m. and
17 resumed at 4:25 p.m.)

18 CHAIR HOLTZMAN: Okay. Should we do
19 this paragraph by paragraph?

20 MS. SAUNDERS: I would note that this
21 bottom paragraph, it begins the Court of Appeals
22 for the Armed Forces --

1 CHAIR HOLTZMAN: Right.

2 MS. SAUNDERS: If you were -- if you
3 feel this is all too lengthy. That could
4 potentially be put into a footnote. That's just
5 an option.

6 CHAIR HOLTZMAN: Well, I'll consider
7 that suggestion. Okay. So, let's go to the
8 first bullet. Which is, you know, the black
9 bullet, the kind of framing bullet.

10 Any objection to that?

11 MR. STONE: I don't know what receive
12 media attention. Why don't you say reported in
13 the media. Reported by the media.

14 VADM TRACEY: How about the JPP has
15 media coverage of two sexual assault court
16 martial appellate cases?

17 MR. STONE: Good. I like it.

18 CHAIR HOLTZMAN: Okay. So with that
19 amendment by Admiral Tracey, is there any
20 objection to the framing bullet?

21 (No audible response)

22 CHAIR HOLTZMAN: Hearing none, it's

1 accepted. Okay. Bullet one. Is there any
2 objection to bullet one?

3 MR. STONE: Yes. The problem with
4 bullet one is the convening authority didn't
5 submit. In the first case, unless these are
6 varied, the defense counsel submitted a
7 declaration in which the convening authority's
8 statement actually at issue as it states, because
9 we have a declaration now.

10 CHAIR HOLTZMAN: Okay. Well, maybe
11 there's some way of doing that so they're using
12 the first thing. A declaration of the convening
13 authority was submitted that states.

14 MR. STONE: Yes. That's the reason
15 the defense had submitted a declaration of the
16 convening authority.

17 JUDGE JONES: Yes.

18 CHAIR HOLTZMAN: Okay. Any other
19 problem Mr. Stone?

20 MR. STONE: Just the citation to Barry
21 hasn't been fixed. I have the citations if
22 people want them to the Barry opinion. And no

1 one can find it.

2 I mean, that just says it was decided.
3 But it's actually, let's see, this is the --

4 MS. GALLAGHER: We could get that for
5 you afterwards.

6 MS. SAUNDERS: Yes. I'm sorry. I
7 really didn't -- I didn't stop and fix that.

8 MR. STONE: Okay.

9 MS. SAUNDERS: I was just
10 concentrating on this.

11 MR. STONE: Okay. Because the CAAF
12 one is.

13 CHAIR HOLTZMAN: Okay. But --

14 MR. STONE: 76 MJ 242.

15 CHAIR HOLTZMAN: With the -- with the
16 agreement of the staff to include your citation
17 or proper citation --

18 MR. STONE: Yes. The reconsideration.

19 CHAIR HOLTZMAN: Do we have any other
20 objection to -- Mr. Stone, do you have any other
21 objection to paragraph -- bullet one?

22 MR. STONE: Only that it says that,

1 duh, duh, duh, then it says, he further stated.
2 I think we should say either it further stated or
3 the convening authority further stated.

4 Right? We're avoiding --

5 CHAIR HOLTZMAN: Okay.

6 MR. STONE: Personal comments if you
7 want.

8 JUDGE JONES: The convening authority.

9 CHAIR HOLTZMAN: The convening
10 authority further stated. Okay. Anything else?

11 MR. STONE: I'm not quite sure how we
12 can't -- I don't know that we need to cite to the
13 declaration footnote two. Because nobody can get
14 that anywhere.

15 Oh, I guess they could get it in --
16 from the -- they could get it from the -- from
17 CAAF. Which is where we got it.

18 CHAIR HOLTZMAN: Okay. Mr. Stone, do
19 you have any other concerns?

20 MR. STONE: So I think the footnote
21 just is there.

22 CHAIR HOLTZMAN: Okay. So bullet one,

1 Mr. Stone, you have no objections. I would like
2 to add -- do we need after -- in the second line,
3 I perceive that if I were to disapprove the
4 findings in, when it says the case, can I say the
5 sexual -- I would add in brackets, the sexual
6 assault case.

7 So it's clear what we're talking
8 about. Any objection to that?

9 MR. STONE: No.

10 PROF. TAYLOR: I agree.

11 CHAIR HOLTZMAN: All right. So, with
12 those several amendments, bullet one is approved.

13 Okay. Bullet two which contains two
14 paragraphs. Should we take them separately and
15 do paragraph one in bullet two?

16 Mr. Stone, do you have any objections
17 to this?

18 MR. STONE: Yes. I was a little
19 concerned because as I read the opinion, and we
20 can look at page three. We all now have it.

21 At the bottom, Judge Franklin is
22 saying this all came out of the different sexual

1 assault case, United States v. Oropeza, where he
2 explained his dual process prior to dismissing
3 the charges in the Wilkerson case.

4 So that's, I think, what they're --
5 what it stems from.

6 MS. SAUNDERS: Okay. That's a -- sir,
7 I think that's actually further procedural
8 background. If you recall, General Franklin was
9 the convening authority who overturned the
10 findings and sentence in the Wilkerson case.
11 Which gained a lot of media attention at the
12 time.

13 And so, I think in the -- in this
14 Oropeza case, they -- they're just simply quoting
15 from General Franklin to where he explains, you
16 know, his thought process in dismissing those
17 charges.

18 And then it's really more on page four
19 where they get into the procedural history that
20 precedes this case.

21 MR. STONE: All right. Well, fine.
22 Here's the objections that I make. On line two,

1 again, okay -- on line two, the Court of Appeals
2 for the Armed Forces that should say, reversed
3 and remanded for retrial, a sexual assault case
4 based on an appearance of unlawful command
5 influence.

6 And this goes back to Ms. Holtzman's
7 comment before, instead of stemming from because
8 senior civil and military leaders reportedly gave
9 the convening authority, blah, blah, blah.

10 At least that's accurate. And we
11 don't need the footnote for to the Wright case,
12 because it's not clear that's why any of this
13 happened.

14 MS. SAUNDERS: Okay.

15 MR. STONE: And I'd strike the
16 footnote. I think that's correct right too
17 there.

18 MS. SAUNDERS: Would it be --

19 CHAIR HOLTZMAN: But the problem is
20 that we have because twice. So, that's going to
21 be a problem in that sentence.

22 MR. STONE: Do you want to say due to?

1 Due to his failure, on the second one? Due to
2 his failure.

3 MS. SAUNDERS: Maybe our technical
4 writer has a thought?

5 MS. FALK: I would say owing too
6 rather than due to.

7 CHAIR HOLTZMAN: Okay. Owing to or
8 for his failure. Would for his failure be okay?

9 PROF. TAYLOR: It sounds good.

10 MR. STONE: Okay.

11 CHAIR HOLTZMAN: Okay. And then what
12 about the second paragraph?

13 VADM TRACEY: I don't understand why
14 we need all that?

15 CHAIR HOLTZMAN: Yes. All right.

16 MS. SAUNDERS: I could put that in a
17 footnote. Or we could get rid of it all
18 together. It just -- it sounded like you wanted
19 more quotes from that case.

20 CHAIR HOLTZMAN: Right.

21 MR. STONE: No.

22 CHAIR HOLTZMAN: Are you -- is

1 everybody okay with just eliminating it?

2 MR. STONE: Just striking it. Yes.

3 PROF. TAYLOR: Yes.

4 CHAIR HOLTZMAN: Great. Okay.

5 Fantastic.

6 MS. SAUNDERS: At the bottom of the --
7 that first paragraph, you're going to keep, would
8 it help to clarify things to say, because of his
9 failure to refer an earlier, unrelated case to
10 court martial?

11 CHAIR HOLTZMAN: No.

12 MR. STONE: No.

13 CHAIR HOLTZMAN: I think it's fine
14 just the way it is.

15 MR. STONE: No. Just the way it is.

16 MS. SAUNDERS: Okay. Great. Okay.

17 CHAIR HOLTZMAN: We'll guild the lily.
18 Okay. So now we are done with the investigations
19 report. Because this was the only issue that was
20 outstan -- am I correct?

21 MR. STONE: No. Well, this is not the
22 investigation. This is the --

1 CHAIR HOLTZMAN: Oh, sorry.

2 MR. STONE: This is the administration
3 report.

4 CHAIR HOLTZMAN: No, right. Sorry,
5 sorry, sorry.

6 JUDGE JONES: I have one question
7 though. Does -- I don't care about getting rid
8 of this second and third paragraph here.

9 But, if you just read the U.S. -- the
10 second bullet, don't we still have to say because
11 of his failure to refer --

12 CHAIR HOLTZMAN: Yes. It says --

13 JUDGE JONES: A prior sexual assault
14 case to court martial?

15 CHAIR HOLTZMAN: You want to say a
16 prior?

17 JUDGE JONES: I mean, we -- you had
18 prior.

19 CHAIR HOLTZMAN: Okay.

20 JUDGE JONES: Yes. Because he's --
21 it's not being --

22 MR. STONE: Okay. Add the word prior.

1 JUDGE JONES: Yes.

2 CHAIR HOLTZMAN: Fine. Okay. But it
3 wouldn't be because, it would say for his
4 failure.

5 MR. STONE: Right.

6 JUDGE JONES: Well, right. Whatever.
7 Yes.

8 CHAIR HOLTZMAN: Okay. All right.
9 So, this is to take the place of -- what pages
10 were we --

11 MS. SAUNDERS: This is following
12 recommendation 56.

13 CHAIR HOLTZMAN: Okay. So, with this
14 amendment as amended, and as approved, do we have
15 the -- I guess we should vote on approving the
16 report regarding Fair Administration of Military
17 Justice in Sexual Assault Cases. We're up to
18 that now.

19 Okay. All in favor say aye.

20 (Chorus of ayes)

21 CHAIR HOLTZMAN: Opposed?

22 (No response)

1 CHAIR HOLTZMAN: Okay. So we --

2 MR. STONE: Can we -- can we -- I
3 can't vote yet. Because I -- we made so many
4 changes, I'd kind of like to see them. Can I --
5 can I call this a tentative vote?

6 I want to -- I want to see them. I
7 mean we made a zillion changes.

8 CHAIR HOLTZMAN: That's a completely
9 unreasonable request.

10 (Laughter)

11 CHAIR HOLTZMAN: When you're talking
12 about seeing and knowing what you voted for.

13 (Laughter)

14 MR. STONE: Exactly. From the
15 beginning the end we changed this one. Are we
16 able to vote by email?

17 MS. SAUNDERS: I can do my best --

18 CHAIR HOLTZMAN: Okay. Can we have it
19 by tomorrow?

20 MS. SAUNDERS: I think we should be
21 able to have it by tomorrow.

22 CHAIR HOLTZMAN: Okay. Well, we

1 should have -- what do you want to see -- what do
2 you want to see, Mr. Stone?

3 MR. STONE: Just their Administration
4 ones. The one we did all the extensive changes
5 on.

6 CHAIR HOLTZMAN: Oh, so that's what
7 you want.

8 MR. STONE: The other two we --

9 CHAIR HOLTZMAN: You want all of them.
10 Okay.

11 MR. STONE: I wouldn't mind seeing
12 also the language that we just worked over on
13 that -- about the cell phone stuff. That would
14 be nice too.

15 CHAIR HOLTZMAN: All right. Let's
16 try. I mean, I think the problem is staff has
17 done a miraculous job. And they're only human.

18 MR. STONE: Well, that's why I was
19 asking whether we're able to, and maybe this is
20 for --

21 CAPT TIDESWELL: Yes sir. I mean, we
22 can. I think we've all tried to take copious

1 notes. And as a team we're able to accomplish --

2 MR. STONE: No, I meant can we take
3 votes by email after this? Even if we -- if it's
4 not ready by tomorrow afternoon?

5 CAPT TIDESWELL: I don't think so.

6 No.

7 MR. STONE: I don't want to make those
8 people hate me.

9 CAPT TIDESWELL: No sir. My only
10 concern is, is we typically go back to the
11 transcript to get the exact language. And we
12 very methodically take hours --

13 MR. STONE: Right.

14 CAPT TIDESWELL: To make sure we have
15 the language that you all have voted on.

16 CHAIR HOLTZMAN: But if we have it
17 before us tomorrow, that should solve the
18 problem. And we don't need the transcript.

19 CAPT TIDESWELL: We could -- yes. I
20 mean, we could do our best.

21 CHAIR HOLTZMAN: Because if we're
22 voting on it, we're voting on it whether it

1 matches what we did yesterday, I mean, the day
2 before this.

3 CAPT TIDESWELL: That's the risk.

4 CHAIR HOLTZMAN: I'm prepared to take
5 that.

6 CAPT TIDESWELL: And the other option
7 is, is to hold a phone meeting. Where we would
8 give notice in the Federal Register.

9 MR. STONE: That's what I was
10 thinking.

11 CAPT TIDESWELL: In sort of a sweep up
12 event. Have everybody connect over the
13 telephone.

14 MR. STONE: And --

15 CHAIR HOLTZMAN: But when would we do
16 that?

17 CAPT TIDESWELL: Well, it would be up
18 to when all of you are available.

19 MR. STONE: Schedule it.

20 CHAIR HOLTZMAN: Let's see what we
21 have tomorrow morning.

22 CAPT TIDESWELL: Yes, ma'am.

1 CHAIR HOLTZMAN: And see how far we
2 can get with that.

3 CAPT TIDESWELL: Okay.

4 MR. STONE: Aren't we going to have to
5 do that on the final report? Because I don't
6 even have a draft that I -- tonight if I stay up,
7 I can't go line by line because we have missing
8 pieces.

9 So, we're going to have to have a
10 phone meeting?

11 CAPT TIDESWELL: Yes, sir.

12 CHAIR HOLTZMAN: I think we have to
13 look at it tomorrow.

14 CAPT TIDESWELL: Right. I guess one
15 theory was, if what we came up with were just
16 minor edits from the members, and everybody was
17 comfortable and we weren't seeing substantive
18 changes or things that looked like they needed to
19 be deliberated on, I would talk to Maria Fried to
20 see whether or not we actually have to bring
21 everybody back up.

22 I think we're going to have to.

1 Because you're going to want a final vote on the
2 report.

3 MR. STONE: And we don't -- and
4 there's holes in it now, right?

5 CAPT TIDESWELL: There are holes.
6 Because we had to wait for the decisions that
7 were being instead.

8 MR. STONE: Right. I get it.

9 CAPT TIDESWELL: Yes, sir. But I
10 think there's going to have to be a phone call, I
11 think, is the bottom line. By the 30th of
12 September.

13 CHAIR HOLTZMAN: Oh, so this could
14 take place in September. Well, no. It's a
15 problem because you have to print up the report.

16 CAPT TIDESWELL: Right. So probably
17 the end of August or early September so we can
18 close down the panel as required by law.

19 CHAIR HOLTZMAN: Oh, I see now.

20 MR. STONE: And that's why -- while
21 we're still in session. That's why I wasn't sure
22 if tomorrow morning is useful because we don't

1 have something to vote on anyway.

2 CAPT TIDESWELL: Yes, sir. So --

3 CHAIR HOLTZMAN: Well --

4 CAPT TIDESWELL: I'm sorry.

5 CHAIR HOLTZMAN: What I would like to
6 do is give everybody to the extent the staff can
7 make the changes, give us a clean copy of what we
8 did on the investigations report and on barriers
9 report, review that tomorrow morning.

10 We can review the outline of the -- of
11 the final report. See whether really there's
12 anything aside from word smithing issues. It may
13 just be word smithing issues that we're dealing
14 with.

15 MR. STONE: You're right.

16 CHAIR HOLTZMAN: And if that's the
17 case, you know, that makes it a lot easier. Word
18 smithing, I don't know, Mr. Sprance is that --
19 can word smithing be done on the phone? Or will
20 you still need a public meeting for that?

21 MR. SPRANCE: We could do word
22 smithing. Well, it -- convention rule

1 deliberations, ma'am, that's what I'm concerned
2 about. And if it does, then there needs to be a
3 meeting.

4 CAPT TIDESWELL: But we could conduct
5 the meeting over the telephone.

6 MR. SPRANCE: We could do the meeting
7 over the telephone.

8 CHAIR HOLTZMAN: Okay. Fine. All
9 right.

10 MR. STONE: We're going to have to.
11 Because we don't have -- we're not going to have
12 by tomorrow all the missing pieces, the final
13 report.

14 CAPT TIDESWELL: No, sir. I won't.

15 MR. STONE: So that meeting, you could
16 throw in and vote on everything that we haven't
17 voted on.

18 CAPT TIDESWELL: Yes, sir.

19 CHAIR HOLTZMAN: Well, I think that's
20 not a good idea. Because the more we finish now,
21 the more we can submit -- I mean, we can't leave
22 everything to the last minute.

1 It has to be printed up. Presented to
2 this -- to Congress and the Secretary of Defense.
3 And who knows what happens to people's schedules
4 and stuff like that.

5 So, I'd really like to get as much
6 finished as we can tomorrow morning. I don't
7 think we'll go past noon. Right? Maybe even
8 less time than that.

9 MS. GALLAGHER: Most of the -- ma'am,
10 most of the holes in the final report are going
11 to be straight lifts out of the prior reports
12 that fill in almost verbatim.

13 CHAIR HOLTZMAN: Oh. So there's
14 nothing -- no substance that's going to happen.
15 You're just going to tell us where you're going
16 to --

17 MS. GALLAGHER: Right.

18 CHAIR HOLTZMAN: So we've already
19 voted on those reports.

20 MS. GALLAGHER: Right.

21 CHAIR HOLTZMAN: So if we vote --

22 MS. GALLAGHER: Absolutely.

1 CHAIR HOLTZMAN: To include what we've
2 already voted on --

3 MS. GALLAGHER: It's here's your
4 recommendations verbatim from prior --

5 MR. STONE: Well, let me ask you a
6 crazy question. As long as you've got all of
7 that, I know military people typically start
8 early.

9 If we didn't come in and start until
10 10:30 let's say, would you by then have today's
11 changes and maybe most of the holes filled by
12 cutting and pasting?

13 CAPT TIDESWELL: I mean, we could try.
14 What I could do is I could have the staff stay
15 later tonight. We can go through the various
16 reports that are pending.

17 Come up with what we believe the
18 language to be without the benefit of the
19 transcript. And then present that to you in the
20 morning.

21 I mean, this is a heavy lift. And
22 then if you all want to come in a little later

1 and then we could try and see if we could fill in
2 the holes to the final report.

3 Because there's really the two
4 sections. She's right. It's really just the
5 recommendations that are pending.

6 I know there's another chapter that
7 talks about things referring to other panels.
8 Which really in this case is the DAC-IPAD.

9 So we would just lift the
10 recommendations that you made, referring to the
11 DAC-IPAD. And just lift those and put them in.

12 MS. GALLAGHER: And the other holes
13 that -- really, the language in that has been
14 what our press releases have said about the
15 reports.

16 So it's really a summary, a statement
17 of what the sexual assault reports said. What
18 the concerns to fairness report said.

19 And it's -- it's really not
20 substantive unless you're quibbling with the
21 language of the summary. And then really, it's -
22 - I don't know that it's all that controversial.

1 You know, so it should be easy to
2 ferret through the summary language tomorrow to
3 read the report, I would think.

4 PROF. TAYLOR: I'm very -- I
5 apologize, but I am very skeptical that that's a
6 fair thing to ask the staff to do.

7 JUDGE JONES: Right.

8 PROF. TAYLOR: You know, for us to do
9 in the morning. I think that if you want it bad,
10 you get it bad.

11 And I'm sorry --

12 CAPT TIDESWELL: Yes, sir. And I'm
13 worried about not having a transcript as well.

14 PROF. TAYLOR: I agree.

15 CHAIR HOLTZMAN: So let's --

16 PROF. TAYLOR: So I think we need to
17 stick with the Chair's original schedule.

18 MR. STONE: And if -- yes.

19 CHAIR HOLTZMAN: So, which is what
20 now? That we look at the -- that you try to do
21 the investigations? Recommendation 50, what we
22 voted on?

1 CAPT TIDESWELL: Yes, ma'am.

2 CHAIR HOLTZMAN: And as much of this
3 other, you know, barriers report, or whatever
4 it's called now, as we can.

5 MS. SAUNDERS: If I had -- if there's
6 some sticking point where I don't have the
7 transcript and I am unable to determine what it
8 was that was decided upon, I guess we could bring
9 that up tomorrow.

10 I'm hoping that won't be the case.

11 MR. STONE: I will be the case.
12 Because I just realized there is one piece that
13 we were going to find out from Maria even by
14 telephone, this business about whether --

15 MS. SAUNDERS: Oh, adopting?

16 JUDGE JONES: The adopting.

17 MR. STONE: Adopting -- what we adopt
18 with modifications. Or whether we attach.

19 MS. SAUNDERS: Um-hum.

20 MR. STONE: And maybe somebody can --
21 maybe she'll tell us by telephone. Because I
22 mean, she knows the issue.

1 But it really -- that gets -- it's not
2 something we were able to resolve.

3 MR. SPRANCE: I'll see what I can do.
4 Talk about that.

5 CHAIR HOLTZMAN: Okay. All right.
6 Anyway, I think we should meet tomorrow at nine
7 o'clock, normal time. And see how far we get.

8 CAPT TIDESWELL: Yes, ma'am.

9 CHAIR HOLTZMAN: And then we'll --
10 whatever we can't finish, we'll do over the phone
11 in a public meeting either early September.

12 CAPT TIDESWELL: Yes, ma'am.

13 CHAIR HOLTZMAN: I guess. Or maybe
14 the end of July. I don't know when you'll get
15 the extra record.

16 JUDGE JONES: So wait a minute. When
17 do we have to have this done?

18 CHAIR HOLTZMAN: September 17 is when
19 --

20 MR. STONE: September 30th.

21 CAPT TIDESWELL: Well, the panel ends
22 on the 30th of September.

1 CHAIR HOLTZMAN: Oh, the 30th.

2 CAPT TIDESWELL: There are some sweep
3 up functions. And we can't take it all the way
4 to the end.

5 So I think comfortably it's probably
6 no later than the first week of September we
7 should be done.

8 CHAIR HOLTZMAN: Right. Because you
9 have to print it.

10 JUDGE JONES: Print it yes.

11 CAPT TIDESWELL: They go to the
12 editor. Then they go to the graphics designer.
13 Then they go -- we send them out to you all. We
14 have a transmittal letter that needs to be
15 signed.

16 CHAIR HOLTZMAN: Right.

17 CAPT TIDESWELL: Which is something
18 I'd like to discuss. Instead of forcing you all
19 to actually sign something and scan, perhaps I
20 could just -- if I could get your permission over
21 an email, we can drop your signatures in.

22 But I would not do so without

1 permission. But that is an option. So you don't
2 have to sign the actual document and scan it on
3 the transmittal letter. Which would make it
4 easier.

5 JUDGE JONES: Do you want blank
6 signatures today?

7 (Laughter)

8 MR. STONE: We've got them in our
9 forms, I think.

10 CHAIR HOLTZMAN: All right. Well, I
11 think -- Mr. Sprance, are we ready to?

12 MR. SPRANCE: Ready, ma'am? Yes.

13 CHAIR HOLTZMAN: Yes, sir.

14 MR. SPRANCE: The meeting is
15 adjourned.

16 (Whereupon, the above-entitled matter
17 went off the record at 4:43 p.m.)

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19

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21

22

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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 07-26-17

Place: Arlington, VA

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