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
CONTENTS

Welcome and Introduction
  Designated Federal Official Opens Meeting
    Mr. Bill Sprance . . . . . . . . . . . . . . . 4
  Remarks of the Chair
    Hon. Elizabeth Holtzman . . . . . . . . . . 4

Panel Deliberations on JPP Report on Panel
Concerns Regarding the Fair Administration of
Military Justice in Sexual Assault Cases . . . . . 6

Panel Deliberations on JPP Report on Fiscal Year
2015 Statistical Data Regarding Military
Adjudication of Sexual Assault Offenses . . . . 202

Panel Deliberations on JPP Report on Sexual
Assault Investigations in the Military
    Ms. Lisa Friel, Special Counsel
      for Investigations,
        National Football League . . . . . . . . . 303

Panel Deliberations on JPP Final Report . . . . 399

Meeting Adjourned . . . . . . . . . . . . . . . . 410
MR. SPRANCE: Good morning everyone,
I'm Bill Sprance, the designated federal official
for the Judicial Proceedings Panel.

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

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

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

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

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

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

Tomorrow the Panel will conclude with deliberations on the JPP final report. Each public meeting in the Judicial Proceedings Panel includes time to receive input from the public.
The JPP received no request for public comment at today's meeting.

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

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

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

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

If you recall at the last meeting in June, the Panel reviewed the Subcommittee report and deliberated on the Subcommittee report on this topic. And the Panel voted to adopt eight
of the nine recommendations of the Subcommittee.

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

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

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


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

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

MS. SAUNDERS: This is the one recommendation that the Panel did not vote on at
the last meeting. The Panel had voted to adopt all of the other recommendations, but if you recall, the original wording on this recommendation was to ask Congress to repeal the two particular provisions from the NDAA that are discussed here.

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Yes, please.

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

CHAIR HOLTZMAN: So this --

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

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

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

JUDGE JONES: I think appear is less definitive, as opposed to -- it's certainly stronger than saying have created. I think appear is less definitive. I don't have any other comments about it.
MR. STONE: Appear to have created makes it sounds like it in fact created it in the past. And I was trying to -- it could even say, may create.

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

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

CHAIR HOLTZMAN: Any other comments about this?

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

MR. STONE: I guess if you look at Tab 4 you will see my concern with that. And that is -- I guess Tab 3. I suggested in the commentary that we don't know if it's a factually accurate statement because the data in the second bullet is unofficial data recalled by individual
military officials. It was not data that Dr. Spohn got and that she analyzed.

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

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

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

JUDGE JONES: It's her last meeting.

(Laughter)

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

I actually have a suggestion that could solve some of this problem, which is, instead of saying, have created the perception,
why don't we say, a perception. And then we haven't said that -- it just makes it a little bit less -- it makes it a little vaguer as to who is perceiving and how widespread it is and so forth.

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

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

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

CHAIR HOLTZMAN: So it would say, because these provisions appear to have created a perception of undue pressure. It's a very minimal change, and maybe it's a meaningless change.
MR. STONE: Can you put that together with what I suggested and say, may have created a perception, because I'm fine with that?

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

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

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

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay. Those in favor
say aye?

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?

(Chorus of no)

CHAIR HOLTZMAN: The no's have it.

Well in that case, let's move to Recommendation 56 itself. Accepting the whole record.

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

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

MR. STONE: I think that's better.

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Okay. Well, I'll then offer that amendment. Instead of, created the perception, to change the word, the to a.

Those in favor say aye?

(Chorus of aye)

CHAIR HOLTZMAN: Opposed? Ayes have
it. No, for Recommendation 56, those in favor say aye?

JUDGE JONES: Aye.

VADM TRACEY: Aye.

PROF. TAYLOR: Aye.

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

MR. STONE: Abstain.

CHAIR HOLTZMAN: Ayes have it.

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

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

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

MS. SAUNDERS: Okay.

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

And that's the material that the staff
sent us about Article 33. Which I think impacts, directly, Recommendation 53.

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

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

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

CHAIR HOLTZMAN: Are you talking about the Joint Services Committee?
MR. STONE: Yes. Yes. The Joint Service Committee.

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

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

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

And so I think we at least have to --

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

The Joint Service Committee released a draft, executive order, on July 11th. And it's
in the Federal Register, open for public comment
for a two-month period.

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

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

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

What's a little bit different about
theirs is that they do retain probable cause as
the standard for referral. What they do is have
a list of considerations that the staff judge
advocate and convening authority should consider
in all cases.
Among those considerations, if you look on Page 3 of the draft EO that we sent you, Number H is, admissible evidence will likely be sufficient to obtain and sustain a conviction in trial by court-martial.

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

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

Which if you recall, that provision specifically refers to the U.S. Attorney's
That they should look to that for guidance.

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

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

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

But probable cause is still the standard for referral, versus, I think what the JPP has recommended, which is, that the standard for referral should be that the charges are supported by probable cause and there is a reasonable likelihood of proving the element of
each offense, beyond a reasonable doubt, using only evidence likely to be found admissible at trial.

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

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

issued by the Department of Justice, the American
Bar Association, the Criminal Justice Standards
for the Prosecution Function and the National
District Attorneys Association, the National
Prosecution Standards.

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

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

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

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

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

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

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

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

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

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

MS. SAUNDERS: That's right.

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

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

VADM TRACEY: So I'm not sure that
it's inconsistent for the Panel to continue to
recommend, or recommending. It may be
appropriate to acknowledge in the sub-bullets
that there is this executive, draft executive
order out there, that would appear to be consistent --

MS. SAUNDERS: Sure.

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

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

CHAIR HOLTZMAN: Judge Jones?

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

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

CHAIR HOLTZMAN: Right. I agree.

JUDGE JONES: I think the referral section basically, when it says, consider the matters, yes, probable cause, but also consider
the matters in 2.1.

And of course, one of the matters in 2.1 is that admissible evidence will likely be sufficient to obtain and sustain a conviction.

So that's what we're saying.

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

I also think, they being who they are, have done a good job of reminding everybody about the interests of justice and good order and discipline in here, which we didn't discuss.

Perhaps wasn't in our sights.

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

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

JUDGE JONES: Right.

MS. SAUNDERS: But I think they just
wanted that to be the standard out there.

Probable cause plus this other --

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

CHAIR HOLTZMAN: Taylor, did you have

a --

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

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

JUDGE JONES: Right.

PROF. TAYLOR: So I really think that,
to the extent we want to make any comment, if we do, it really should be confined to the limited issue of referral and not to anything else in the comments.

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

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

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

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

I do think it's a good idea to note, that the, in another bullet, that the Joint Services Committee has proposed, in section
whatever it is, 2.3, 2.1, 2.2, 2.3, essentially a similar change in terms of considerations for convening authorities and staff judge advocates. So that would be my proposal.

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

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

You know, this topic.

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

That shows that we knew about it, we've read it, we understand. I totally agree with both Member Jones and Member Taylor, that the Joint Service Committee is way more
prescriptive in detail than us and also went
further and covered other topics.

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

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

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

CHAIR HOLTZMAN: But that raises a
separate issue. It's one thing to have a bullet
acknowledging the existence of this report, the
Joint Services Committee proposal, and to say
that it is essentially similar to our
recommendation and note that the proposal became public after our work on this recommendation.

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

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

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

CHAIR HOLTZMAN: Okay.

JUDGE JONES: Over lunch.

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

And then you could have another sentence, we could look at that one, in that
Panel endorses that. And we can vote on both of those.

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

VADM TRACEY: And it may be different once --

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

MS. SAUNDERS: And I just think --

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

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

PROF. TAYLOR: It seems to me that I
would not feel comfortable going much farther than saying we acknowledge its existence and think it's generally consistent. Or something like that.

CHAIR HOLTZMAN: Yes, exactly.

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

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

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

I don't know. So I'm comfortable with a more limited acknowledgment and saying it seems
generally consistent, but not going much beyond that.

CHAIR HOLTZMAN: Right.

JUDGE JONES: I agree.

PROF. TAYLOR: Focusing on 2.3.

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

JUDGE JONES: Right.

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

JUDGE JONES: Okay.

CHAIR HOLTZMAN: Okay, certainly.

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

CHAIR HOLTZMAN: All right.

PROF. TAYLOR: No, I agree with it.

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

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

MS. SAUNDERS: Yes, ma'am.
CHAIR HOLTZMAN: Okay. So we have Mr. Taylor's comments in Tab 2.

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

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

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

CHAIR HOLTZMAN: Why don't you --

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

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

And of course, ideally at some point,
we will get to the point where there are fewer of one, and more of the other, in an even more concise way.

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

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

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

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

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

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

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

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

VADM TRACEY: In paragraph 3.

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

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

CHAIR HOLTZMAN: Okay, can you explain
again?

VADM TRACEY: -- paragraph structure.

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

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

CHAIR HOLTZMAN: Right.

VADM TRACEY: And, the original
version, the next sentence began, while it's caused. The it's refers to the one possible sign. Now we've got another thought in the middle that disrupts --

CHAIR HOLTZMAN: I see.

VADM TRACEY: -- the connection.

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

VADM TRACEY: Yes.

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

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

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

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

PROF. TAYLOR: Right.

VADM TRACEY: -- rise in cases being
prosecuted would connect to the confidence of the
criminal justice system. The decrease in the
number of reports wouldn't be connected to that.

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

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

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

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

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

CHAIR HOLTZMAN: Well, why don't you
just limit it to the increase? While the cause
of the increase cannot be identified with
certainty, many believe that the rise indicates
greater confidence in the criminal justice --

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

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

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

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

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

PROF. TAYLOR: That's good.

JUDGE JONES: That's fine.
PROF. TAYLOR: Thank you.

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

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

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

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

CHAIR HOLTZMAN: Okay. Any objection to that change?

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay, that's accepted.

Now, the next change on page 3?
PROF. TAYLOR: So, this gets a little bit into Mr. Stone's comments that he made about these two cases.

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

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

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

CHAIR HOLTZMAN: Can we do -- can we adopt yours and then consider Mr. Stone's changes
later? Because I think -- I don't think that's --
- is that inconsistent?

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

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

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

The now-Retired Rear Admiral said
nothing about undue influence, command influence.
His affidavit that's attached, if you look at Tab
4, says only -- his only concerns were the
sufficiency of the evidence based on his reading
of the record and the legal considerations. He
said nothing about undue command influence.
The pleading of the attorney, and by
the way, it's a pleading of a private defense
attorney, so this has no reflection on any
military attorneys, is that, oh, this must mean
that there was undue command influence and the
only support of that is an affidavit by somebody
else who says, quote, third-hand, I heard that
there was undue command influence on this person.

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

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

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

Now, what's really disturbing about
the way the media reported that is, when you go
to the case, and I have a copy of it here in case
anybody didn't get it, and I pulled the case, the
first thing that the Navy-Marine Corps Appeals
Board says in its opening footnote of the case,
because they had the case, is that we're talking
about the second convening officer here.

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

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

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

And, they have the footnote. They
reprint the entire comment by that second
convening authority who, to be transparent, said,
it's quoted in full, not like in this pleading
attached here in Appendix 4.

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

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

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

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

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

And, after they write that opinion, the private defense counsel raises these
allegations that are attached in Tab 4. And they're extremely flimsy because, although the Retired Rear Admiral's cooperating and filing an affidavit for him, he does not say word one about undue command influence.

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

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

And, by the way, it only has to do
with clemency. It doesn't have to do with processing the case in the first place. Well, I guess it does because he -- there's all kinds of claims in it.

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

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

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

So, instead of it reading as if there's something that isn't, you know, that this reflects that there's problems here, it's just exactly the opposite. It reflects when there's
any shred of evidence, and it's not, by the now-
Retired Rear Admiral who was cooperating with the
defense.

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

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

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

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

CHAIR HOLTZMAN:  I'm very confused, I
must say. Mr. Taylor cites to the case of Barry.
I see an affidavit in Barry. I know it's signed by Patrick J. Lorge who says that he's a Rear Admiral, Retired.

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

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

MR. STONE: I'm saying --

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

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

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

MR. STONE: I wasn't claim to disproof.
CHAIR HOLTZMAN: Okay, so you -- in other words, you disregard paragraph 6 and the basis on which he decided --

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

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

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

MR. STONE: Okay --

CHAIR HOLTZMAN: -- this paragraph.

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

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

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

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

MR. STONE: Because it's on 20165 CCA
Lexis 634.

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

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

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

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

So, I have not read the cases as Mr. Stone has read the cases. And, the changes that were proposed were proposed by the staff, not by me. I just proposed that they actually go to the source rather than rely upon media reports of
what the various parties had said.

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

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

So, I did not author any of this language.

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

MS. SAUNDERS: The --

CHAIR HOLTZMAN: Or which entity?

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

CHAIR HOLTZMAN: Which Track Changes? The purple?

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

CHAIR HOLTZMAN: Okay, and the blue?

MS. SAUNDERS: The blue is -- the only
thing, if you see down at the bottom that's
highlighted in blue, query, was there a petition
filed? That sentence, that was from Mr. Taylor.

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

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

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

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

So, you have potential risk that
people believe that the media coverage is correct
and that here are two instances in which people
were railroaded because of undue command influence.

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

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

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

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

But, that doesn't take away from your point that, again, I thought the real purpose in
having these two cases was to talk about concerns related to pressure on convening authorities, pressure on convening authorities, not ultimately whether it was or was not unlawful command influence.

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

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

Once you start down that path, then I think you're in the quandary that Mr. Taylor
points out that, you know, there's been some
developments around both of these cases that
would tend to suggest that they're not as they
were portrayed in the press.

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

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

CHAIR HOLTZMAN: Or?

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

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

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

We are trying to say there is a
perception out there of undue influence.

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

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

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

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

But, I think we have to support this perception and this is about as recent and the
best evidence, maybe true or not, I'm not saying anything's true just because it's signed under oath, that we have.

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

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

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

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

CHAIR HOLTZMAN: Okay, that's good.

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

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

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

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

VADM TRACEY: So, it'd be the purple -- the next purple sentence there?
CHAIR HOLTZMAN: Maybe not even as much as that. Yes, right, because, right. My consideration -- right, right. Okay, whatever it is.

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

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

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

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

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

And, I do have a couple of quotes down at the bottom of page 4 in Tab 2 on that. I don't know -- and they do talk about this specter of unlawful command influence.
MR. STONE: You haven't discussed, though, in Boyce that they found that there was, in fact, no unlawful command influence that they --

MS. SAUNDERS: Right.

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

MS. SAUNDERS: Right.

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

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

And, therefore, they said, not for the military litigators but for the public they were going to reverse it in a 3 to 2 decision, which
is not yet final because the time to petition to
the Supreme Court has not run.

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

So, there's no mention of that either.

Now, I do not -- and I do not really
care to cite media reports when we're writing a
report for Congress where, first of all, the
heading says, Recent Judicial Developments, and now we're talking about media reports.

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

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

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

Now, one of the reasons we don't need to mention it is because, on the page before, the very last item on the page number 4 says, counsel perceived that convening authorities may feel
pressure to refer the sexual assault cases even, now it's going to say, based on weak evidence to trial.

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

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

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

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

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

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

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

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

And, by the way, just to emphasize that, eight days after the Boyce opinion issued, the Court of Appeals for the Armed Forces issued United States v. Shea May 30th, I have the
opinion here and copies for you if you would
like, where they declined to follow Boyce because
that was a case that dealt with an appearance in
the public but not in the military.

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

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

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

CHAIR HOLTZMAN: Okay. I think, Mr.
Stone, first of all, just to respond on one small
thing, we're not talking about ancient history.

The Patrick J. Lorge affidavit is dated May 5th, 2017.

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

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

MR. STONE: Yes.

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

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

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

We're talking about the perception in the military about these issues, whether the
courts deal with them effectively or not, may also, in the end, contribute to that.

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

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

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

VADM TRACEY: Citing these two -- excuse me --
CHAIR HOLTZMAN: Yes?

VADM TRACEY: Citing these two cases, are they indicative of more than Issue Number 4?

One page 2, we've got this list of seven issues that the Subcommittee raised.

So, these two cases illuminate --

CHAIR HOLTZMAN: Page 4?

VADM TRACEY: -- more than Issue Number 4?

MR. STONE: It's one page 2.

VADM TRACEY: It's on page 2.

MS. SAUNDERS: At the bottom.

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

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

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

    CHAIR HOLTZMAN: Right --

    VADM TRACEY: If we're going to keep
whatever we're going to keep about these two

    CHAIR HOLTZMAN: Right.

    VADM TRACEY: Do those discussions

belong here, or do they belong in the

extrapolation of our comments on issue number

    CHAIR HOLTZMAN: Good point. Where is

issue number four dealt with?

    MR. STONE: Fifty-six, recommendation

    MS. SAUNDERS: It's dealt with, this

whole issue is dealt with obviously more at

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

    VADM TRACEY: The discussion of it is

in recommendation number 56.

    CHAIR HOLTZMAN: Where is that in our
MR. STONE: Page nine.

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

MS. SAUNDERS: So we could put that?

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

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

VADM TRACEY: Put it there.

PROF. TAYLOR: That makes sense to me.

CHAIR HOLTZMAN: Anybody object to what --

(Simultaneous speaking.)

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

JUDGE JONES: No.

CHAIR HOLTZMAN: Any objection to that?

PROF. TAYLOR: No.

CHAIR HOLTZMAN: Okay, so we can now
address the substance. Do we want to ask the
staff during our lunch break? Of course, they
don't get to eat lunch. Sorry about that. To
cut this substantially. I'm just trying to
understand.

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

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

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

CHAIR HOLTZMAN: So let's see if you
could try and handle that, so. Now we're back to --

PROF. TAYLOR: Page seven.

CHAIR HOLTZMAN: Page five.

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

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

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

CHAIR HOLTZMAN: Right.

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

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

VADM TRACEY: No.
CHAIR HOLTZMAN: Okay. That's accepted, now we're up to page eight.

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

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

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

PROF. TAYLOR: Well, the Secretary of Defense is ordered in numerous statutes to do
many things which the Secretary never does.

    MS. SAUNDERS: Right.

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

    MS. SAUNDERS: Okay.

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

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

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

    PROF. TAYLOR: Yeah, that was the reason I didn't tinker with that language,
because I understood that, right.

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

(Simultaneous speaking.)

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

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

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

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

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

MR. STONE: It didn't know if that gets confusing or not.
CHAIR HOLTZMAN: Thank you for getting that. All right, any objection to that one?

(Chorus of no.)

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

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

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

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

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

MR. STONE: Okay.

CHAIR HOLTZMAN: Any objection?

JUDGE JONES: No.

CHAIR HOLTZMAN: Agreed to. Now we're
off the page.

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

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

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

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

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

PROF. TAYLOR: I'm fine with generally.

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

MR. STONE: I'd rather have it deleted.
all together. I don't like to characterize it. They perceived it, then we get back to the how
many, and did they all perceive it.

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

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

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

JUDGE JONES: I'm fine with it too.

It can just read --

CHAIR HOLTZMAN: Okay.

JUDGE JONES: Trial and defense
counsel.

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

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

VADM TRACEY: On page two, we edited
the similar phrasing as the rest of the sentence.
We edited it earlier to say authority is to refer
to sexual assault cases to trial, even based on
weak evidence.

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

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

PROF. TAYLOR: Right.

JUDGE JONES: Right.

PROF. TAYLOR: I would favor that.

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

JUDGE JONES: I thought we'd done --

MR. STONE: It's the second place.

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

PROF. TAYLOR: It's the same place.

MR. STONE: On page ten, the same

words --
JUDGE JONES: Oh, okay, I was back on two.

MR. STONE: In the first bullet.

CHAIR HOLTZMAN: Where on page ten?

MR. STONE: First bullet.

MS. SAUNDERS: The one that begins trial.

MR. STONE: End of first sentence.

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

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

JUDGE JONES: Okay, good.

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

(No audible response.)

CHAIR HOLTZMAN: Okay.

PROF. TAYLOR: And then in the first bullet under recommendation 57, counsel on site visits reported high acquittal rates, etc. The low standard of probable cause for referral, I
would just want to use sole instead of low.

JUDGE JONES: Do you want to say --

oh, you want to say sole?

PROF. TAYLOR: Right.

JUDGE JONES: Or just the standard.

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

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

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

PROF. TAYLOR: I would be fine with that.

MR. STONE: Me too.

CHAIR HOLTZMAN: Any objection?

(No audible response.)

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

PROF. TAYLOR: On page 11, this is
just a question of reordering the bullets so that
we have like things together. So one has to do
with training in general. I mean two bullets
have to do with training, two bullets have to do
with understanding of impairment, and they were
not organized together.

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

CHAIR HOLTZMAN: Is there any

objection to that?

JUDGE JONES: No.

CHAIR HOLTZMAN: Without objection,

it's agreed to.

PROF. TAYLOR: Thank you.

CHAIR HOLTZMAN: And we're finished

now with Mr. Taylor's proposals. We're up to Mr.

Stone's proposals. Shall we take a five minute

break now?

MR. STONE: Sure.

(Whereupon, the above-entitled matter

went off the record at 10:19 a.m. and

resumed at 10:36 a.m.)
CHAIR HOLTZMAN: We're up to page one in Mr. Stone's comment.

MR. STONE: Okay.

MS. SAUNDERS: That's at Tab 3.

CHAIR HOLTZMAN: That's at Tab 3.

MR. STONE: Right.

CHAIR HOLTZMAN: Do you want to proceed?

MR. STONE: Sure. The first paragraph, I would strike the last sentence because of two separate things. The first is I don't know the documentary film Invisible War, I don't know who made it. I know the Panel never screened it as a panel. So I don't want to talk about what, or even imply that I know what it covered, because it wasn't something we got to. And we didn't have members certainly of the U.S. Senate here. We had some House members. And when they came to us, they, I don't think they said anything about sexual assault being rampant.

They had concerns about it, but I
I don't think they used that language. I think some of that language, again, may be from, goes back to this thing about media reports. And I don't want to suggest the House and Senate officials, elected officials, are casual or overstate what they think is the problem.

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

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

And the language, Swept the problem under the rug. If you go and look at, and it was actually quoted in more detail, that same phrase seems to be the phrase that came out of the affidavit which was quoted back in the last section that we got here, the last segment of
this booklet, on page three, where the
declaration from the retired rear admiral said,
Avoiding the perception that military leaders
were sweeping sexual assaults under the rug.

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

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

    So I mean, maybe in that sense --

CHAIR HOLTZMAN: Ok, Mr. Stone, let's
try that --

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

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

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

    And indeed the military itself
acknowledges that there not only was this
perception problem, but the problem, and Congress as well, that the problem needs to be addressed. Because they're constantly making additional rules and additional changes. If everything were, to use a colloquialism, hunky-dory, it wouldn't happen. If we were in Nirvana, it wouldn't happen.

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

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

CHAIR HOLTZMAN: Outcry about what?

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

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

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

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

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

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

CHAIR HOLTZMAN: The work of members of Congress.

MR. STONE: And, okay. And the work of members of Congress. And did you then jump to
have failed --

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

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

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

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

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

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

CHAIR HOLTZMAN: Yeah.

MR. STONE: Sexual assault allegations or cases?

CHAIR HOLTZMAN: By failing in sexual
assault cases to effectively prosecute the accused --

MR. STONE: Okay.

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

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

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

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

CHAIR HOLTZMAN: Admiral.

VADM TRACEY: I would make two recommendations. One, I think the first sentence ought to stand alone, because this is not, this report is talking about some issues that are not then the subjects of the following paragraphs, right.
Then you have the historical context, and I recommend we begin with a paragraph that begins, Within the past several years, media reports and work of the members of the House and Senate, or the Congress, have fostered a public perception that the military has --

MR. STONE: Failed.

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

MR. STONE: I accept all those changes.

CHAIR HOLTZMAN: Any objection?

JUDGE JONES: No.

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

MR. STONE: Yeah, yeah.
VADM TRACEY: Reports and the decrease in events.

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

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

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

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

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

And then these changes may have, because we're dealing with anecdotal, not statistically significant evidence. And I think we just have to be, I don't want to be criticized for relying on those summaries which are not identified and not statistically validated.
So I think we say the same thing as long as we say may have. Because we go along, and if we're going to make recommendations later, it's just that we want to show what we've got here.

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

MR. STONE: Okay, I can take appeared.

CHAIR HOLTZMAN: Is there any objection to that?

MR. STONE: In both places?

JUDGE JONES: No.

MR. STONE: These changes appear to have?

CHAIR HOLTZMAN: Right.

MR. STONE: Okay. And I don't think we need on the next line the word serious. They raised questions about the fundamental fairness.
That's a serious question by definition. I think that that word is superfluous in there.

CHAIR HOLTZMAN: Is there any objection to striking serious?

VADM TRACEY: No.

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay.

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

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

And I actually think it's exactly the opposite when it comes to women. We may have an
easier time recruiting women now, if there's some publicity for these changes. So, and I actually thought that was one of the main purposes of what Congress has been doing, to be able to recruit more qualified women, and to get them to reenlist. So.

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

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

MR. STONE: Okay, taking what you just said. After the word perception in the new version we have, do we want to say among everyone, or among all, or among -- in other words, see, I took that to mean among the
military members. But you're saying it's really in society. If you're going to recruit people, they're people who are not in yet.

CHAIR HOLTZMAN: It's both.

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

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

MR. STONE: I'd say among all.

CHAIR HOLTZMAN: Among all?

MR. STONE: Among all citizens.

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

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

CHAIR HOLTZMAN: Yes, they do.

JUDGE JONES: Yes, they do.

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

MR. STONE: If they're documented,
permanent resident aliens. You want to say among
all permanent alien resident and citizens?

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

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

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

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

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

MR. STONE: That's the -- I don't
know, that doesn't quite get where I was going.

All right, it still could be among the military.
I would just like it to say among all persons, I guess.

CHAIR HOLTZMAN: In the world, in what?

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

CHAIR HOLTZMAN: In the world.

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

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

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

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

MR. STONE: That's okay.

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

MR. STONE: Yeah. Among military personnel and the public.
JUDGE JONES: Does that do it, or does anybody, I don't know.

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

VADM TRACEY: I have no objection.

PROF. TAYLOR: I'm okay with that.

CHAIR HOLTZMAN: All right, let's go.

MR. STONE: Great, okay.

CHAIR HOLTZMAN: The bottom of the page.

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

JUDGE JONES: No, we were also looking at, I think the Subcommittee was also looking at what was actually happening with these changes. So it wasn't just the perception, they were also
looking to see what was going on. In fact --

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

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

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

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

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

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

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

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

VADM TRACEY: I'm okay with that.

JUDGE JONES: Okay.

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

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

CHAIR HOLTZMAN: Page two.

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

And then I realized that we really needed a little more description of who they were and their affiliations, etc. So I wrote, During 13 days of closed-door hearings, they heard from panels of similarly employed individuals who chose to come forward, including more than 280
individuals from 25 military installations.

Blah, blah, blah, blah.

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

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

JUDGE JONES: Okay, well, first, I don't know that anybody chose to come forward. I mean, maybe I didn't, I didn't organize who we saw. But I was under the impression that they were probably ordered, or given that assignment to come and talk to us. But I'm not sure. Maybe the staff can help.
MS. SAUNDERS: Well, what the staff had done is for each base that was, for which there was going to be a site visit, they asked the Services to identify a representative who we could communicate with who would set everything up.

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

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

MS. SAUNDERS: Well, for example, we said for example, we want a panel of prosecutors, we want a panel of defense counsel, special victim counsel, etc. And then in most, if not all, of the places the Subcommittee went to, there were other military installations
surrounding the installation where the meetings would take place.

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

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

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

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

JUDGE JONES: For themselves, right.

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

JUDGE JONES: I like from, yeah.

Okay.

MR. STONE: And maybe we should in the
line before that I had just say, During 13 days of closed-door hearings, they heard from panels of similarly employed individuals who came forward. And just leave that open. Yeah, similarly employed individuals including more than.

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

JUDGE JONES: Period.

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

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

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

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

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

CHAIR HOLTZMAN: With a who?

MR. STONE: They each had a vested
interest, whether there was a panel of
prosecutors, whether it was a panel of defense
counsel --

VADM TRACEY: You mean a shared
perspective.

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

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

VADM TRACEY: You mean a shared
perspective.

MR. STONE: Okay, a shared
perspective.

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

MR. STONE: In the past.

CHAIR HOLTZMAN: In the past, right.

So this, I --
JUDGE JONES: I don't know what this adds. What are you trying to say?

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

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

MR. STONE: These are, these were --

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

MR. STONE: These were interested panels.

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

MR. STONE: Yes, it means number one that they didn't necessarily get the same questions and topics thrown at them. They may
have been worded differently.

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

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

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

    MR. STONE: Not to me.

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

(Simultaneous speaking.)

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

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

MR. STONE: Okay.

CHAIR HOLTZMAN: So take out your --

MR. STONE: No, no, no.

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

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

And that right there changes the
nature of what they may have, off the record, felt comfortable saying. They may, in the presence of the prosecutor with other prosecutors there, may not have felt comfortable and quite as candid as he would if you interviewed him alone.

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

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

But I don't think there was any effort to change anything. And if you want to take the Heisenberg Principle, just the mere fact of talking changes peoples' minds. So are we getting the truth, truth, truth? What is the truth?
So I think this is like angels dancing on the head of a pin -- how many of them are there? I just really think that it's not necessary to suggest that there's some real credibility issue with the work of the Subcommittee, which is what these changes, or this change at least, suggests to me, so I.

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

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

CHAIR HOLTZMAN: What did the Subcommittee report describe what it did?
MS. SAUNDERS: I think that this was taken, if not exactly word for word from the Subcommittee report, at least very similarly. So they said, At the request of the JPP, they spoke to more than 280 individuals, all involved in the military justice process, from 25 military installations in the United States and Asia about the investigation prosecution, and defense of sexual assault offenses.

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

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

CHAIR HOLTZMAN: Panels of what, Barbara?

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

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

CHAIR HOLTZMAN: And you're leaving off victims.
VADM TRACEY: Well, I'm not finished. I don't think we need a few commanders. I think commanders is enough.

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

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

JUDGE JONES: Right.

PROF. TAYLOR: All involved in the military justice process, from 25 installations in the United States and Asia about the investigation, prosecution, and defense of sexual assault offenses. That's what they said they did. I don't know why we wouldn't just use those
CHAIR HOLTZMAN: Well, of course if you say in panels, it doesn't even indicate that these were panels consisting solely of prosecutors or whatever. So you're not resolving the problem that Mr. Stone raised. I just point that out.

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

MR. STONE: To panels.

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

(Chorus of aye.)

CHAIR HOLTZMAN: Those opposed.

No.

Panels is added.

MR. STONE: Now I'd like it to do, take a vote on whether they spoke to panels of
more than 280 similarly employed individuals,
instead of individuals.

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

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed.

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

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

CHAIR HOLTZMAN: I think everybody
agreed to that already.

JUDGE JONES: Yes.

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

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

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

JUDGE JONES: Because we had
commanders in our interviews.

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

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

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

And I think that's not fair to commanders. Commanders might feel they'd want a little more input. They don't want to suggest that, I mean, we make a lot of recommendation thing, and comments later, some of which, you know, dig deep into the weeds.
And I don't think the commanders, as a group, were represented when you talk to six. And victims weren't represented either, and that's why those two changes are there.

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

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed.

(Chorus of no.)

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

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed.

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

The next one is, I guess, these individuals.

MR. STONE: I don't know.

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

CHAIR HOLTZMAN: Oh, okay. All right, fine. What's your next proposal, Mr. Stone?
VADM TRACEY: Adding the word both.

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

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

MR. STONE: In the sentence above.

MS. SAUNDERS: Right.

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

MS. SAUNDERS: Right.

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

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

MR. STONE: Okay.

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

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

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

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

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

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

MS. SAUNDERS: The other report, okay.

And that is what we have in the other
Subcommittee reports, that they adopted them with
modifications for the recommendations.

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

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

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

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

MR. STONE: Well, that's probably
inaccurate and should be changed too. We have to talk about that, that one is later on our agenda today.

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

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

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

MR. SPRANCE: Reject it.

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

CAPT TIDESWELL: In some instances, yes.

CHAIR HOLTZMAN: And the modifications.

CAPT TIDESWELL: You adopted it with modifications.
CHAIR HOLTZMAN: As a result of this deliberation, the JPP adopted the Subcommittee's report and recommendations with modifications. Is that a true statement?

MR. SPRANCE: Yes, I believe so.

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

MR. SPRANCE: I believe so.

MR. STONE: I believe so, yes.

CHAIR HOLTZMAN: Legal, okay.

CAPT TIDESWELL: As long as you deliberate on it.

CHAIR HOLTZMAN: Okay.

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

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

CAPT TIDESWELL: Right.

JUDGE JONES: Correct.
MR. STONE: I thought she said we
couldn't adopt it either.

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

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

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

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

MR. STONE: Yes.
CHAIR HOLTZMAN: Even if it legally can be done.

MR. STONE: Yes.

CHAIR HOLTZMAN: Now what is your problem?

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

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

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

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

CHAIR HOLTZMAN: No, we issued our own recommendations, which were the recommendations
as modified.

MR. STONE: Correct.

CHAIR HOLTZMAN: We modified their recommendations.

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

CHAIR HOLTZMAN: All right, well --

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

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

MR. STONE: Okay.

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

JUDGE JONES: No, I would only say that whether we adopt them or not, I'd like to see them part of our, you know.
MR. STONE: Right. And I left --

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

MR. STONE: And I absolutely let that --

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

MR. STONE: That's not an issue.

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

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

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

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

CHAIR HOLTZMAN: Is there any comment on this?

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

CHAIR HOLTZMAN: Any other comment?

JUDGE JONES: I prefer the language as it is.

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

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed say no.

(Chorus of no.)

CHAIR HOLTZMAN: No's have it, it's
not accepted. Item four.

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

CHAIR HOLTZMAN: Yeah, the weakness, right.

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

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

CHAIR HOLTZMAN: Any discussion of that?

MR. STONE: And I think that's because the wide variety of the summaries that we got about the interviews said that that almost exclusively came from defense counsel. So I didn't say just defense counsel or most defense counsel, or whatever. I just said some counsel,
so that they knew that it's not a universal view. Because some disagree.

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

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

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

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

VADM TRACEY: I think the Subcommittee members heard that from trial counsel and others as well, that it was this perception.
CHAIR HOLTZMAN: Well, can we say something? I would feel more comfortable if we said some trial counsel and defense counsel. So to make it clear that it's not just defense counsel that's complaining.

VADM TRACEY: I'm good with that.

CHAIR HOLTZMAN: Any --

JUDGE JONES: I think we should make that clear.

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

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

JUDGE JONES: No.

CHAIR HOLTZMAN: Hearing no objection to that, it's accepted. Item five.
MR. STONE: Okay, in item five, I reviewed the testimony that we had here and I reviewed the summary. And I think what the trial counsel were complaining about, and I wasn't sure this was the right word, was lack, was sometimes lacked the type of access.

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

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

They weren't saying they couldn't prepare them, but they were saying they weren't able to prepare them in the way they would like. So I didn't want words that made it sound like
these were absolutes. I was just --

JUDGE JONES: Well --

MR. STONE: The feeling is there, but

I was looking to --

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

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

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

CHAIR HOLTZMAN: Yeah, I don't think
you need, I don't think the type of really adds
anything. I think Mr. Taylor made a good point
here. I mean.
MR. STONE: I guess based on these last three comments, I have no problem saying trial counsel sometimes lack the frequency and type of access that they believe is necessary. I'd like to convey more here than it conveys at the moment.

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

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

MR. STONE: The what of access?

CHAIR HOLTZMAN: Breadth?

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

VADM TRACEY: Sufficient access.

CHAIR HOLTZMAN: Oh, sufficient, okay.

MR. STONE: The breadth or what?
CHAIR HOLTZMAN: Sufficient rather than the breadth.

MR. STONE: Okay, okay.

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

JUDGE JONES: Yeah, me too.

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

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

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

But it was more than just, you know, one person on this panel, one person on that panel, one person in this installation, one
person in that installation. It was a very widespread point of view. So I think some minimizes that and is an unfair characterization.

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

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

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: Both trial and defense counsel.

VADM TRACEY: Many trial and defense counsel?

MR. SPRANCE: Numerous.

VADM TRACEY: Many.

PROF. TAYLOR: Yeah, I guess I just have to wonder if it's just trial and defense counsel, because my guess is that SJAs are feeling the same pressure. Because it's not, so it's not just a question of trial and defense
counsel, which I think even widens the aperture.

JUDGE JONES: Right.

PROF. TAYLOR: Of counsel who are understanding this.

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

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

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

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

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

MR. STONE: Well, based on that though, if we change, if we do put something in other than some, then I think along with that, we have to say perceive the convening authorities
may feel pressured. Because I read those summaries very carefully, and I actually took account of what was being said.

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

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

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

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

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

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

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

MR. STONE: With Mr. Taylor's

corrections.

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

MR. STONE: All right.

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

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

CHAIR HOLTZMAN: Yeah, right, we

agreed to --
MR. STONE: Did we do that?

CHAIR HOLTZMAN: Is anybody opposed to sufficient access?

(No audible response.)

CHAIR HOLTZMAN: No.

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

CHAIR HOLTZMAN: Anybody opposed to best prepare?

VADM TRACEY: It's a split infinitive.

Other than that --

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

PROF. TAYLOR: Got the grammar czar.

CHAIR HOLTZMAN: That's for sure.

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

(No audible response.)

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

MR. STONE: Okay, number six was about training fatigue. I added the word some, because
we didn't collect numbers, and that was not as universal among those interview summaries as some of the other things we've spoken about. It showed up in some panels, but most panels didn't talk about training fatigue.

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

CHAIR HOLTZMAN: Is there any objection to that?

JUDGE JONES: No.

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

MR. STONE: Okay. Increase is likely. The prosecutors find it difficult to expedite a transfer. This really goes back to number, what we just said in number five. And I guess it used to say to adequately consult prior to trial with victims who have been transferred to faraway locations.
And I wanted to change it to say
difficult to consult prior to trial in person
with victims. Because again, this goes to the
complaint was, yeah, they can get them on the
phone, yeah, they may even be able to Skype them.
But I'm not looking in their face and they're not
looking in my face.

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

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

CHAIR HOLTZMAN: I'm not sure though.
I mean, I take your point, Mr. Stone. But I'm
not sure that it was only the talking to them in
person that was the concern. That maybe that
they couldn't talk to them at all.

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

JUDGE JONES: That was --

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

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

So if we're going to talk about
expedited transfer, I think we have to focus a
little more narrowly than their general problem,
which is that there are victims who don't want to
talk to them, whether they're local or moved
away.

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

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

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

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

MR. STONE: We got that entirely from
the Subcommittee. There wasn't a single person
from any of the military Services who spoke about
that. What the military Services people told us
when they came here was that the policy on
expedited transfer of sexual assault victims was
the most important change that's been made to the
system.

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

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

PROF. TAYLOR: Well, I would just go
back to the original Subcommittee report, and, in
their finding of a problem, they talked about, and this is a quote, "The current policy on expedited transfer of sexual assault victims can make it difficult for investigators and prosecutors to adequately consult with victims prior to trial when victims have been transferred to far-away locations."

MR. STONE: I'm fine with that.

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

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

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

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

CHAIR HOLTZMAN: Likelihood means possibility. Can also reflects a possibility. They're exactly the same.

MR. STONE: You want to put the word can in here? Can increase the likelihood?
That's what I'm saying. That is not an absolute.

This one is an absolute.

**CHAIR HOLTZMAN:** Increases the likelihood to increase the possibility is not an absolute.

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

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

**CHAIR HOLTZMAN:** And what is the Subcommittee language?

**PROF. TAYLOR:** This is on page 2 of the executive summary, "The current policy on expedited transfer of sexual assault victims can make it more difficult for investigators and prosecutors to adequately consult with victims prior to trial when victims have been transferred to far-away locations." So this adds investigators to the equation. We're directing this only to prosecutors.

**MR. STONE:** Then I guess my proposal then is to take that language. I think that
language is what they said.

CHAIR HOLTZMAN: Is there any objection to that?

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: No.

CHAIR HOLTZMAN: No objection. Then it's adopted. Okay. These recent judicial developments we're postponing.

MR. STONE: Right. That whole thing we're going to wait for a bullet.

VADM TRACEY: But we're moving it from here, right?

MR. STONE: Yes.

CHAIR HOLTZMAN: Yes.

MR. STONE: Okay. So we jump all the way down to findings and recommendations.

CHAIR HOLTZMAN: Now we're at the bottom of page 4, correct?

MR. STONE: Yes. Okay. My first correction is in describing what the Subcommittee's attention was during every site
visit. It says specific examples, and I put
albeit unnamed and undated examples because the
summaries do not ever, even when they say, oh, I
had an example of that and another one says I
have an example, no one has ever given a case
name, they never said I have three examples and I
had them in the last five weeks, they never said
here's the name of the victim. We were not able
to follow up. It doesn't mean that we're not
saying that there weren't examples. We're just
saying that those were summarized matters and
we're being clear about it because, if they were
named and dated examples, we probably should have
followed up here and called those people because
those people wouldn't be the counsel talking to
us, they would be the victims in the case and/or
maybe the perpetrators.

JUDGE JONES: Well, I think the reason
there was a subcommittee is because the Panel
couldn't possibly track down every issue and
every item by having even more presentations and
interviewing more people than we already did. I
think the point of this subcommittee, too, is to
get information that then could be followed up
and was a lead in a further investigation into
how the military is doing. We're not saying this
is the bible. It's useful information so that
this whole inquiry can go forward.

So I don't really, I don't think we
necessarily need to put in albeit unnamed and
undated examples. If you want to say by
examples, that's fine. I think the language is
fine the way it is.

MR. STONE: I think then we should
just cross out "was supported by specific
examples." Just cross it out. Brought to the
Subcommittee's attention during every
installation visit and also contextualize, blah,
blah, blah, blah, blah. Like you say, if we're
going to have examples and not follow them up,
then we have to explain why and set specific
examples and we didn't follow them up because we
didn't have time or personnel. We have to have
some explanation of why we didn't follow them up.
CHAIR HOLTZMAN: No, we don't have to.

We don't have to follow up on anything that the
Subcommittee reports. It's not an obligation of
ours. It's simply not.

MR. STONE: I guess I disagree with

that.

CHAIR HOLTZMAN: Okay. But in any
case, I think there's also a problem that, I
mean, just to follow up with what Judge Jones
said, these people wanted to, part of the reason
the summaries are as vague as they are is because
there's a requirement and promise to the people
who spoke to the Subcommittee of anonymity. And
the more you identify, the more you break the
promise of that anonymity and create problems.

So I don't think there's -- all we're
saying is that the Subcommittee told us that what
they were saying was supported by specific
examples. That's all we're saying here. We
could disbelieve the Subcommittee. I guess we're
allowed to disbelieve them, but I don't know on
what basis we would choose to disbelieve them.
PROF. TAYLOR: So I would like to chime in with just a couple of observations. One is that I do think that this language, although unintentional, as Mr. Stone stated, does stand to cast doubt on the credibility of the Subcommittee report, and I think that's something we don't want to do because it's pretty well established in the public policy field that you have quantitative analysis and qualitative analysis. And it would not be correct to say that just because this is based on what we would call qualitative data gathering that it's any less credible or should command less attention than something that's more quantifiable. So I was comfortable with this as stated because I didn't think that all the issues need to be further investigated. I think what the Subcommittee did was to conduct investigations, although they did it qualitatively with anonymous research and sources, rather than something that, chapter and verse, somebody can go back and verify, which would be more of a quantitative method.
MR. STONE: See, we say in the last sentence of that paragraph, "Taken together, these considerations suggest that the issues could be systemic and should be investigated," oh, I put investigated further. I guess it said addressed. Well --

PROF. TAYLOR: See, I don't think we need another investigation. I think that's what the Subcommittee did. I think they've got the issues identified, and what we now need to focus our attention on is ways to address the issues that they've identified, rather than having another investigation, if you get what I mean.

MR. STONE: I thought that's what we were telling the next panel that there were certain things we wanted them to go out and do in our recommendations. A couple of them, we told them specifically to go out and do this and go out and do that. The Defense Sexual Assault Prevention Response Office should blah, blah, blah, blah, go out and do this, go out and do that.
CHAIR HOLTZMAN: This is just a preliminary discussion of the findings and recommendations. It says that the views and -- it is a qualified, it is a qualifier to begin with. It says, "Recognize that the views of the individuals who participated in site visits may depend in some measure of the military Service." So it's already saying that it's dealing with a statistical objections that you had to begin with, so now we've dealt with the statistical objections by talking that this reflects personal points of view.

On the other hand, we then go on to say that it was brought to the attention at every installation site so that it suggests it could be systemic. Why are we qualifying this? It's not necessary. I think we've already qualified and we're giving some background in saying that, because of the fact that these were found at, whatever it says, all the sites, every installation site visit, that these issues could be systemic and should be addressed.
This is the background of it, and I
don't know how many more times it needs to be
qualified and how many more times it needs to be
sliced and diced and told that it's not credible.
That's really what I think all of your, all of
these suggestions are. I don't think we need to
have albeit unnamed and undated, I don't think we
need to have the matters -- some of them we make
a recommendation they should be further
investigated or be further monitored, but we
point to these problems because it may be not
only that they should be further monitored but
maybe the Secretary of Defense is going to want
to take some action in connection with it and
brings it to the Secretary's attention. It just
says further addressed or addressed. I really
think it's unnecessary.

That's my opinion, but people may
disagree, and we'll just take a vote on it now.

MR. STONE: Fine. I'll just say that
the last sentence that you just pointed out as
the summary sentence is itself inconsistent as it
stands. If the considerations suggest that the issues could be systemic, then you do have to flesh them out more before you address them because you're only suggesting it could be, not that they are systemic.

And then Recommendation 54, we're asking the DAC-IPAD to conduct military installation site visits and further research to determine whether blah, blah, blah, blah, blah. They should also determine what effect blah, blah, blah, in 54. And in 57, we say the same thing. The Secretary of Defense and DAC-IPAD continue to gather data and etcetera, etcetera.

Well, I mean, I think that's right that this stuff suggests the issues could be systemic, but that means, number one, they have to be investigated further because we just have a suggestion, and they're not going to be able to investigate the examples that we got that we could pass them our materials because we didn't get any details. They're going to have to go out and collect new examples. We're not withholding
them from them. We don't have them to give them.

CHAIR HOLTZMAN: Okay. I think all

the issues --

MR. STONE: That's where they're

coming from.

CHAIR HOLTZMAN: -- have been

discussed on this. Those in favor of Mr. Stone's

suggestion in red in the last paragraph on page

4, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no's.)

CHAIR HOLTZMAN: The amendment by Mr.

Stone, the suggestions are not adopted. Page 5.

Are these your suggestions? Is that your

suggestion, the nine recommendations? Or is this

--

MR. STONE: No, no, no.

CHAIR HOLTZMAN: Okay. So we're up to

page 6.

MR. STONE: We're up to page 6.

CHAIR HOLTZMAN: Okay.
MR. STONE: Let's see. Did we already conform this with Mr. Taylor's discussion before? He took care of this and I can ignore my mine on the top.

CHAIR HOLTZMAN: You mean in Bullet 2?

MR. STONE: Yes, Bullet 2.

CHAIR HOLTZMAN: Okay.

MR. STONE: So then we're down to --

CHAIR HOLTZMAN: Okay. So Bullet 2 is resolved by Mr. Taylor's amendment. Okay. Now we're up to bullet --

MR. STONE: Five.

CHAIR HOLTZMAN: -- 2, 3, 4.

MR. STONE: Oh, okay, right. Bullet 4. This, again, goes to the content of the summaries, which I went through and tallied, and I thought the word often was not the right word. If you don't want to use sometimes, you can suggest some other words. If you want to say may and leave out all the times, may refer. I mean, I don't know what to say there, but the summaries did not show that the convening authorities often
do it. It showed that it happens.

CHAIR HOLTZMAN: So your first

suggestion is to put the word sometimes instead

of often?

MR. STONE: That's right.

CHAIR HOLTZMAN: And what about just

striking often and sometimes and just have it

refer cases?

MR. STONE: Well, I guess I'd like to

see what others think. I'm thinking about that.

Just say refer cases? I don't know.

VADM TRACEY: How about the convening

authorities refer charges in some sexual assault

cases, even when Article 32 preliminary hearing .

. .

CHAIR HOLTZMAN: Ms. Saunders, what is

your sense of the frequency issue from the

Subcommittee report? Judge Jones, maybe you want

to answer that. How do you feel about this,

Judge Jones?

JUDGE JONES: I think I would accept

-- look, I went to one and then I reviewed the
others a while ago. I think it was quite
frequent that at least somebody in the room who
knew told us this, but I can't tell you what
frequency. I didn't go back and count.

MS. SAUNDERS: We do have something in
the Subcommittee report, let me just find it for
a moment, where there was an actual count. That
was done by the staff using the fiscal year 2015
cases that we had obtained from Services.

PROF. TAYLOR: I think it might be on
page 8 and 9.

MS. SAUNDERS: Okay, thank you. Yes,
here we go. Starting on page eight, data on
Article 32 recommendations and convening
authority referral decisions, out of 416 sexual
assault cases that went to general court-martial
in fiscal year 2015, 54 cases involved an Article
32 investigating officer or preliminary hearing
officer recommending against referring one or
more sexual assault charges to court-martial and
the convening authority electing to refer the
charge despite that recommendation. So 54 of
those cases.

    MR. STONE: So it's like one out of eight.

    PROF. TAYLOR: Right.

    MS. SAUNDERS: I know one of the Subcommittee members thought that was quite high, and I think she spoke of her concern when they presented this report. That was Dean Schenck.

    CHAIR HOLTZMAN: Thought what was high?

    MS. SAUNDERS: The number at 54. Right. That 54 of the cases in which the Article 32 officer --

    CHAIR HOLTZMAN: Okay. Well, so then I think sometimes is an accurate -- would you say so, Judge Jones?

    JUDGE JONES: Sure. I can accept that.

    MR. STONE: Okay. And I stopped the sentence may not be referred because we didn't have data on exactly what reason, and it doesn't really matter which reason. It's just that they
did it, so I didn't want to characterize why they
did it because that got into some stuff we didn't
know. Maybe it was always because they thought
there was no probable cause or maybe it was
because it was always because they thought there
was a low likelihood of conviction.

MS. SAUNDERS: In reviewing the
Article 32 reports from those cases, the numbers
that we just discussed, it seemed to be a mix of
either where the 32 officer was recommending it
not be referred either because there was no
probable cause or because there's a low
likelihood of conviction. I don't have exact
numbers, one versus the other, but that seemed to
be the general --

CHAIR HOLTZMAN: Right. That's your
report and analysis of the data. What does the
Subcommittee say in terms of what they were told?
Do we have that in their report?

MS. SAUNDERS: Right. Going back to
-- I mean, we do have in the Subcommittee report
that they heard on the installation site visits
that they heard that, and I would have to see
what the number is, if it's frequently or often
or how they characterized it, but --

CHAIR HOLTZMAN: We're talking about
the reason, the last sentence.

MR. STONE: I mean, did they tally the
reasons?

MS. SAUNDERS: I don't know if they
tallied it, Mr. Stone. But they did take away
from talking with defense counsel and trial
counsel that convening authorities, on occasion
at least, did not take the advice of the Article
32 preliminary hearing officer.

VADM TRACEY: We don't need it. Their
reasons would be that there was not a charge,
that the individual was -- I mean, so those would
be even more egregious.

MS. SAUNDERS: Right. And there's no
jurisdiction, nor -- right. I don't recall that
ever being raised. I think the counsel --

CHAIR HOLTZMAN: Are you okay with
that then?
JUDGE JONES: Yes.

CHAIR HOLTZMAN: All right. So we accept Mr. Stone's suggestion on Bullet 4.

MR. STONE: Okay. Look to the next bullet.

CHAIR HOLTZMAN: Yes. Bullet 5.

MR. STONE: I think we took that out of somewhere else that we didn't know, we had no idea whether senior and experienced officers were more likely to offer an opinion based solely on the strength of the case. And so I thought we were putting something back in here that elsewhere we've already decided that we don't know the answer to that and that, therefore, it's not really necessary. We're saying should be examined to determine whether seniority, experience is a factor. In other words, I don't think we need to go beyond that. That's what we agree is something that should be looked at.

MS. SAUNDERS: I believe this came out of the last hearing where the Panel met and I think, in fact this may have been your
suggestion, Vice Admiral Tracey, that you thought
that more senior and experienced officers serving
in this role may be more likely to offer the
convening authority an opinion based on the
strength of the case.

VADM TRACEY: I didn't have a problem
with this formulation because all it says is that
we believe that it could be a benefit, that it's
not saying that anybody testified.

MS. SAUNDERS: Right. I think that
was based more on the Panel's deliberation.

CHAIR HOLTZMAN: Are you still
advocating that change, Mr. Stone?

MR. STONE: I think it's unnecessary,
and I think it detracts from what's in front of
it because we're saying and I think we should say
that we don't have evidence to know but we do
think it's something that should be looked at.
That's all. I don't like to throw it on the
waters where we just have an observation. It may
be a logical observation, but we don't have
anything for sure that we're basing it on. So, I
mean, since we're looking to see that followed
up, I still think that it detracts from it to say
what we believe when those are our logical
beliefs. There's no evidence for them that was
presented to anybody. So, yes, I just think --

CHAIR HOLTZMAN: Okay. So let's --

MR. STONE: -- stop with what we know.

CHAIR HOLTZMAN: All right. And,

Admiral, your view? What's your opinion?

VADM TRACEY: I don't know that we
need it. I just don't find it objectionable.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: I have a note here on
this particular session about haven't we said
this before. I don't know where, but I agree
with it. I don't think we --

VADM TRACEY: So the first sentence,
actually it says that we believe you should look
at whether seniority or experience level. So to
that point, you're nearly repeating the same
thought.

JUDGE JONES: Yes, I don't think we
need it.

CHAIR HOLTZMAN: All right. So
without any objection, Mr. Stone's recommendation
is agreed to. Okay. Now we're up to page 7.

MR. STONE: I was thinking we should
skip this whole page until after lunch when we
see what the new bullet is because we have to get
a new bullet on that one.

CHAIR HOLTZMAN: Right. Okay. Up to
page eight.

MR. STONE: Oh, no, seven, we're not
using should. Okay. The bottom of seven, we're
going to delete shoulds everywhere. I put some
in, but you don't think we need them. Okay. So
I'm on my page 8 on that top bullet.

CHAIR HOLTZMAN: We have a
formulation. Is that Mr. Taylor's formulation?
Do you see his formulation? You have something
about the weakness of the evidence.

MR. STONE: Yes. Even based on weak
evidence here it said.

CHAIR HOLTZMAN: All right. So you're
taking out the strength. So you --

MR. STONE: If you want to put his formulation even based on weak evidence, that's okay. Yes, I can accept what he just said.

PROF. TAYLOR: Okay. I got you.

CHAIR HOLTZMAN: All right. So that's Mr. Taylor's formulation that goes in there instead. Okay. Now we're in box 55.

MR. STONE: Box 55.

CHAIR HOLTZMAN: Recommendation 55.

Sorry. Is that you, or is that the staff?

MR. STONE: This is me, and this --

CHAIR HOLTZMAN: Well, it should initially -- forget that one. Now you'd just like to encourage --

MR. STONE: Oh, this one, that's right. This one still says -- oh, there's two shoulds in there. Should review it, should be amended.

CHAIR HOLTZMAN: It's only the first sentence.

MR. STONE: It's only the first one?
CHAIR HOLTZMAN: Yes, the first sentence that doesn't have should. The rest of them can say should.

MR. STONE: And this is the same as my prior concern on my page 2, item 3, where I wanted to say the staff judge advocate will have less incentive, rather than saying that we're going to pressure him to do something wrong. So I wanted to say here a review should consider whether such a change would encourage the staff judge advocate to provide more fully-developed advice. I mean, it doesn't really enable him.

CHAIR HOLTZMAN: I have no objection to that. Does anybody have any objection to that?

JUDGE JONES: No.

VADM TRACEY: No.

CHAIR HOLTZMAN: Okay. So that's accepted. So on to page 9.

MR. STONE: Okay.

CHAIR HOLTZMAN: Bullet 2. We're up to Bullet 2 on page 9.
MR. STONE: Yes, I'm trying to decide whether we already did some stuff to this before. Let me look back at it. I thought we did some stuff to Recommendation 56. I don't want to re-do stuff we have done. Yes, we've done quite a bit of stuff. Okay, right. We decided that the language already, we voted the revisions appear to have created a perception in the actual recommendation, and this is not noted on here but it's in light of what we just said. The Secretary of Defense -- the last sentence of the recommendation says, "The Secretary of Defense should develop procedures to mitigate this perception." I think based on what we just saw in the cases that I read you, including that in the Howell case, since 2014, they have developed stuff that we should say the Secretary of Defense should develop additional procedures to mitigate this perception, that we shouldn't suggest that the Secretary of Defense has been doing nothing.

CHAIR HOLTZMAN: Well, my response to that suggestion is that we're talking about the
perception of undue pressure resulting from the fact that you have to refer decisions to higher-ups. That may not be -- and so I don't know that the Secretary of Defense has developed any procedures with regard to that, and that's what we're just -- I mean, it's very focused in that sense and any other things that create a perception of undue command influence. But it's just focused on the issue of the referrals, I mean the review issue.

MR. STONE: I guess, since we are talking about that there were Congress review and consider revising at the beginning of that recommendation, provisions in the NDAAAs and blah, blah, blah, blah, I don't --

CHAIR HOLTZMAN: It says -- let me just finish that. It said because these provisions, meaning the review provisions, of the convening authority's actions, because these provisions appear to create a perception of undue pressure because of the --

MR. STONE: On convening authorities,
yes.

CHAIR HOLTZMAN: Yes, to refer such cases. The Secretary of Defense should develop procedures to mitigate this perception is very narrow dealing with these provisions. That's how I read that recommendation.

MR. STONE: Okay. And I would add additional because, if he's done none, then additional works. If he's done some, additional still works. But if he's done some procedures which we did not explore or give him a chance to explain and we're telling him develop procedures, I think that that's, it's presumptuous on our part. We did not go into whether the non-referral decisions, whether there are some procedures to mitigate that. So I think the word additional is an appropriate clarification that we're not saying we've examined everything that's out there.

VADM TRACEY: My recollection of how this recommendation evolved was our view was that the congressional direction had been implemented
in a way that only advances review of cases that are not referred. By itself, that creates a perception that the preference is that they be referred. If we're only going to ask about cases that are not referred, that must mean that referral is a good thing. So what we wanted was for the Secretary to look at whether there was a different way to implement what the Congress had already done that would make that less of a risk.

CHAIR HOLTZMAN: Right. And so we're not talking about in general what they're doing. We're talking about those specific NDAA provisions that create this perception of a one-sidedness. So other things that don't relate to the one-sidedness are irrelevant to that. That's why I think additional really is not appropriate in that circumstance.

MR. STONE: Here's my hypothetical of why I think it should say additional. Because if we are and the Secretary of Defense is collecting numbers and putting them out in an annual statistical analysis or report, annual report on
these things, he is doing something to mitigate the perception. We just think providing the numbers, the raw data, is not enough. He's not doing nothing. He's at least counting them.

VADM TRACEY: If he is not reviewing cases that are referred, and we have no evidence that he is reviewing cases that are referred, then he is allowing the perception that the only right answer is to refer the cases. Otherwise, somebody checks your homework. Then that is -- this was about whether there was a different way to comply with congressional direction than the one that was chosen.

CHAIR HOLTZMAN: Right. That's all it is. All right. So now we --

MR. STONE: Can we put that language in here? Should consider whether there is a different way to comply that will mitigate this perception. That, to me, would say what you're wanting to say, and I wouldn't be confused, among others.

JUDGE JONES: I mean, at the
beginning, what we're really talking about is recommending Congress review and consider revising. So, I mean, that's very separate from then asking the Secretary of Defense to do something about the perception.

MR. STONE: Yes.

CHAIR HOLTZMAN: Well, I think, unless there's any further comment, I think we probably should vote on this. All those in favor of Mr. Stone's suggestions, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no's.)

CHAIR HOLTZMAN: No's have it. The suggestion is not agreed to. Let's go to Bullet 2. Is that where we are, Bullet 2 --

MR. STONE: Yes, Bullet 2.


MR. STONE: I clarified the first sentence because this is not data that went to Dr. Spohn, and I want to separate it from data that did. It doesn't mean that we're not relying
on it. It just says unofficial data recalled by individual military officials because they were not, it was not data that we got from designated representatives in the statistical department, regarding their service's review of disposition decisions, blah, blah, blah, blah, since the provisions enacted reflect no instances. I just want it to be clear that this was not the statistical data we got. We said to them did you remember, how many of these do you remember and how many do you remember, and they said, well, I don't remember any of them and another one said I remember one out of eight and another one said I don't remember any, but we didn't have --

MS. SAUNDERS: I should clarify that, Mr. Stone. That was not from the site visits. That was a --

MR. STONE: No, no, I know.

MS. SAUNDERS: -- request for information that we sent to the Services.

MR. STONE: I know, I know. But it was not the site visits.
MS. SAUNDERS: I think it was based on numbers and information that they keep.

CHAIR HOLTZMAN: So it's not unofficial data?

MR. STONE: You think that's official data?

CHAIR HOLTZMAN: That the Services provided to us?

MS. SAUNDERS: We asked them the number of cases that met these criteria, and they provided that to us since these statutes were enacted.

MR. STONE: I thought that data, which was listed on a sheet, said this agency recalled, no, they recalled, no, nobody recalled. I thought that's what that said.

MS. SAUNDERS: We have that in the Subcommittee report.

MR. STONE: Could only recall one, blah, blah, blah.

MS. SAUNDERS: No. If you have the RFI, we do cite to that and a review of
disposition decisions. So on the Subcommittee report, on page 12, they do talk, responding to the JPP's Subcommittee's request for information on the number of times these have been invoked, the Services provided the following. And then it say the Services reported that, since this particular date, there have been zero instances in which the Service Secretary reviewed. So these were the numbers that were provided by the Services --

CHAIR HOLTZMAN: So it's official data.

MS. SAUNDERS: Right.

CHAIR HOLTZMAN: I don't think you can say unofficial data.

MS. SAUNDERS: I did not get the sense that this was a recollection by them, that this was information that they kept in due course of business.

MR. STONE: Fine. Based on that, I'll drop the beginning, but I still think we should say reflect no instances. They were recalling.
They didn't have a data system that they drew
that from. They were asking, as I recall, their
various people. It may have been an official
request, but I know they didn't say our data
system shows this many cases and that. We don't
think there were these, we don't think -- nobody
recalls this.

CHAIR HOLTZMAN: I'm unclear as to
what the original text says here. The original
text says show instances.

MR. STONE: Show no instances.

CHAIR HOLTZMAN: That's the original
text?

MR. STONE: Yes. And I'm just, I
would soften it and say reflect no instances.

CHAIR HOLTZMAN: So all you're doing
is changing the word show to reflect?

MR. STONE: Yes, that's all.

CHAIR HOLTZMAN: Is there any
objection to that?

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay. Without
objection, it's accepted.

MR. STONE: Next bullet. I think we, again, we have this word universally that we took out before. And then on the next line we have strength of the evidence, which we changed to the other language, the weakness of the evidence.

JUDGE JONES: Right.

MR. STONE: And then that just leaves the last sentence there, they perceive the commands would rather refer cases to trial than deal with the potential adverse effects of not referring the cases, such as career setbacks, media scrutiny, and elevated review of non-referral decisions. At least in the summaries that I saw, it says they perceive that commanders. I didn't think we got much feedback from commanders, and I didn't think, I think those are the logical things, but I didn't think they said that. And so I thought we made our point in the first sentence, and we didn't need to start talking about commanders and what's logical, which we didn't hear from more than six
people and I don't think we heard that as listed here because I have that summary with me.

CHAIR HOLTZMAN: But, Mr. Stone, this doesn't refer to commanders. It refers to the trial and defense counsel and what they said and what their perception is.

MR. STONE: Of commanders, right.

CHAIR HOLTZMAN: Of commanders. So what a commander says is not the point here. The point is what trial and defense counsel says, and I think that that's an accurate, I mean, unless the staff corrects me, I think that's an accurate reflection of what we heard from the trial and defense counsel as to why there was this perception of pressure.

MR. STONE: I think it's speculation, but that's why I --

CHAIR HOLTZMAN: Yes, for the trial and defense counsel. I think that they --

MR. STONE: I don't think it's needed. I think it takes us into the realm beyond what we need to say.
PROF. TAYLOR: I would just point out, though, that the Subcommittee report corroborates that to some extent because on page 14, for example, when asked what, if any, pressure on commanders to handle sexual assault cases, a certain commander replied he felt the need to do something immediately or face harm to his career. So there's some corroboration for this perception.

CHAIR HOLTZMAN: Even from a commander.

PROF. TAYLOR: From a commander.

CHAIR HOLTZMAN: Right. But the bullet refers to trial and defense counsel, what they perceive. Okay. So let's vote on this. Those in favor of removing the last sentence of Bullet Number 3 on page 9 say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed.

(Chorus of no's.)

CHAIR HOLTZMAN: No's have it. Not agreed to. Okay. I think the should on
Recommendation 57 is not, you're not advancing that anymore, right?

MR. STONE: No, and not in 58 either or 59.

CHAIR HOLTZMAN: All right. So on page ten, we're up to page ten now. Okay. Page ten, the first change is in Recommendation 59; am I correct? Or is that not yours? It reads continue to. Is that you or is that the staff?

MS. SAUNDERS: That is Mr. Stone.

CHAIR HOLTZMAN: Mr. Stone, are you -- okay. So we're in Recommendation 59. Let me ask you all a question. Should we break now, or should we just go to the end? This might be --

MR. STONE: You want to break?

PROF. TAYLOR: We're almost there.

CHAIR HOLTZMAN: All right.

MR. STONE: Wait. What did we decide? Go to the end?

CHAIR HOLTZMAN: Yes. You struck continue to.

MR. STONE: Yes, because that implies
that we have data about what's going on today, which we don't need to say. We just have to say that they should monitor whether misperceptions regarding alcohol consumption and consent affect court-martial panel members. That's all. It's the same thought without suggesting we already have data and made findings that we know this is happening. I mean, because we didn't say potentially continue to, blah, blah, blah, blah, blah. I just didn't want to say more than we know, and continue says more than we know.

CHAIR HOLTZMAN: All right. Any discussion? Okay. Those in favor, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed.

(Chorus of no's.)

CHAIR HOLTZMAN: The no's have it.

It's not agreed to. Let's go to the next bullet.

MR. STONE: The next bullet about that the SAPR training has been bad I only saw in summary from defense counsel. I don't think that was in anything from trial counsel, and so,
therefore, I thought that particular one ought to be clarified about where it came from because we're criticizing a particular kind of training and they're saying it's not fair to us. I mean, that conveys to the people doing SAPR training what we think they ought to be concerned about, and they reported their perceptions, as we said, in a million other places; and, therefore, I just wanted that to be consistent.

And, actually, if you look at the next bullet, the same thing is true. The SAPR people did not think that the one means no consent is the way they train people and they didn't think it was affecting them, but the defense counsel indicated they still hear misconceptions. That's legitimate for defense counsel to say, but it identifies where the criticism is coming from and if they make a correction to whom they should realize they need to correct it.

PROF. TAYLOR: So on page 19 of the Subcommittee report, the first sentence on this topic says this, "Most sexual assault response
coordinators and victim advocates who spoke with Subcommittee members acknowledged that misperceptions persist throughout the military regarding the consumption of alcohol and lack of consent, specifically that the consumption of any alcohol amounts to making a person incapable of consenting to sexual activity." So it seems to me that this is a wide, more widely held view than just defense counsel based on this, if I'm reading this correctly.

MR. STONE: Well, you're reading that correctly, but that's why I asked for and I got the summaries of the site visits and I went through the site visits. Now, which one is exactly right, I don't know. If you want to leave it all counsel, if you're comfortable with that report. I thought it actually would help SAPR members to know where the criticism is coming from and how to correct it but . . .

CHAIR HOLTZMAN: Well, certainly in the second bullet, that would not be accurate based on what Mr. Taylor just read because it
wasn't defense counsel because it's everybody, I mean it's the coordinators and others.

PROF. TAYLOR: Well, just to continue briefly, if I may. The second paragraph says, "Commanders who spoke to the Subcommittee consistently expressed concerns about the frequency, describing it as time-consuming and potentially counter-productive. In the view of some practitioners, SAPR training has become so pervasive that it affects the judgment and selection of potential court members," and then it goes out to talk about counsel in the Army.

Now, it does, in the next paragraph, say a defense counsel stated, you know, so it's clear that defense counsel are included within that group of people who think that this is a problem, but I think it's a problem in general.

MR. STONE: Right. But our lines here don't say defense counsel. You're right, that one does. So somewhere I was trying to get that notion in here.

VADM TRACEY: What notion?
MR. STONE: I don't know whether you want it in that bullet or in the next bullet, but it seems to me -- in the next bullet, you've got SAPR telling the Subcommittee they do not train military members that one beer means no consent or use variations of that slogan. So I'm trying to identify what you just pointed out from the Subcommittee report.

CHAIR HOLTZMAN: Yes, but I think Mr. Taylor, in defense of Mr. Taylor, no defense needed from me, but, in any case, what he was saying is that it's a widespread view that they hear misperceptions about alcohol use and impairment from court-martial panel members. It's not only defense counsel. Well, I guess this is from court-martial panel members but that the problem is not, the perception of the problem is not limited to defense counsel, and I think it's misleading to suggest that the perception of this problem is limited to defense counsel.

That's my concern.

PROF. TAYLOR: Mine, as well.
JUDGE JONES: So --

MR. STONE: I guess I made those two comments primarily because the words their perceptions was not in the first bullet. If I have, if we had the word their perceptions in the first bullet, I have less problem dropping defense before the word counsel in both the first and the second bullet.

CHAIR HOLTZMAN: Does anybody have an objection to using the word perception?

VADM TRACEY: No.

JUDGE JONES: No.

CHAIR HOLTZMAN: So that's accepted. So your proposal of defense counsel is dropped --

MR. STONE: I'll drop it in the first and second bullet.

CHAIR HOLTZMAN: -- and the term their perceptions is added. Okay. We're up to the second to last bullet.

MR. STONE: Right. This goes back to what I said before. You've got a total of seven commanders who spoke to the Subcommittee out of
two-hundred and whatever it was people, 250
people or something. So I don't want to just say
commanders who spoke to the Subcommittee
consistently expressed concerns about blah, blah,
blah, blah, blah, and training fatigue because it
was a tiny number. So somehow that needs to be
modified. I guess we could say commanders who
spoke to the Subcommittee expressed concerns and
lave out consistently or if you want to, you
know, or the few commanders who spoke, but
something to make it clear that we don't know
that all the commanders who spoke to the
Committee and a lot of them spoke as an
introductory statement, the vast majority, and
didn't make any statement about this. It was a
welcoming speech, which I understand.

CHAIR HOLTZMAN: Well, I have no
problem with taking out the word consistently. I
mean, I think expressed is fine.

JUDGE JONES: I'm fine with that.

CHAIR HOLTZMAN: But I am unhappy with
the few commanders. Let's say the commanders who
spoke to the Subcommittee.

JUDGE JONES: Yes. And we took out few before, so, for no other reason than consistency, I don't think we should start saying few or numbers, putting numbers in here, other than the 280.

CHAIR HOLTZMAN: Okay. Mr. Stone, are you accepting that or do we have to vote on it?

MR. STONE: I'd still like a vote because I think seven out of 280, unless you clarify that somewhere, is a misperception and I'm not wanting to mislead anybody.

CHAIR HOLTZMAN: All right. So the first proposal by Mr. Stone is to add the words the few in front of commanders. Those in favor, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no's.)

CHAIR HOLTZMAN: The no's have it.

The second -- are you okay if we take out the word consistently?
MR. STONE: Yes, yes.

CHAIR HOLTZMAN: Anybody opposed to taking out consistently?

JUDGE JONES: No.

CHAIR HOLTZMAN: So that's accepted.

Okay. I think we're up to the last bullet on page 10; am I correct?

MR. STONE: Yes. The last bullet on page 10, once again, is talking about a case not described here, it doesn't describe what else the Navy, Marine Corps Court of Criminal Appeals has done in that case or before that case or after that case. And if we're going to start doing legal discussions, then I'm going to want to add a lot of stuff that makes it very specific and accurate, as well as putting in the citation which is not there.

VADM TRACEY: Where did this reference come from?

MS. SAUNDERS: This is, I believe, cited in the Subcommittee report. I can certainly add a footnote here, as well, that
there is a citation in there and it just -- let me find it in here -- the court just found that there was an erroneous jury instruction on the term impairment in a sexual assault case, and they just found that many of the members who sat as panel members on that case were under the impression that any amount of alcohol may constitute inability to consent.

VADM TRACEY: How did the Subcommittee come to consider this?

MS. SAUNDERS: It was just research from the staff that was presented to them.

MR. STONE: Did they look to see how many other cases affirmed convictions where that claim was made and they found that there was no confusion?

MS. SAUNDERS: No, Mr. Stone, they didn't. I think they were just highlighting what the report found --

JUDGE JONES: The fact that it is still a problem.

MS. SAUNDERS: That it's still a
problem, even in this case.

    MR. STONE: Do we know if the case was taken by the Court of Appeals of the Armed Forces, that there's a further decision in the case?

    MS. SAUNDERS: I am not sure. I would have to look at that. This case came out in September of 2016.

    MR. STONE: Right. We, as a panel, decided last time when I cited and I wanted to cite a unanimous U.S. Supreme Court case that we were a policy body and not a legal body and we aren't going to be citing cases when we thought there was a policy that needed to be handled correctly. And for the reasons when we talk about the other cases, the same thing, I think, applies here. If we're going to get into the case, I, for one, first of all, I'm going to read it. I'm not going to cite a case that we haven't attached and nobody has read here and we haven't heard from the prosecutors and defense counsel or even the Service's prosecutors and defense
counsel as to whether this is a typical case, an outlier, was it published or unpublished. It gives an indication of how important the particular Service thought it was. So I --

MS. SAUNDERS: This is cited in the Subcommittee report on page 19 and then it continues on to page 20. And it simply stands for the proposition that, in this case, a lot of the panel members were counted, the training they had received from SAPR personnel and their impressions that versions of one drink equals inability to consent.

JUDGE JONES: It's cited for the fact that -- not for any legal proposition or whether the case was handled correctly as a matter of law. It has nothing to do with the law.

MS. SAUNDERS: And, in fact, in Footnote 110 of the Subcommittee report, they discuss some of the comments that they heard from some of the panel members. If you did have any form of impairment you can't have consent, you need sober consent for the brief. These are all
comments that were made by the panel members in
that case.

MR. STONE: Right. But if that's one
drive who doesn't know the law and improperly
instructs the jury in this case, it doesn't
represent the ongoing problem.

JUDGE JONES: Mr. Stone, we're talking
about facts that some jurors basically said this
is what they thought they were taught in SAPR.
It has nothing to do with an incorrect
 instruction, and all we're doing is trying to say
there may still be a problem. That's it.

MR. STONE: We're citing a case
without its citation here, without having read
it, without having heard from the people
involved, and without even knowing if it's been
reversed. That's why I move to strike it.

CHAIR HOLTZMAN: It could be reversed
on the law. We're talking about the facts. It
seems impossible that an appellate court would
say that the factual statements that were taken
by the jurors are incorrect. On what basis could
an appellate court possibly make such a decision?
We're just talking about the facts of what the
jurors themselves or the panel members said.
They said this is what we were told. Were they --
so that's all. We're not signing for any
proposition of law. We're not saying that the
judge handled that properly, didn't handle it
properly, it should have been reversed, shouldn't
have been. I mean, what can a prosecutor tell
you about or a defense counsel tell you about
what the experience was of these jurors? That's
all we're focusing on, so it seems -- okay. I
think we --

MR. STONE: I strike cases that I
haven't read. I don't cite cases I haven't read
either, and I think it's irresponsible to do so.

MS. SAUNDERS: The footnote is in the,
or the citation is in the Subcommittee report.
I'd be happy to add it here.

MR. STONE: No, I want the opinion,
not the cite, if you don't mind.

MS. SAUNDERS: I'd be happy to give
you that information.

MR. STONE: Okay. And the subsequent history of it.

CHAIR HOLTZMAN: Okay. I think, meanwhile, I think Mr. Stone can have that if he wants it, but I think we are ready to vote on this. Those in favor of removing the last bullet on page ten, say aye.

(Chorus of ayes.)

VADM TRACEY: Those removing it?

CHAIR HOLTZMAN: Yes, removing it.

VADM TRACEY: Sorry. I'm opposed to removing it.

CHAIR HOLTZMAN: Okay. Those opposed to removing it, say -- all right. Those in favor of removing this bullet, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed say no.

(Chorus of no's.)

CHAIR HOLTZMAN: The no's have it.

The amendment is rejected. Okay. Do we have -- I don't know what the purple is. Mr. Stone, is
that the staff?

MR. STONE: No, no, no, no, that was --

MS. SAUNDERS: Those were Mr. Stone's comments. We were not able to fit them all on the printed pages, so we --

CHAIR HOLTZMAN: Oh, oh, okay, fine. So those aren't amendments.

MS. SAUNDERS: Right.

MR. STONE: Right. And those simply have, we jumped and we'll get back after lunch to 53.

CHAIR HOLTZMAN: Okay. So we're finished, except for the review of those two pages, what you're going to write up about that.

MS. SAUNDERS: For the two bullets. My only question I have on page 7 is, Mr. Stone, you had crossed out the bullet about the American Bar Association's Criminal Justice Standards. Did you still want that to be crossed out or --

MR. STONE: Well, it depends. I want to see what we do on the other bullet.
CHAIR HOLTZMAN: All right. So page 7 --

MR. STONE: I've got to see what the other bullet says.

CHAIR HOLTZMAN: Right. So page 7 is being held in abeyance.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: Is that correct?

MR. STONE: Yes.

CHAIR HOLTZMAN: All right. Thank you. We made a lot of progress, and so I guess we'll take a break for lunch now.

CAPT TIDESWELL: We're scheduled for 45 minutes.

CHAIR HOLTZMAN: Oh, okay. Well, far be it for me to --

JUDGE JONES: You haven't seen us eat. We can do faster than that.

(Whereupon, the above-entitled matter went off the record at 12:17 p.m. and resumed at 1:06 p.m.)

CHAIR HOLTZMAN: Oh, Mr. Taylor's
here. Okay. I think we should, we're up to the data --

CAPT TIDESWELL: Ms. Holtzman, if I may, Ms. Saunders is in her office feverishly working away. She's not finished, so I thought we would stay on the agenda and perhaps start and open with the data piece.


MS. PETERS: Okay. Members of the Panel, good afternoon. At Tab 6 of your read-ahead materials, you have the updated copy of the court-martial data report. The purpose of this session is to obtain the Panel's final approval of the language changes that you voted on and approved at the last meeting, and also we received some additional edits from the members in between the last meeting and today. Those are going to be reflected in yellow highlight in this report, and what I would recommend, ma'am, is that we start with, these are primarily edits to the findings supporting the recommendations and
one change that was made to one of the recommendations itself.

From there, edits were made to the body of the report just to conform to the language of those changes. So we could start with page three of the report that contains the recommendations of the findings.

CHAIR HOLTZMAN: So do you want to read the change that you're recommending?

MS. PETERS: Yes, ma'am. The first change is in the bullet that's highlighted in yellow on page three. This falls right under, immediately under Recommendation 52. I would just note that, while the staff is concurrently drafting multiple reports, these numbers, tentatively, will overlap with the Panel concerns report, but we will amend that as we determine the order of production, obviously. They will not overlap. For ease of reference today, if we could just refer to them as 52, 53, and 54 to stay on the same page.

CHAIR HOLTZMAN: Okay.
MS. PETERS: The edit that the staff would like to draft your attention to is the second sentence in Bullet 1. Would you like me to read it aloud?

CHAIR HOLTZMAN: Yes, please.

MS. PETERS: It says that -- the purpose of this, by the way, was to explain what a document-based data collection system was. And the language added says, "The JPP's document-based approach to data collection involves obtaining relevant case documents from the military services (for example the charge sheet, report of results of trial) and recording the relevant case history data into a centralized database for analysis."

CHAIR HOLTZMAN: Is there any objection to that change? Any discussion, objection? Approved.

MR. STONE: I have yellow on page two. Did we jump that?

MS. PETERS: Yes, sir, we do. I was suggesting, subject to your decision that,
because that change merely corresponds to
language that's consistent with the
recommendations and findings, if you change
something up here we'll have to make a
corresponding change over there.


MS. PETERS: The next edit is at page
4. At the top of page 4, there is a bullet. It
technically supports Recommendation 53 regarding
systems required to be produced under Article
140a, Code of Military Justice. So the first
bullet at the top of page 4 that falls under the
recommendation, simply change the words military
justice practitioners to military justice
personnel, and instead of saying that they should
be responsible for providing the information
collected that they should be, it has been
changed to they should be involved in providing
the information collected, pursuant to Article
140a.

CHAIR HOLTZMAN: Okay. Is there any
objection to this change?
(No audible response.)

CHAIR HOLTZMAN: Hearing none, it's approved. Next.

MS. PETERS: Yes, ma'am. The next two bullets below that one are highlighted because they are new, and this reflects language or ideas and recommendations that were provided by the Panel Members and voted on at the last meeting, but this is the actual language the staff is proposing to fulfill that change.

So the first would read, "DoD SAPRO should rely solely on the Article 140 data for its sexual assault case adjudication data when developing the DoD SAPRO annual report to Congress."

CHAIR HOLTZMAN: Any objection to that?

MR. STONE: I have a concern, and I want to see what the Panel thinks. After the words Article 140a data, which we know is not data they collected but we're forcing them to use, do we want to say, comma, including any
supplementation they require? Because, I mean, maybe they have slightly different data that the Article 140a rule will say, no, no, no, we don't collect that or that's not important to us or you're looking at that from a slightly different perspective. So do we want to make it clear that they can footnote or add to the 140a data? They've got to use it, but, if they need something that's not in there to explain what they're doing, they could supplement it? I feel like, otherwise, we might be locking the door on them and then they'll complain later, well, I couldn't say this and I couldn't say that because you wouldn't let me go beyond and add to that data in an extra table.

JUDGE JONES: What would it be? I mean, this is pretty narrow. 140a is for sexual assault adjudication data. What kind of thing are you thinking of? I mean, SAPRO's annual reports will go way beyond just adjudication data, I assume.

MR. STONE: I know. And I --
JUDGE JONES: But the way beyond won't be in 140a, or am I missing something here?

MR. STONE: Well, because it says here should rely solely that I want to just give them an escape hatch so they can write their report.

VADM TRACEY: Tell me what source of data would you want them to use.

MR. STONE: I don't know. I have no idea what they'll decide when they look at their data. They may decide they don't need to supplement it, but they could well say, well, you know, that's the Article 140a prosecution data footnote. In addition, we had, I don't know, 30 reports to us that came roundabout that, blah, blah, blah, blah, that didn't fit in that thing or we had 30 reports that we can't reconcile with the 140a data.

I don't know, but I didn't want to tell them they can't put it in anywhere. I want to at least somehow have a little supplementation thing. Does that make some sense, Ms. Peters?

JUDGE JONES: I mean, I think the
point of this is that we don't want to gather
individual blocks of data from each service, and
so it's meant to say we're not looking at any
individual data from any service, we are only
looking at 140a, so get it into 140a. Is that
the point of this?

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

MS. ROZELL: I understand where you're
coming from, Mr. Stone. SAPRO is a victim-based
organization, and the adjudication of 140a is
not. So I understand where you're coming from.

MR. STONE: I mean, I want them to be
able to look at the footnote and say we also saw.
That's why I said supplementation. In other
words, not instead of.

VADM TRACEY: 140a is the source of
only adjudicated data. If there's information on
cases that were not adjudicated, then there's
nothing about this language that prohibits them
from supplementing.

JUDGE JONES: Right. That's how I
read it.
VADM TRACEY: You don't want SAPRO making up their version of what the adjudication statistics were.

CHAIR HOLTZMAN: Right. We're just saying, with regard to sexual assault case adjudication data, that's it. Anything else they want to talk about in the SAPRO report, God bless them. But on this, they have to rely on Article 140a data.

All right. Ready to vote?

MR. STONE: Well, I guess my question to everybody is does anybody think they need that escape hatch, the presenters or the staff? If nobody thinks -- I'm just raising that question. If nobody thinks they need that escape hatch, then it doesn't even need a vote. I'm sitting on the fence here.

MS. ROZELL: I think when they go to develop the 140a database that they would take into consideration all the key points that are reported in SAPRO, SAPRO's every report to Congress.
MS. PETERS: The experience of the staff and the information we had that was supportive of this was that there are multiple different systems that do different things in different ways and that, if SAPRO were to continue business as usual as running a separate but parallel system with the methodology that is opaque and potentially questionable, and this would bring transparency, reliability, and uniformity to the way SAPRO presents its sex assault adjudication data to the public and bifurcating that in any way would bring me back to the original problem I think the Panel is trying to address in its recommendation.

MR. STONE: Will the 140a data include all the administrative punishments and all the separation instead of punishments in some of this alternative stuff? Because that strikes me as something they might say they don't even want us to tell you that we thought there was another ten percent again of those cases which were resolved by other than adjudication means, but they're
really adjudicated, in effect, they're adjudicated data.

I don't know. I'm just asking that question because I hate to tell somebody that they can't drop a footnote and try and supplement something on something that we're trying to look ahead and guess at.

MS. PETERS: Yes, sir. I think any case where a prosecution has commenced would be captured in an adjudication database --

MR. STONE: Right.

MS. PETERS: -- regardless of the way it's resolved. Separately, if it's not in 140a, I don't believe the intention is to limit the source of information that SAPRO has. They can still report the resolution of that case, whether it's in 140a or not, because it's a case that they've been tracking since a report was filed. I don't think the language of this supports that they're just saying, there's additional problems when SAPRO begins collecting and interpreting legal adjudication information, which is now
going to be housed under this 140a system, so we just take it all from their shelf.

MR. STONE: So your bottom line is you don't think they need an escape clause?

MS. PETERS: No, sir.

MR. STONE: And, Ms. Rozell, what would you do?

MS. ROZELL: I agree. I agree with Meghan.

MR. STONE: Okay.

MS. ROZELL: I think that, because the 140a data collection system will be, should be administered by legal personnel, then I think that it will be much more accurate than this analysis.

MR. STONE: I agree. I just didn't know if there was something else --

PROF. TAYLOR: Mr. Stone, the reason I don't think this is a problem is because DoD has not actually implemented this yet. So in designing it, one would think they would include all the different aspects that you're thinking
about. One would think.

MR. STONE: I just know when there has been a data collection issue and we have to use it later, somehow somebody says, wait, wait, wait, we need this footnote over here, nobody thought about X, Y, and Z, and we drop a footnote somewhere. That's all. Or sometimes you thought about it, but the equipment you have won't collect it or the system you have in place or the questionnaire or whatever, you can't get people to collect it. And so I just was going to leave a little escape hatch, but not if nobody thinks we need to.

CHAIR HOLTZMAN: Right.

MR. STONE: I just throw in the --

CHAIR HOLTZMAN: I think that's where we are, so let's go on to the next bullet, please.

MS. PETERS: Yes, ma'am. That was an approved, ma'am? I just want to make sure I heard.

CHAIR HOLTZMAN: Yes, it's approved.
MS. PETERS: Okay. The final bullet says, "To the extent possible, DoD should avoid developing a source of data under Article 140a that does not communicate with other sources of data within the Department of Defense, such as DoD SAPRO's sexual assault incident database." I think this is to address a concern raised by Admiral Tracey at the last meeting about, and other panel members, about the interoperability of multiple DoD systems.

CHAIR HOLTZMAN: So I hate to raise this, but why are we saying to the extent possible? Why don't we just say DoD should avoid?

MS. PETERS: There is no particular reason, other than to assume we don't know all eventualities, but it may just be, I see the point that it's surplus. There was no substantive reason to have that in there.

CHAIR HOLTZMAN: Anybody have an objection to taking that --

JUDGE JONES: No.
CHAIR HOLTZMAN: Okay. Otherwise, any objection to including the third bullet with that amendment? Hearing none, it's approved.

MR. STONE: Wait, wait, what was the amendment exactly?

CHAIR HOLTZMAN: It takes out to the extent possible.

MR. STONE: Oh.

CHAIR HOLTZMAN: Because we have DoD should.

MR. STONE: Well, on the next line then where it says that does not communicate with, do you want to say all of the sources of data within DoD? You have other, but maybe you want to say all other.

CHAIR HOLTZMAN: No. Okay. Are we okay with Bullet 3?

JUDGE JONES: I am, yes.

MR. STONE: I'm okay.

CHAIR HOLTZMAN: So it's approved.

We're up to Recommendation 54, C.

MS. PETERS: Yes, ma'am. The changes
voted on at the last meeting are reflected in yellow. The first is to add, under Recommendation 54, Part C, that if a service member is charged with a sexual assault offense and pleads guilty --

CHAIR HOLTZMAN:  Pleads not guilty.

MS. PETERS:  Oh, excuse me. And pleads not guilty. Thank you for correcting that. And the second issue is that, I guess I would continue that, if he pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is low. And then after the comma is language that was added at the last meeting, "and the probability that he or she will be convicted of any offense, i.e. the probability that he or she will be convicted of either a sex or a non-sex offense, is high."

CHAIR HOLTZMAN:  Any objection to this language? Hearing none --

MS. PETERS:  May I raise an issue for the Panel's awareness?

CHAIR HOLTZMAN:  Yes.
MS. PETERS: As to this, the concerns or the --

CHAIR HOLTZMAN: You don't have to explain it if there's no objection here. Is there something you want to explain?

MS. PETERS: Yes, ma'am. The cases in which, when I reviewed the transcript, the cases in which a person pleads not guilty is one set of, is one type of conviction rate. Another set is what you referred to, Mr. Stone, when we, when you proposed your language, which is the second part of the edit that says the probability that he or she will be convicted of any offense is high, you referred to a 70-percent statistic. I just want to clarify that the 70-percent overall conviction rate applies to all cases referred to trial and includes guilty pleas.

So if we're going to base the second edit on cases including guilty pleas, we can't also say that if you're charged and you plead not guilty your conviction rate is high. The actual conviction rate for contested cases in which
someone is pleading not guilty is 57 percent, not
70 percent.

CHAIR HOLTZMAN: So how would you
change this, please?

MS. PETERS: The suggestion is to
either add the actual statistics that marry up
with this language. Instead of saying low or
high, we would substitute it with an actual
figure, or remove 54C altogether with the
understanding that it doesn't substantively
really change the focus or purpose or intent of
Recommendation 54.

MR. STONE: Well, what are the two
numbers you put in? The second one is that a
high would be 57 percent, and what would it be
for low?

MS. PETERS: Right. It is on page 29.
Thirty-six percent.

MR. STONE: Okay. I'm always in favor
of the numbers if we've got them. Much better
than characterizing --

CHAIR HOLTZMAN: But the numbers are
not consistent. The first number only includes conviction after trial; am I correct? And the second number includes guilty pleas.

MR. STONE: No, that is 57.

MS. PETERS: As drafted, that's the issue with this language. The statistics that marry up --

CHAIR HOLTZMAN: Right. So that's what I'm saying, that you're comparing apples and oranges here.

MR. STONE: No, she just gave us the right number. In other words, if we put 70 percent as the second number, it would be apples and oranges. But 57 percent is apples and apples.

CHAIR HOLTZMAN: Fifty-seven percent does not include guilty pleas.

MS. PETERS: Correct.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: But it does include convicted of contact offenses and non-sex offenses.
CHAIR HOLTZMAN: Right, right, okay.

So any objection to adding those numbers --

VADM TRACEY: I'm sorry. I'm not sure that's the right number. If you plead not guilty, the probability that he or she will be convicted of a sexual assault offense.

MS. PETERS: Because if any sexual assault offenses, you have to add in the two percent, so it becomes 38 percent.

CHAIR HOLTZMAN: What's the two percent for?

MS. PETERS: Two percent is --

VADM TRACEY: Contact and --

CHAIR HOLTZMAN: Oh, I see. I also suggest, by the way, that you take out, you don't need the probability in the parens. You don't need to repeat the probability. You can just simply say i.e. either a sex or a non-sex offense.

MS. PETERS: Yes, ma'am. So strike all the language between the comma and either.

Okay.
CHAIR HOLTZMAN: Admiral, are you okay or --

VADM TRACEY: What does it say now?

I'm not sure I understand --

CHAIR HOLTZMAN: What it's going to say now is the probability, the second part of this --

VADM TRACEY: All the numbers.

CHAIR HOLTZMAN: Okay. Go ahead, Meghan, please.

MS. PETERS: It would read as follows, "If the Service member is charged with a sexual assault offense and pleads not guilty, the probability that he or she will be convicted of a sexual assault offense is 38 percent and the probability that he or she will be convicted of any offense is 57 percent."

CHAIR HOLTZMAN: Well, that's not exactly it. Any offense, parens, i.e. either a sex or non --

MS. PETERS: Either a sex or a non-sex offense. Yes, ma'am.
CHAIR HOLTZMAN: Close paren.

VADM TRACEY: Okay. The 38 is the sum of people accused of penetrative offenses as the most serious offense who are convicted of a penetrative offense or a contact offense?

MS. PETERS: Yes, ma'am.

MR. STONE: I'm sorry. Which table is that one?

MS. PETERS: This is on page 30, Table 5.

MR. STONE: Table 5.

CHAIR HOLTZMAN: Page 30?

MS. PETERS: The reason the staff was suggesting to pull from that particular column is it seems the case, the type of offense breakdown is heavily weighted in the penetrative offense column and that's where the vast majority of the cases reside. And for simplicity's sake, you pick a representative number to include in a bullet where you're trying to be concise was the staff's thought process when suggesting a particular statistic.
In addition, I think we were referring to the 70 percent, I think that aligned with penetrative cases, as well, so in my mind I was trying to do the same thing.

MR. STONE: Oh, you mean so the number should be 66 percent, not 57? Is that the idea?

CHAIR HOLTZMAN: Not really because it's, partly it's -- the 66 percent is just for contact.

MR. STONE: Right.

CHAIR HOLTZMAN: And you do have a combined statistic?

MS. PETERS: I can easily tabulate one, but I don't believe it's a straight-up average of the two because of the high number of penetrative cases. But we could do it that way if you'd like.

MR. STONE: Okay.

CHAIR HOLTZMAN: So, yes, can you calculate the statistic?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay. That would be
great. So based on the, I mean, with the calculation to be added, do we adopt this language, yellow reading "and pleads not guilty" and then "and the probability that he or she will be convicted of any offense (i.e. either a sex or a non-sex offense) is X percent," the X to be --

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: -- provided by the staff. Any objection to that?

(No audible response.)

CHAIR HOLTZMAN: Okay. Hearing none, it's adopted. Okay. Then I think our next amendment --

MS. PETERS: Ma'am, I could highlight where the body of the report or the executive summary have been edited to conform to the language that you've adopted in the findings and recommendations. And beyond that, there are some minor edits towards the end of the report, but if you'd like to just go over here on --

CHAIR HOLTZMAN: Oh, on page 14?

That's just a conforming edit?
MS. PETERS: Yes, ma'am, and page 2 of the executive summary, as well.

CHAIR HOLTZMAN: And page 2 of the executive summary. Okay. All right. Do we have any objections to these two amendments, pages, I guess it's 10 -- I'm sorry. No, it's not 10. Where are those pages?

MS. ROZELL: Fourteen.

CHAIR HOLTZMAN: What?

MS. ROZELL: Fourteen.

CHAIR HOLTZMAN: Fourteen and two.

Any objection to those changes?

(No audible response.)

CHAIR HOLTZMAN: Okay. What else do we have? Is that it?

MS. PETERS: No, ma'am, there is one minor, it was a staff edit on page 21. Just to make you aware that on the table, on the second column, there's a highlighted -- it had said DoD active duty population. That would be inaccurate if you factor in the Coast Guard is not part of DoD so just amended it to total active duty
population.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: But I'm still struggling with this data. So are the National Guard and reserves, activated National Guard and reserves in the numbers in the first column?

MS. PETERS: I didn't read a footnote or any citation that spoke specifically to that.

VADM TRACEY: But I'm trying to be sure that we're not flagging the Army as having an extraordinary number of these when, in fact, it's how big they are by comparison to everybody else that's driving the number, and their number includes something of the National Guard and something of the Army Reserve and Air National Guard of some content is in the Air Force's number but --

MS. PETERS: Yes, ma'am.

VADM TRACEY: A DMDC report is usually pretty precise.

MS. PETERS: Yes, yes, it is. And I read this to be the active duty population only
and that reserve population and National Guard is broken out, it definitely broken out separately. I thought you were referring to whether somebody had been counted if they were mobilized.

VADM TRACEY: I am asking. If people who are subject to the UCMJ, people who've been mobilized, so if the active duty number for the Army is only regular Army, then we run this stating the denominator for them because they've got certainly activated Guard and reserve personnel right now.

MS. PETERS: That's the potential of --

VADM TRACEY: Can you just clear up what that actually, what that data actually is?

MS. PETERS: I can do that; yes, ma'am.

CHAIR HOLTZMAN: And when you clear up, will you communicate that to us?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay, great.

MR. STONE: And I'd like to confirm
that's an important clarification because when I went to that course down in Charlottesville, training SVCs and VLCs, there were a bunch of reserve people there. And they said we don't, you know, we're not so large that we have our own training program, so we come to this one, and they must have filled up 20 seats.

MS. PETERS: Okay.

CHAIR HOLTZMAN: The next edit is on page 41.

MS. PETERS: Yes, ma'am. The first edit on page 41 comes in at the bottom of the second paragraph. It was, I think, the staff changed the word of to on, the minor --

CHAIR HOLTZMAN: That grammar still doesn't work. You need the underlying causes of or influences on.

MS. PETERS: Yes, ma'am. So adding --

CHAIR HOLTZMAN: Anyone object to that? We're just talking grammar. Okay. And then there's a typo in the next paragraph. It should be for instead of or.
MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay. So any objections to these changes on page 41?

(No audible response.)

CHAIR HOLTZMAN: Hearing none, they're adopted. Okay. Last paragraph.

MS. PETERS: Yes, ma'am. On page --

VADM TRACEY: Page 41 in the note 78, maybe it's just a word missing, the first line of note 78, had higher rates of case attrition.

MS. PETERS: Yes, ma'am.

PROF. TAYLOR: Good catch.

CHAIR HOLTZMAN: Page 42.

MS. PETERS: Yes, ma'am. The last paragraph, the only full paragraph on page 42, the first edit is intended to conform to the language of Recommendation 54C, so it will read to include the statistics that you all just voted to approve.

CHAIR HOLTZMAN: And then changing the parenthetical.

MS. PETERS: Yes, ma'am.
MR. STONE: In other words, you're going to conform that.

CHAIR HOLTZMAN: Yes, okay. Any objection to that?

(No audible response.)

CHAIR HOLTZMAN: Hearing none, adopted. Then --

MS. PETERS: Yes, ma'am. We had a few additional edits provided by Mr. Taylor. It begins with eliminating, I think, the word that right below the highlighted yellow, and it changes, I think, the language in the middle of the paragraph to the success rate, instead of saying the chances or the probability of approving that a sexual assault offense occurred is rare it would read the success rate in proving that a sexual assault offense occurred is low. So I think those are the two edits meant to reflect the success rate is low.

CHAIR HOLTZMAN: Three edits, that, the success rate, and rare to low. Any objection?
(No audible response.)

CHAIR HOLTZMAN: Hearing none, adopted. I don't think that we have anymore. That's it.

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay. So aside from your communicating the statistics, that's it.

We've approved this report. Captain, is that correct?

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: Do we have to take a formal vote on approving the report?

CAPT TIDESWELL: We could just do a little quick one.

CHAIR HOLTZMAN: Okay. So subject to receiving the conviction, the new tabulation of the statistics that Ms. Peters promised us, all in favor of approving this report say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

(No audible response.)

CHAIR HOLTZMAN: Hearing no
opposition, it's adopted. Okay. Two down.

Well, sort of.

CAPT TIDESWELL: Terri Saunders is hitting print. It will be ready in five minutes.

I am not able to locate Ms. Friel --

CHAIR HOLTZMAN: Oh, okay.

CAPT TIDESWELL: -- investigations.

The other option would be to launch into the final report. So I think the options are wait five minutes and we'll get the printed copies from Terri or we launch into the final report.

MR. STONE: We have very few --

CHAIR HOLTZMAN: Well, some people might want to read this, the new opinion, so maybe we want to take the time to do that.

MR. STONE: If you want to. I was going to go through sexual assault investigations first to get that one out of the way. There's very little changes.

CHAIR HOLTZMAN: Yes, where is the section?

MR. STONE: Tab 7. There's almost
nothing.

CHAIR HOLTZMAN: We may wait until Ms. Friel on that. If we have any questions about it, right.

MR. STONE: I don't think there's any, I mean, we made those changes.

CHAIR HOLTZMAN: Okay. So if people want to read the new one, it's right in front of us.

MR. STONE: That's Tab 7. We'll break to read it, I guess.

(Whereupon, the above-entitled matter went off the record at 1:36 p.m. and resumed at 1:53 p.m.)

CHAIR HOLTZMAN: Has everyone gone through the materials? Mr. Stone, have you gone through the materials?

MR. STONE: What?

CHAIR HOLTZMAN: Have you gone through the materials?

MR. STONE: Yes, I have.

CHAIR HOLTZMAN: Okay. So let's
start, if it's okay with you, with the item on
the Newlan case on page 10 of Tab 3.

    MR. STONE: Since I was the one who
objected, would you like me to tell you how I
would modify that?

    CHAIR HOLTZMAN: Okay.

    MR. STONE: Okay. I would start the
bullet by saying an unpublished blah, blah, blah,
blah, United States vs. Newlan, and the reason
I'd say that is because I don't want somebody to
start trying to go look for it and find out they
can't find it, so if you don't have a cite you
say that it's unpublished, which it is.

    Now, the second sentence, I'm sorry to
say, is not accurate to my liking. It should say
the court noted because it didn't find. This was
not integral to its conclusions on the
instructions. This is in the introduction. The
court noted, and then it should say that members
of the, and it's not panel, it's venire. The
venire is many more people than the panel. And
if you look in the footnote, the footnote itself
shows they're quoting about a dozen people and
then later they say which three of them wound up
on the panel.

So it's many members of the venire
received, and now you've got to go continue the
yellow footnote onto the next page and it says
prevention training from SAPRO personnel that,
and then I quote what the footnote quotes in the
first paragraph of five. It says the same thing,
but I think it's more accurate. It says, quote,
"If there's any amount of alcohol involved, it's
better to be safe than sorry, so just assume that
you can't give consent or receive consent if
there's alcohol." That's what it says in that
footnote. Now, with those words I'm fine because
those words are all accurate. It's not
summarizing, it's quoting what the judge at the
first level said as to what he found from the
venire. It also doesn't overstate SAPRO in terms
of, it does say the trainings must have confused
them, but he said and he makes a finding that the
members described training that was focused on
prevention. So I don't want to take a slap at SAPRO that's not warranted. I want to say it received prevention training that, but the fact is that prevention training is what they led people to make other statements.

CHAIR HOLTZMAN: Okay. Just a question. Are you contesting the accuracy of the quotation contained in that bullet point, which is if someone ingested any alcohol that individual is no longer able legally to consent to --

MR. STONE: That is not what the footnote --

CHAIR HOLTZMAN: No, I know. But the text of the opinion on page four, quoting the text, not a footnote, says many of the venire replied that they had been trained by sexual assault response SAPRO personnel that, quote, "if someone ingested any alcohol, that individual was no longer able to legally consent."

MR. STONE: Okay. You said quote. The opinion doesn't say quote, and it has a
footnote and the note here in our report doesn't
include the footnote. So I went to the footnote,
which explains what the summary is. So, yes,
it's a summary, it's not a quote.

CHAIR HOLTZMAN: It's not a quote?

You don't think, you don't consider that the
quotation that's in the bullet accurate?

MR. STONE: I think that it's a
summary of the quote that isn't highlighted in
the same footnote, or they wouldn't have included
it.

CHAIR HOLTZMAN: I don't understand
what the inaccuracy is of that. I'm just curious
because, as I read it, it says, quote, and I'm
reading the next to last sentence of the yellow
underlined paragraph, the last paragraph, not the
footnote but the last paragraph in the opinion on
page four starting on the next to last sentence,
quote, I'm going word for word, "if," that's the
same as the word in the bullet, "someone," same
as the word in the bullet, "ingested," same as
the word in the bullet, "any alcohol," same as
the bullet, "that," same, "that individual was no
longer able to legally consent." Do you consider
that to be an inaccurate quote?

MR. STONE: It's a summary with a
footnote because not one single person used those
words, so they tried to --

CHAIR HOLTZMAN: But this is a --

MR. STONE: -- summarize what a dozen
people had said by summarizing it.

CHAIR HOLTZMAN: Right. But it's what
the court said. This is an accurate quote of
what the court said. Am I correct?

MR. STONE: But the court footnote --

CHAIR HOLTZMAN: I'm just asking you
yes or no about that, Mr. Stone.

MR. STONE: I don't have to answer yes
or no. I'm not being cross examined by you.

CHAIR HOLTZMAN: I'm just trying to
understand what your point is.

MR. STONE: The footnote says that the
factfinder --

CHAIR HOLTZMAN: Okay.
MR. STONE: -- was the lower court judge and they included what he said. It's not so different, but it doesn't mis-describe what a dozen people there are saying.

CHAIR HOLTZMAN: Okay. Anybody have any other comments about this?

JUDGE JONES: I have to -- I'm not quite sure what we want to change. Would you tell me again what your suggestions are?

MR. STONE: Sure, sure, that the last sentence say, "The court noted that many members of the venire received prevention training from SAPR personnel that," and then I go to this quote right here, "If there's any amount of alcohol involved, it's better safe than to be sorry, so just assume that you can't give consent or receive consent if there's alcohol."

That's right from the record. That's what the military judge concluded. That's a quote of what the judge said at the first level. It's not so different, but it's the words out of the footnote that are being summarized above.
JUDGE JONES: Well, I mean, the footnote has lots of quotes.

MR. STONE: Yes, it does. Yes, it does, and this was the military judge's conclusion. It says, "concluded." He is the first level person and he's talking about this SAPR training. It's just thoughts right here in these two lines.

JUDGE JONES: Well, I think we need to indicate that one, that many members of the panel have received SAPR training, and are you good with the second sentence or are you not even objecting to the first part?

MR. STONE: I'm not objecting if we put, "an unpublished," blah, blah, blah. I'm fine right up to the period. I'm only wanting to go back to, "The court noted that many members of the venire, not the panel."

JUDGE JONES: That's fine. We've got that.

CHAIR HOLTZMAN: Okay, is there anybody that objects to that change?
JUDGE JONES: No.

MR. STONE: Okay, and I have on the last line, "received."

CHAIR HOLTZMAN: Does anybody object to that change, changing the word "panel" to "venire"? Okay, go ahead.

MR. STONE: Okay, and then the last two lines, "received," that's okay, and then I jump to what the judge said here in the footnote on page five. "Prevention training from SAPR personnel that," which is still in there, and then I go quote these two lines right here from the top of the first paragraph on page five. "If there's any amount of alcohol involved, it's better safe than to be sorry, so just assume that you can't give consent or receive consent if there's alcohol," closed quote.

JUDGE JONES: Which page, five? As long as it indicates that they found that many members got the wrong idea from the SAPR presentation.

MR. STONE: Correct, and they
absolutely, that's still in there. That's
absolutely in there.

JUDGE JONES: Well, I would still
prefer to pick out, you know, there's a couple
here that say virtually what this is. This is
right from the horse's mouth -

MR. STONE: Except they weren't on the
panel.

JUDGE JONES: - without being
disrespectful of our - well, it doesn't matter
whether they were in the panel.

MR. STONE: Right.

JUDGE JONES: We're getting
information from the venire. I would like to
make the point better by using a quote that came
directly from one of the panel members who had
been trained by SAPR because that's what we're
trying to show here as opposed to this long
conclusion by the judge or summary by the judge.

I think their words are better
evidence, and there's lots of them. There's one
guy who says, "If there is alcohol involved,
there is no consent." That's pretty easy for our purposes here, and, "Once the victim has had one drink, there's no longer a legal consent."

We don't have to say that that's all. We can just say that the impression of it was, "Two members of the venire were A and B," or something along those lines, but I would prefer to quote something one of them actually said.

MR. STONE: That's okay too.

JUDGE JONES: Okay, so maybe we could just -

MR. STONE: If you want it, two of those people were on the panel. You can go back to the panel. One of those is the one you just had, Master Sergeant D. That's one of the ones you want to talk about, and another one is Major T.

JUDGE JONES: Well, "If there is alcohol involved, then there is no consent," and, "once the victim has one drink." Sergeant M is the closest to what we're talking about and what we've always been concerned about with SAPR
training based on what we've heard from people, you know, who have come in. That's the one closest to, you know, it sounds like some people either understood or misunderstood from SAPR training.

MR. STONE: Which one are you choosing?

JUDGE JONES: The last one, "Once the victim has had one drink, there is no longer,"

MR. STONE: Master Sergeant D?

JUDGE JONES: Yes, Sergeant D.

MR. STONE: It's Master Sergeant D.

CHAIR HOLTZMAN: "If a person has one drink of alcohol, they may be considered impaired. Therefore, they may not be able to give consent."

JUDGE JONES: Well, D is one, and M just says it even more simply. "Once the victim has had one drink, there is no longer a legal consent." Either or both would be -

CHAIR HOLTZMAN: Where is M? I'm not seeing where M is.
JUDGE JONES: M is the very last one.

MR. STONE: It's the very last one.

CHAIR HOLTZMAN: Oh.

MS. SAUNDERS: I will include the citation in a footnote here, and also where that opinion can be found which is on the website of the court. So even though it's unpublished, it's still publicly available.

CHAIR HOLTZMAN: Okay, well, that would be good for the citation, yeah.

MR. STONE: I still want to know whether the word, if we're going to include, "received prevention training from SAPR," because the judge is saying in the next paragraph on the top of the next page that he thinks that these people are summarizing their prevention training and taking it over to the legal context.

That's what he's saying, and that they were taught to be safe rather than sorry, and he thinks that what they were taught to avoid the problem they are inappropriately taking to the legal context, and then he instructs them to
ignore that training because that's not part of
the legal standard.

    I mean, I can totally understand them
walking out saying, "Oh, the easy thing that I
get from that is don't even have it. Don't try
and deal with anybody who has had one drink
because you're going to be in trouble." I mean,
that's what the judge is saying. That's the
first-line judge's conclusion about having the
training, so I would like to say you're seeking
to prevent something.

    JUDGE JONES: I don't care.

    VADM TRACEY: They get sexual assault
prevention and response training.

    MR. STONE: Okay, that's okay. That's
good.

    VADM TRACEY: They get prevention and
response training.

    MR. STONE: That's fine.

    VADM TRACEY: And the statement, I
think, in the document says that the emphasis of
that training is on prevention, so it's not
prevention training.

MR. STONE: Okay, prevention or response. That's fine.

CHAIR HOLTZMAN: Well, why do we need any of that? Why can't we just say, "received training from SAPR personnel?" I think it's fine.

MR. STONE: Because I think it suggests without that explanation that they were being told about the legal standard, and the judge is saying, "No, they weren't being told about the legal standard." They were being told informally, "Hey, let's avoid all these problems."

CHAIR HOLTZMAN: And where is the judge saying that this is from the legal standard?

MR. STONE: In the first paragraph of page five.

CHAIR HOLTZMAN: "As a result," or are you talking the footnote?

MR. STONE: The footnote, "Not all of
the members agreed with the information they received at SAPR training."

JUDGE JONES: Where are you? Oh, in the footnote.

MR. STONE: Yes, "Not all of the members."

JUDGE JONES: Right.

MR. STONE: That's the venire, "agreed with the information they received at SAPR training, and the military judge concluded that the members' remarks described training that was focused on prevention," and I guess really it should say, "prevention and response, e.g., if there's any amount of alcohol involved, it's better safe than to be sorry, so just assume that you can't give consent or receive consent if there's alcohol."

JUDGE JONES: I don't understand the point you're trying to make though.

MR. STONE: I'm trying to make the point that the SAPR training was not a training for people who were going to be serving as
members on a panel, and we sort of suggest that
in our line that this was the preventive training
everybody gets. "Hey, there's dynamite over
here. Don't go near that place," as opposed to,
"Don't go near that place and strike a match."

JUDGE JONES: I think all they're
trying to say - We're trying to say there is
something called SAPR training which includes
prevention and response, and some people took
away from that the notion that one drink and the
person can't give consent. That's all we're
saying.

MR. STONE: Okay.

JUDGE JONES: We're not saying SAPR is
giving out legal advice. The judge may be
concerned that they're going to import it in
their decision-making what they learned in SAPR,
and that's why he had to ask the questions and he
had to inform them. I don't know what we're
quibbling over.

MR. STONE: I completely agree with -
I'll tell you. I completely agree with what you
just said which was that some people, and you
said this, "took away from that training." Yes,
that I completely agree with.

        CHAIR HOLTZMAN: I don't think the
word "some" is accurate because actually if you
want to read - of course you don't agree with
what the appellate court said here, but the
appellate court says "Many of the venire
replied," not some, many.

        MR. STONE: No, that took away from
that training is what I'm talking about. In
other words, as it reads now -

        CHAIR HOLTZMAN: Right.

        MR. STONE: - it's that SAPR training
was wrong, and what took away from that is saying
the way the SAPR training was interpreted, not
that the training was wrong, but that the
training may be not clear enough for the people
who were taking it. It doesn't mean it's wrong.
It just means they might not be sophisticated
enough to understand what they were being told.

        CHAIR HOLTZMAN: Well, and then -
MR. STONE: So if you can somehow put that in there -

CHAIR HOLTZMAN: Then it's a fault in the training. I think the point is somebody has to understand. The point we're making here simply is that as a result of the training, whether it was intentional, negligent, stupid, or whatever the cause was, SAPR training is leaving this impression which gets carried into the courtroom, and that impression undermines the fair administration of justice.

MR. STONE: No, I guess I'm going to have to dissent from that. I thought we were saying something completely different -

CHAIR HOLTZMAN: Well, that's what I feel. Maybe I'm wrong.

MR. STONE: - because the judge made clear it didn't get carried in the courtroom because he instructed them against them and told them they absolutely couldn't consider that when he heard it. He went into detail. He found it, and he made sure it wasn't considered.
CHAIR HOLTZMAN: Right.

MR. STONE: I thought you were saying that the SAPR training just generally is no good and ought to be fixed. If you're using this case to show it gets taken into the courtroom and used, then no, then I don't want the case cited at all.

CHAIR HOLTZMAN: No, what happened? They didn't bring this into the courtroom?

MR. STONE: The judge instructed them not - read the next paragraph.

CHAIR HOLTZMAN: Right.

MR. STONE: "To address this issue, the military judge instructed each of these members substantially as follows."

CHAIR HOLTZMAN: Right.

JUDGE JONES: Okay, how about this? "The court found that many members of the venire received training from SAPR personnel that led them to believe that," and then we put in if someone had one drink, they can't consent.

MR. STONE: That's better.
CHAIR HOLTZMAN: Excuse me, they did carry it into the courtroom.

PROF. TAYLOR: I was about to make the same suggestion, "that led them to believe that," quote, and then whatever goes in that quote. I was fine with what the Chair said, that is using the judge's words, but at least if you put, "that led them to believe that," it doesn't fault the SAPR personnel who are providing the training.

CHAIR HOLTZMAN: Well, I do want to fault the SAPR persons who are providing the training because there is a problem. This could be an unintended consequence. I'm assuming it's an unintended consequence. If they are not aware of the unintended consequence of their training, then that is the problem that needs to be addressed.

And yes, they do carry it into the courtroom because the venire is sitting in the courtroom, and that's a problem. Yes, you can get a judge instruction, but that creates a problem. Many people don't agree with the
judge's instruction, so, I mean, it does create a problem.

So, my concern is that SAPR needs to be aware that this is happening. That's all. I'm not saying that they're maliciously doing this, far from it, but the fact is that it's happening. That's my concern, and I think that's what the staff was trying to do.

And I think that the point of this is that Recommendation 59, that the Department of Defense Sexual Assault Prevention and Response Program ensure that sexual assault training provide accurate information to military members.

So, I mean, we are making a recommendation to them because there is a problem with the training. That's the whole point of this. Maybe I missed something here, but there's an inadequacy in the training. I'm not saying it's deliberate.

MR. STONE: Mr. Taylor, the only suggestion I make with respect to your comment would be if it's going to start with, "the court
found," as opposed to, "the court noted," then
I'd have to say, "the trial court found," because
the appellate court didn't make the finding.

They just noted what had happened
below, but if you want to say, "The trial court
found that many members of the venire received
prevention and response training from SAPR
personnel that led them to believe that," blah,
blah, blah. I'm fine with that.

JUDGE JONES: What was your
suggestion, Mr. Taylor?

PROF. TAYLOR: Well, I take the
Chair's comments seriously. So what if you said,
"that resulted in their believing?" Because, I
mean, I do fault the SAPR training. I agree with
you on that, Madam Chair.

JUDGE JONES: Too many people got the
wrong idea, so it had to come up somewhere.

PROF. TAYLOR: Yeah, I agree with that
point, but if you said, "that resulted in the
belief that," would that make a difference?

CHAIR HOLTZMAN: Yes, I mean, in fact,
the judge, excuse me, but as I - maybe I'm
misreading this case, but the appellate court
found that the failure of the military judge to
instruct the panel that one drink doesn't mean
you can't consent was an error on page nine.

MR. STONE: But then you're going to
the court's instructions again, which you told me
we're not focused on. We're focused on the SAPR
training which is discussed in footnote nine.

CHAIR HOLTZMAN: Right, but this goes
to the point about what's carried into the
courtroom, and the fact that the judge failed to
correct it. I mean, you're saying the judge gave
them an instruction to disregard, but that wasn't
sufficient according to the appellate courts.

It wasn't enough to say, "Just
disregard what SAPR told you." I mean, the
appellate court said, "Gee, this is pretty
serious what they've been told, so you have to
explicitly say."

So it just reinforces the point I'm
making that the training, you couldn't just say,
"Oh, well, you know, you've gotten all this inaccurate, or you've gotten all this training which leads you to believe that one drink is bad." The judge can't just say, "Disregard it," because it's so concrete, and so specific, and so incorrect.

VADM TRACEY: So the recommendation, "The court found that many members of the venire panel received training from SAPR personnel that led them to believe that"?

CHAIR HOLTZMAN: Right, and then it's one of the quotes from the footnotes.

MR. STONE: Well, if you guys said, "The trial court found that," or, "The court noted," if you're going to continue to talk about the appellate court, because it didn't make a factual finding. It just repeated the finding. So I can go either way to say, "the court noted," because it's appellate court. We'll say, "the trial court found."

VADM TRACEY: Okay, "The trial court found that many members of the venire panel."
CHAIR HOLTZMAN: You don't need "panel" just venire.

MR. STONE: Venire.

VADM TRACEY: Okay.

MR. STONE: "Received prevention and response training."

JUDGE JONES: Technicalities.

MR. STONE: That's the name of the group that they bring in from which they choose the panel.

VADM TRACEY: I'm just reading, "The defense counsel queried the panel venire on how they interpreted it." Okay, so, "The trial court found that many members of the venire had received training from SAPR personnel that led them to believe that, 'If a person has one drink of alcohol, or once the victim has had one drink, there is no longer a legal consent.'" Is that the quote we want to use?

CHAIR HOLTZMAN: I would prefer going to the appellate court because the fact that we cited trial court suggests -
VADM TRACEY: "If someone ingested any alcohol, that individual is no longer able to legally consent," is that what you want to use? That's the quote that is in the body.

CHAIR HOLTZMAN: The problem with referring to the trial court is that it suggests that there is some disparity between the trial court and the appellate court, so I'd prefer saying, "The court noted."

VADM TRACEY: Okay, "The court noted that many members of the venire received training from SAPR personnel that led them to believe that, 'If someone ingested any alcohol, that individual is no longer able to legally consent.'"

CHAIR HOLTZMAN: Well, they're going to have a different quote because they want to have a quote from the footnote.

MR. STONE: Well, if you take out the quotation marks, you can leave it in there because no individual person actually said that.

CHAIR HOLTZMAN: But the court said
it.

VADM TRACEY: We don't need the quotes, right? We can, just as Mr. Stone suggests, we can just leave the words?

MR. STONE: Yes, in other words, it's a summary of what's quoted later. If you want it as a summary, that's one thing.

CHAIR HOLTZMAN: But it's the exact words of the court. I don't think you can use the exact words of the quote without the use of quotation marks around it.

MR. STONE: Then you should have either, "footnote omitted," after it, or put the footnote in. That's the way you do stuff when you quote a sentence that has a footnote after it.

CHAIR HOLTZMAN: Well, we don't have to put quotes up to the end of the sentence.

MS. SAUNDERS: But you're correct grammatically. If we're going to quote the court, I think we would put that in quotation marks.
CHAIR HOLTZMAN: But I think if you want to quote - I thought, Barbara, you and Mr. Stone had said that you wanted to quote the actual footnote.

JUDGE JONES: I said that, but I gather that I'm not opposed to using the cite from the appellate court, but which do you want?

MR. STONE: I don't care as long as either you take out the quotation marks, or you say, "footnote omitted," or you go to the details of what's in the footnote because that's a summary. That's not what any single person actually said. That's a summary.

Most of them said, "was no longer able to consent," and didn't say, "legally consent," because they were giving you their casual opinion. One of two said, "legally," but most of them didn't say that. So, I mean, if you want to use that as a summary because it also includes some people who were not on the venire, don't put it in quotes.

That doesn't mean it's not accurate.
It just means that if you're going to do it, the court was careful to footnote it so you could see which ones, which were, I think, a majority, didn't say anything about "legally consent." It said, "They couldn't consent."

And my guess is that's what caused the trial judge to say, "This was prevention and response training. They weren't getting trained for the courtroom. They were getting trained for how they interact on the base, but it looks like there might be carryover, so I'm going to instruct them to ignore all of that because we're in a courtroom now. We're not in the barracks."

JUDGE JONES: All right, how do we make the quote we're trying to make which is just that they were trained by SAPRO and they ended up with the impression that if there was alcohol involved, then there's no consent, or one drink and you can't consent? That's all we're trying to do here.

CHAIR HOLTZMAN: I think you could take the - I don't mean to misrepresent what your
concern is, Mr. Stone, but I think if we just
left the present language, change the word
"panel" to "venire" and put after or before the
quote, after the quote "footnote omitted" and
change the word "found" to "noted" and put
parenthesis "footnote omitted" after the word
"legally consent" in quotation marks, would that
solve the problem?

MR. STONE: If we have the language
that Admiral Tracey threw in, yes.

VADM TRACEY: "The training that led
the personnel to believe that."

CHAIR HOLTZMAN: Okay.

MR. STONE: Then I'm fine.

CHAIR HOLTZMAN: Do you read that
back? Do you have it? Yes, have a chance to
read it back.

MS. SAUNDERS: Okay, so it should read
now, "The court noted that many members of the
venire received training from SAPR personnel that
led them to believe that if someone" -

CHAIR HOLTZMAN: Quote.
MS. SAUNDERS: - quote, 'If someone ingested any alcohol, that individual was no longer able to legally consent,' closed quote, parentheses, "(footnote omitted)." Does that work?

CHAIR HOLTZMAN: Okay, any objection?

PROF. TAYLOR: No.

MR. STONE: No objection.

CHAIR HOLTZMAN: So that's adopted.

Okay, so is that – oh, no, that doesn't finish. We have to go back to –

MS. SAUNDERS: We have - I handed out two pieces of paper to you.

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: And these are proposed bullets for some of the recommendations.

CHAIR HOLTZMAN: Pages eight and ten, right.

MS. SAUNDERS: Right, it depends. If you want to refer to tab three, the pages are slightly different, but on tab three, recommendation 53 begins on page six and ends on
page seven.

CHAIR HOLTZMAN: Okay.

MS. SAUNDERS: And -

CHAIR HOLTZMAN: So that's page seven.

MS. SAUNDERS: Right, so the highlighted, the first highlighted page with the shorter material -

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: - is proposed as -

CHAIR HOLTZMAN: On page number eight, the handout page number?

MS. SAUNDERS: It is, and I'm sorry. I took that from another -

CHAIR HOLTZMAN: No, that's all right.

MS. SAUNDERS: - document.

CHAIR HOLTZMAN: Don't worry about it, and it relates to pages six and seven.

MS. SAUNDERS: I would propose this be the second bullet under the recommendation. So the first bullet would be the fiscal year 2017 -

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: - NDAA, and then this
would be the second bullet.

CHAIR HOLTZMAN: Okay.

MS. SAUNDERS: And it would read, "On July 11, 2017, the Joint Service Committee on Military Justice published for public comment proposed disposition guidance under Article 33 UCMJ. The JPP reviewed and assessed Sections 2.1 and 2.3 of the proposed guidance, and notes that Section 2.1(h) is generally consistent with the JPP proposed standard."

CHAIR HOLTZMAN: Any comment, Mr. Stone? Do you have a comment about that?

MR. STONE: With that yellow bullet, no.

CHAIR HOLTZMAN: Okay, the only thing, should it say "noted" because we say "reviewed and assessed," or is it and notes?

MR. STONE: What do you want to say, "reviewed and noted," or, "noted?"

CHAIR HOLTZMAN: No, no, no, but the "noted" is in the present tense.

MR. STONE: Oh, okay, okay.
VADM TRACEY: I do think that we have not actually assessed, right?

MR. STONE: Yes.

CHAIR HOLTZMAN: Okay, so we're taking out "assessed?"

VADM TRACEY: I think, "The JPP noted that Sections 2.1 and 2.3 of the proposed guidance, and notes that."

CHAIR HOLTZMAN: Well, you can repeat that.

VADM TRACEY: Yes.

MR. STONE: Oh, so just put all -

VADM TRACEY: So "reviewed those sections."

CHAIR HOLTZMAN: Yes, "reviewed," I think "reviewed" is okay, and, "notes that."

Notes or noted, notes? Okay, fine. So take out "assessed," and with that change, is there any objection to that bullet point as it is? Hearing none, that's adopted.

Okay, now is there something else that we have to do on page seven?
MR. STONE: Yes.

CHAIR HOLTZMAN: Because this relates to page seven.

MR. STONE: Yes, it relates to page seven and tab -

MS. SAUNDERS: Three.

MR. STONE: - three, okay. Now, I had a lot of stuff I wanted to put in in the second bullet, but I don't need it because it's all in the Joint Service Committee report, and I didn't feel that the American Bar Association bullet said it all, but that's also in the Joint Service's report, so I'm fine now with that. And now I move down to the last bullet.

CHAIR HOLTZMAN: Last bullet.

MR. STONE: And I only have a concern. I would strike basically what amounts to pretty much the last line after the words, "in making disposition decisions." I mean, after that it says, "such as the credibility of the victim and the likelihood of obtaining a conviction at trial."
Given all of the stuff we have before, we don't need that, and there is absolutely nothing in any of the standards that are referred to above, any of them that talks about the credibility of the victim.

We talk about the likelihood of obtaining a conviction at trial, but I don't think we need to say that again. So at a minimum, I would strike the words "the credibility of the victim and," but I don't think you need anything after "disposition decisions."

And to the extent you say something, you're not inconsistent with the Joint Service Committee proposal.

CHAIR HOLTZMAN: Any comment? Why are you taking out the words "at trial?" Oh, you mean because it could be a plea?

MS. SAUNDERS: It's not. That's just where the -

CHAIR HOLTZMAN: Okay, fine, all right. Any comments?

VADM TRACEY: Did the - so weren't
there some comments on the credibility of the victim as one of the factors?

CHAIR HOLTZMAN: I can't remember.

MR. STONE: No, credibility is not mentioned.

CHAIR HOLTZMAN: Actually, I don't have a problem with taking out credibility because I don't recall, but maybe -

JUDGE JONES: I don't remember either specifically.

CHAIR HOLTZMAN: So that -

JUDGE JONES: It's certainly a factor, but there's lots of factors, so.

CHAIR HOLTZMAN: Right, and the likelihood of obtaining conviction would include the credibility of the victim, so.

JUDGE JONES: Yes, yes, okay.

PROF. TAYLOR: I have no problem with deleting that.

CHAIR HOLTZMAN: Okay, so I have no problem, so your suggestion about deleting the credibility of the victim is adopted. And I
guess just reading this, this is - I'd like to
make another suggestion. We say, "The convening
authority should be allowed to take into
account." That's not really what we're talking
about that they "should be allowed to take into
account," that they, "should be required to take
into account."

MR. STONE: So "should take into
account."

CHAIR HOLTZMAN: Or "should take into
account," right.

PROF. TAYLOR: I agree with that.

VADM TRACEY: Yes.

CHAIR HOLTZMAN: So we strike out
"should be allowed," and we just have "to take
into account." Is there any objection?

MR. STONE: No, not the "to," "should
take."

CHAIR HOLTZMAN: Yes, "should take,"
right.

JUDGE JONES: And that what will it
read, "to take into account other factors in
making disposition decisions including the
likelihood of obtaining"?

CHAIR HOLTZMAN: Well, we can have
"such as the likelihood of obtaining a
conviction."

JUDGE JONES: Okay.

CHAIR HOLTZMAN: I mean, I don't have
to change that. Okay, so any objection to this
as it stands?

PROF. TAYLOR: None.

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay, all right, so
now where are we, up to the second change on page
ten which relates to which of Mr. Stone's
changes?

MS. SAUNDERS: This comes under
recommendation 56 in tab three. This would be on
page nine.

CHAIR HOLTZMAN: Oh.

MS. SAUNDERS: This is a proposed
bullet that would go under recommendation 56.

CHAIR HOLTZMAN: Right.
MS. SAUNDERS: And this is replacing the other material. It reads, "The JPP notes two sexual assault courts-martial appellate cases that received media attention, both of which came to light following the Subcommittee's issuance of its report that underscored the JPP's concerns related to perceived pressure on convening authorities. The first case, United States v. Barry, involves an allegation by the convening authority."

CHAIR HOLTZMAN: And the footnote there would be a citation to the case, is that correct?

MS. SAUNDERS: Right.

MR. STONE: But it isn't. That's not a citation to the case.

CHAIR HOLTZMAN: But it will footnote.

MR. STONE: Well, there's 14 on that page. I'll give you the cite. I have it. There's an actual cite where people can find it.

MS. SAUNDERS: Oh, this is to the actual - this is for the reconsideration granted
by CAAF.

MR. STONE: There's a cite to that too.

MS. SAUNDERS: Okay.

MR. STONE: There's cites to all of them.

MS. SAUNDERS: "Involves an allegation by the convening authority that he felt pressure to approve the findings of the case based on political scrutiny regarding the military's handling of sexual assault cases and comments from senior military leadership.

"The convening authority stated that even though he was convinced, he should disapprove the findings in the case. He approved the findings based on his consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug.

"The second case, United States v. Boyce, involved senior civilian and military leaders reportedly giving the convening authority
an ultimatum to retire or be removed from his position based on his failure to refer a separate sexual assault case to court-martial."

CHAIR HOLTZMAN: I had a suggestion about condensing the second sentence when you first mention United States v. Barry because I don't think the first description is necessary.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: So I think it's enough to say, "The first case, United States v. Barry," and maybe the wording here isn't perfect, "involves an allegation by the convening authority that even though he was convinced he should disapprove the findings in the case, he approved the findings based on his consideration."

In other words, take out "He felt pressure," blah, blah, blah, because I don't know that we need that, but if you disagree - it's just a way of condensing it, but maybe the pressure point is important.

MR. STONE: It's not an allegation -
CHAIR HOLTZMAN: Right.

MR. STONE: - by the convening authority. It's an allegation by the defense counsel. That's why they're having a hearing.

CHAIR HOLTZMAN: Well, you could have a statement by the convening authority because it was contained in a document.

MR. STONE: Well, it's not a statement. It's an affidavit, and he hasn't stated -

CHAIR HOLTZMAN: He's making the statements in the affidavit.

JUDGE JONES: Right.

MR. STONE: At this point he hasn't been cross examined, and as I say, he nowhere says, "I did this because of the pressure." He doesn't say that.

CHAIR HOLTZMAN: He doesn't say "pressure," but he says what I'm just quoting. I'm just saying take out the characterization of what he did.

MR. STONE: Okay.
CHAIR HOLTZMAN: And just use the quote. So it would be just simply - where is the quote? Where does it start? "The convening authority stated that even though he was convinced he should disapprove the finding, he approved the finding based on," quote. That's where we pick up his quote.

So basically it's not characterizing what - I mean, I guess we could quote more from it, but basically I took out the stuff that he felt pressure and so forth because I thought it was redundant actually, but I don't know how the rest of you feel. Maybe you think that's too much of an excision.

JUDGE JONES: I would have left it in.

CHAIR HOLTZMAN: Okay, well, do you want to leave it in?

JUDGE JONES: I think pressure is important.

CHAIR HOLTZMAN: Okay.

MR. STONE: Okay, so tell me which words you're dropping out first. "The first
case, United States v. Barry, involves an allegation by the defense counsel that the convening authority approved the findings of the case based on the political scrutiny regarding the military's handling of sexual assault cases."

Is that what you're saying?

CHAIR HOLTZMAN: Based on the pressure he felt.

MR. STONE: No, no, no, he never says the pressure he felt. He says, "the pressure that was out there." He never said that they applied it to him. There's no allegation that anybody said anything to him. We're talking about -

CHAIR HOLTZMAN: Well, I thought we were talking about an allegation by defense counsel. Isn't the defense counsel alleging that he felt pressure? I mean, that you - well.

MR. STONE: Okay, "approved the findings based on scrutiny and the comments from senior," -

CHAIR HOLTZMAN: Well, you could -
MR. STONE: I think we could stop right after "senior military leadership" and not get into "stated" because he didn't state anything or "under the rug." You've made your point right there, I think, and it doesn't say anything about what's going to be remanded.

CHAIR HOLTZMAN: Well, I think you need to have the quote from the affidavit that he submitted. I think that that's very important because it said what was in his mind. That's my view about that.

MR. STONE: Well, he hadn't stated it. What do you want to say, "averred?" He didn't state anything.

CHAIR HOLTZMAN: Well, if a statement's contained in an affidavit, to me, I think the English word "state" certainly includes that, but that may be my limited understanding of English.

JUDGE JONES: I'm not opposed to going to his declaration and quoting it, then we don't have to get involved in -
CHAIR HOLTZMAN: Right, characterizations.

JUDGE JONES: The declaration from this is from this case and involved in this case, and then I think we should just take the quotes from the convening authority's declaration.

CHAIR HOLTZMAN: Correct, that's what I was trying to do, but I think you said it better.

MR. STONE: And then you got to say - what do you want to say, "The convening authority has stated in a declaration"?

JUDGE JONES: I don't really care how we say it, but I want it out of the declaration.

MR. STONE: Well, it's got to say something like that.

JUDGE JONES: Well, of course.

MS. SAUNDERS: "The declaration from the convening authority states," and then quote.

JUDGE JONES: Right.

MS. SAUNDERS: Okay.

JUDGE JONES: Yes.
CHAIR HOLTZMAN: Well, you can say, "In the first case, United States v. Barry, the convening authority," -

JUDGE JONES: "Submitted a declaration."

CHAIR HOLTZMAN: - "submitted a declaration that stated," colon, and then take out the quote.

MR. STONE: Okay, so we're going to drop most of what's in that sentence now and just go, "In the first case, the United States v. Barry, the convening authority stated in a declaration."

PROF. TAYLOR: So are you proposing now to leave out the phrase that I thought the Chair earlier had in, but I may have misheard it, "even though he was convinced," -

CHAIR HOLTZMAN: Yes.

PROF. TAYLOR: - "he should disapprove."

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: You're going to omit
that?

CHAIR HOLTZMAN: No.

PROF. TAYLOR: You're not?

CHAIR HOLTZMAN: That's a quote. It's part of the quote.

MR. STONE: No, that's not part of the quote.

CHAIR HOLTZMAN: Oh, it's not part of the quote, oh.

PROF. TAYLOR: It is not part of the quote.

MR. STONE: No.

PROF. TAYLOR: That's why I was seeking clarification.

JUDGE JONES: Where is the quote?

CHAIR HOLTZMAN: Where is the declaration again?

MS. SAUNDERS: It's on tab four.

VADM TRACEY: "Even though I was convinced then and am convinced now that I should have disapproved the findings," -

JUDGE JONES: I think it's all in the
MR. STONE: In different places.

JUDGE JONES: Yes.

VADM TRACEY: - "military leaders were sweeping sexual assaults under the rug."

PROF. TAYLOR: Yes, so I was looking at what's actually in quotation marks.

CHAIR HOLTZMAN: Yes, so let's use that whole quote that he has.

PROF. TAYLOR: Yes, I'm okay with that.

VADM TRACEY: So I'll just use the whole quote.

CHAIR HOLTZMAN: Where is that quote contained?

VADM TRACEY: It's in tab four, page two.

MR. STONE: It's on page two -

CHAIR HOLTZMAN: Oh, sorry.

MR. STONE: - of the second document in tab four.

VADM TRACEY: It's in appendix one.
CHAIR HOLTZMAN: Right, right, thank you.

JUDGE JONES: Everything that was in your synopsis, Terri, can be taken out of this and quoted. He even has the, "He wanted to avoid the perception that leaders were sweeping sexual assault under the rug." I mean, I think everything that you took out is what I'd like to see in there, but we should quote it right from the declaration.

CHAIR HOLTZMAN: We could even include the first sentence which is, "I perceived that if I were to disapprove the findings the case, it would adversely affect the Navy even though I was convinced then and convinced now," if you wanted that too. I don't mind that first sentence either.

MR. STONE: Yes, I'd like that sentence in there because that shows there was no undue command influence, that he was talking about how it would affect the Navy, not him personally. That's exactly the point. That's
what's going to come out at the hearing. "I was worried about the Navy generally. Nobody said anything to me, but I was worried about the Navy."

JUDGE JONES: None of us are worried about the outcome of this case.

MR. STONE: I know, but every convening authority was aware that there was consternation about what the Navy was doing, and that's exactly why in that case I cited before, the Navy-Marine Corps took special action in the Howell case to make sure they wouldn't continue that way in 2014.

Now, some of these guys didn't get the message. I mean, he says in the paragraph above, "Would bring hate and discontent on the Navy from the President," who was President Obama at the time, "as well as senators," and he names some senators, "hate and discontent." His mind was really in the wrong place.

CHAIR HOLTZMAN: Well -

MR. STONE: I've never heard of a
judge saying, "I was worried it was going to
bring hate and discontent on the Navy."

CHAIR HOLTZMAN: But in terms of
pressure, in fact if you read the next paragraph,
paragraph eight, he has a conversation prior to
his action in this case. He meets with Vice
Admiral Nanette DeRenzi, then Judge Advocate
General of the Navy.

She mentioned, skipping down, every
three or four months, military commanders making
court-martial decisions that got questioned by
Congress and other political and military
leaders, including the president. "This
conversation reinforced my perception of the
political pressures the Navy faced at that time."

MR. STONE: That's right, and you need
that sentence again. It reinforced his own
perception. It didn't say, "It reinforced what
she told me," or, "It reinforced what anybody
else told me."

VADM TRACEY: I think that the quote
that we had is -
MR. STONE: He screwed up walking around saying, "They're going to hate the Navy."

That's his perception.

VADM TRACEY: I think that the quote that we have is sufficient for the purposes for which we are citing these two cases.

CHAIR HOLTZMAN: Right, I'm just saying that there is - his declaration does refer to political pressure -

VADM TRACEY: Yes.

CHAIR HOLTZMAN: - and in fact uses the word, and it's not only a pressure that's in the air, but it's something that he felt because it refers to "my perception."

MR. STONE: That's what that next case called, that the Shea case calls undo influence in the air. That's exactly what they call it, in the air, not said to you directly, and that's what they'll decide at this rehearing.

CHAIR HOLTZMAN: Right, but what the legal standard is may not be what the standard is that we want to see in the military and for a
standard of justice, two different things.

Anyway, so are we satisfied with that change, with the quotes for dealing with the first case of U.S. v. Barry? Anybody else have any - Judge Jones, are you satisfied with it?

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Okay, but what about the second case? My concerns about that were I don't know what "failure to report a separate sexual assault case," what does separate refer to? What were the reasons given for the ultimatum?

MS. SAUNDERS: I was trying to avoid it. It's rather convoluted because the - I was trying to shorten it and obviously did not do so very effectively. There was a separate case called the United States v. Wright, and the general at the time did not want to refer charges in that sexual assault case on the advice of his staff judge advocate.

He then received a call from the Chief of Staff of the Air Force saying, you know, "The
Secretary of the Air Force has lost confidence in you, and you either need to resign, or retire, or she's going to remove you from this position."

CHAIR HOLTZMAN: Because you haven't - she's lost confidence in you because you haven't referred this case to a court-martial?

MS. SAUNDERS: Because he declined to refer it. This is the same general that previously had overturned the conviction on another -

CHAIR HOLTZMAN: I'm trying to understand. There has to be something that links what happened in United States v. Boyce to -

MS. SAUNDERS: Right.

CHAIR HOLTZMAN: - put some kind of pressure on him because of his failure to refer the case.

MS. SAUNDERS: Right, but this is what happened, so this was made based on the other -

CHAIR HOLTZMAN: Have we said, "because of his failure to refer a case to court-martial"? That would clarify it for me. That
was my concern.

MS. SAUNDERS: Okay, I just didn't want to give the misleading impression that he failed to refer this case to court-martial. It was actually a different case.

CHAIR HOLTZMAN: Okay, "based on his failure to refer."

MR. STONE: That's not the holding in the case or the facts. That's the background. The holding in the case was that there was only an appearance of unlawful command influence, and not any actual unlawful command influence. That's the holding.

MS. SAUNDERS: But I -

MR. STONE: So you're citing the case for something that is completely irrelevant. It's the historical background and it's not any of the holdings or any of the legal discussion.

MS. SAUNDERS: Ms. Holtzman just asked me about why I used the wording that I did, and I was trying to explain to her the procedural background of the case and why this happened.
CHAIR HOLTZMAN: Okay, well, I would be more comfortable - I would understand this point better if it said, "Based on his failure," and it said, "because of his failure to refer," should be just a - why do we need a separate sexual assault case to court-martial?

MS. SAUNDERS: Okay, so just remove "separate?"

CHAIR HOLTZMAN: Yes.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: If that's clear. To me, it's just a clarifying on that.

MS. SAUNDERS: And I could clarify in the footnote that this other case was U.S. v. Wright if that would help.

CHAIR HOLTZMAN: Yes, fine, we can add a footnote to that.

MR. STONE: Okay, I guess I'm going to object to that because U.S. v. Wright has nothing to do with the analysis, the discussion, or the holding in U.S. v. Boyce. It's simply historical background. It has nothing to do with the
outcome of the case.

If you want to cite United States v. Wright, then maybe that's what you want to do, but United States v. Boyce has nothing to do with that case, and he absolutely didn't fail to refer a sexual assault case to court-martial, which is what you now want to say if you're not going to say, "a separate case." It's a complete misdescription of this case.

MS. SAUNDERS: If you look at the -

CHAIR HOLTZMAN: If you said "describes" instead of "involves," is that a more accurate statement about what United States v. Boyce is about? Is it a description of what happened in that?

JUDGE JONES: What is - I'm sorry. I read this. What is inaccurate about this?

MR. STONE: What's inaccurate is, and I wrote a whole memo that everybody got -

JUDGE JONES: The word "involves" means "involves."

MR. STONE: But the case doesn't
involve an ultimatum to retire or be removed
based on a failure to refer.

VADM TRACEY: How about the media
coverage of the second case?

MR. STONE: That's a different case, right, used before that involved that.

VADM TRACEY: How about "media
coverage of a second case, United States v.
Boyce, brings to light incidents involving senior
military leaders reportedly giving," yada, yada,
yada?

CHAIR HOLTZMAN: Wait a minute. Can
we go into Boyce for a second?

MS. SAUNDERS: I'm happy to explain
why Boyce is related to Wright if you're
interested.

CHAIR HOLTZMAN: Yes, why is Boyce
related to this issue? Does this issue come up
in that case, not as an issue? Does the court
refer to these facts in that case?

MS. SAUNDERS: It does.

CHAIR HOLTZMAN: In the opinion?
MS. SAUNDERS: It does.

CHAIR HOLTZMAN: Can we quote from the court's opinion?

MS. SAUNDERS: I would have to see how lengthy it is, but I can certainly do that. I mean, but it's intricately tied, the Wright case is intricately tied to the Boyce case in its background, and that's why I cite to it, because of his failure to refer charges in the Wright case, that caused the Secretary of the Air Force to lose confidence in his ability to lead -

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: - for giving him the ultimatum to either retire or she would remove him from his position.

CHAIR HOLTZMAN: And what did he do?

MS. SAUNDERS: He decided to retire.

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: And then unbeknownst to anyone at a senior leadership level, he referred charges in a sexual assault case of U.S. v. Boyce several days -
MR. STONE: Are you going to put in there what -

MS. SAUNDERS: If I may please finish, he referred charges in U.S. v. Boyce several days later. Then there was a motion.

CHAIR HOLTZMAN: Several days after he was -

MS. SAUNDERS: After he made the decision to retire.

CHAIR HOLTZMAN: Oh, but not after he retired?

MS. SAUNDERS: No.

CHAIR HOLTZMAN: Before he retired?

MS. SAUNDERS: Before he retired, he made the decision in his mind to retire.

CHAIR HOLTZMAN: Right.

MS. SAUNDERS: Later, he then referred charges in the U.S. v. Boyce case, and then the defense counsel raised a motion of unlawful command influence based on this ultimatum in the Wright case that was given to him.

CHAIR HOLTZMAN: Okay.
MS. SAUNDERS: And so the CAAF analyzes it in this regard.

CHAIR HOLTZMAN: And what do they conclude?

MS. SAUNDERS: They conclude that there was apparent unlawful - while there was no actual unlawful command influence, there was apparent unlawful command influence.

MR. STONE: And there's no actual unlawful command influence because it recites that he made the decision to retire before there was any statement in the press, "Do this or I'll fire you, or retire."

MS. SAUNDERS: Correct.

MR. STONE: And everybody conceded that there was absolutely no question there was no unlawful command influence in the case and it didn't affect the military.

And the only decision was whether people outside the military, meaning the media, would take this case incorrectly, and they thought they would and they didn't like that, so
they said, "the public perception," which they cite three different times, "is the standard," not anything that happened in the military or any changes to military law.

CHAIR HOLTZMAN: So he was called by the - he was never called by the Secretary of the Army?

MS. SAUNDERS: The Chief of Staff of the Air Force.

CHAIR HOLTZMAN: He was never called by the Chief of Staff?

MS. SAUNDERS: He was called by the Chief of Staff.

CHAIR HOLTZMAN: So the Chief of Staff did tell him that he had to retire or resign because he didn't refer this case?

MS. SAUNDERS: Right, he told him that the Secretary of the Air Force had lost confidence in his ability to lead and he had this choice.

CHAIR HOLTZMAN: Can we quote this? It seems pretty clear to me.
MS. SAUNDERS: I'll pull some quotes out, absolutely.

CHAIR HOLTZMAN: Does that solve your problem, Barbara?

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Does that solve everybody's problems? Do you want to see if you can provide us the quotes before we -

MS. SAUNDERS: Oh, certainly.

CHAIR HOLTZMAN: - finish up today and then maybe Mr. Stone would agree with it too? I don't know.

MS. SAUNDERS: Absolutely.

CHAIR HOLTZMAN: Would that help you if we quote it before?

MR. STONE: I'll look at it.

CHAIR HOLTZMAN: Okay.

MR. STONE: But I gave you a memo that has seven reasons why this case stands for exactly the opposite of what it's being cited for here, that it shows how the military bends over backwards when there's no unlawful command
influence and worries about people outside the military getting the wrong impression, and goes ahead and sends it back for a new trial because it has no implications as to the guilt or innocence of the person in the sexual assault trial.

MS. SAUNDERS: And I can certainly -

MR. STONE: And they say that he shouldn't get an unwarranted windfall and they're sending it back, so this only has to do really with the media, so I don't think it has anything at all to do with either unlawful command influence or in any way United States v. Barry or even United States v. Wright, which he may have been involved in, but has nothing whatsoever to do with this case.

CHAIR HOLTZMAN: I don't know. It seems to me when the Secretary of the Army calls somebody -

MR. STONE: I can email the - I'll email the Captain the copy and she can find out and give you the citation.
CHAIR HOLTZMAN: Yes, I think I've got it.

MR. STONE: Because the citation is publicly available to everybody, and no decision, I understand, has been made yet on whether or not there should be a petition for certiorari in that case. The case is not final, and the time to petition for cert is still running.

CHAIR HOLTZMAN: Yes, but the cert is not going to be granted in this case.

MR. STONE: Well, I'm not on the Supreme Court, so I don't know.

CHAIR HOLTZMAN: But the chances are like minus in this kind of case, okay.

MS. SAUNDERS: I'd be happy -

MR. STONE: I might add it's a four to three decision. Three of the judges on the CAAF disagreed with that holding. Five judges below on the Military Court of Appeals disagreed with the majority, and the original trial judge.

So you had nine judges who think the outcome is wrong, and you've got four who think
it's right. So I think potentially, it's not a
silly case in terms of whether or not the Supreme
Court will be interested in it.

CHAIR HOLTZMAN: I don't see the
federal -

JUDGE JONES: I just want to say that
it doesn't matter how this case comes out, how it
came out originally, or what happens in the
future. It's a story that is perfect to
illustrate what we're talking about, which is
that there is real or perceived pressure, and I
mean, that's the point. These are illustrations,
not legal propositions.

MS. SAUNDERS: Yes, ma'am, and that's
why I included it, and I should have made that
more clear. I apologize.

CHAIR HOLTZMAN: Okay, so we're
finished with - based on - is there anything else
that we have to address in Mr. Stone's comments
aside from your rewriting page 10 and Mr. Stone's
comments on page three, in tab three? Is that
it?
MS. SAUNDERS: Unless you all have anything else, I'll work on that.

CHAIR HOLTZMAN: Okay, going, going, gone.

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: All right, so subject to that, we are finished with this report. Okay, so next we have?

CAPT TIDESWELL: It's the sexual assault investigations report, ma'am. I would recommend a five-minute break perhaps and we'll get Ms. Friel on the phone.

CHAIR HOLTZMAN: Yes, let's do that.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: All right.

(Whereupon, the above-entitled matter went off the record at 2:52 p.m. and resumed at 3:07 p.m.)

CHAIR HOLTZMAN: Okay, Admiral Tracey has come, so now the whole panel is here. Lisa Friel is on the phone. She's a member of the subcommittee and is prepared to provide - what do
we call her?

CAPT TIDESWELL: Subject matter expert.

CHAIR HOLTZMAN: Subject matter expert. That's what you are, Ms. Friel.

MS. FRIEL: Okay.

CHAIR HOLTZMAN: It's a hell of a title, okay.

MS. FRIEL: It takes 30 something years to get it.

CHAIR HOLTZMAN: Right, okay, so we're on page five of tab seven.

MS. FRIEL: Got it.

CHAIR HOLTZMAN: Okay, and Mr. Stone has a number of corrections or amendments to the bullet points under Recommendation 50, so should we start with bullet point number one?

MS. STONE: Well, why don't I just introduce them a second?

CHAIR HOLTZMAN: Yes, sure.

MS. STONE: They actually are just a reorganization. Stuff from some bullets was
moved to other bullets, etcetera. At the time we discussed this, Admiral Tracey ticked off a number of points and said, "We want to make point one, two, three, and four," and I agreed that's what we wanted to say.

And so then I went back and I tried to sort of separate out the threads so each bullet was a one, two, three, and four. And generally, bullet one talks about, we're talking about getting to cell phones is what we're talking about in digital devices.

   Bullet two talks about why we want to get to the cell phones. Bullet three talks about what the problems are that cause us to not get the cell phones, and number four talks about the current practice.

   So bullet one was, "MCIO investigators who have access to military search warrants have nonetheless reported difficulties obtaining cellular phones or other digital devices."

That's the issue. The second sentence I moved down to the last bullet.
Then I went to the second bullet and pointed out, and this is why we want them, "Victims and defendants' cell phones may contain, among their other contents, a wealth of evidence such as photographs, text messages, or social media information." I think we just lost somebody.

CHAIR HOLTZMAN: Yes.

MS. STONE: Do you want me to wait or go on?

CHAIR HOLTZMAN: Yes, just wait.

MS. FRIEL: Hello?

CAPT TIDESWELL: Ms. Friel, I'm sorry.

MS. FRIEL: Thank you.

CAPT TIDESWELL: Yes, ma'am.

MS. FRIEL: I was just emailing to tell you it cut out. Thanks.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: Okay, by the way, you have page five in tab seven. You have the recommendations.

MS. FRIEL: Yes, right in front of me.
CHAIR HOLTZMAN: Okay, good. Okay, Mr. Stone, you may proceed.

MR. STONE: In the second bullet, again I moved what was lined out in the second line down to the fourth bullet. I didn't throw it away. I just moved it down, and then I clarified, which people wanted, that, "The victims and defendants' cell phones may contain photographs, text messages, social media information which may aid investigators and prosecutors to make their decisions about investigating and charging sexual assault crimes."

Then in the third bullet, I pretty much left this one the same. "Victims' concerns about providing cell phones," yada, yada, yada, "and also victims' privacy concerns relating to disclosure of vast amounts of personal, confidential, or privileged diary-type information typically contained on a smart phone." I just described it with a little more detail so people know what we're talking about.
It isn't just personal. It may be confidential. It may be privileged.

Okay, then I go to the fourth one which is sort of the meat of what's going on. "Some SVCs and VLCs reported that as allowed by current law, they advise clients that unless there is a valid military search warrant for a cell phone, victims just like defendants should not voluntarily turn over their cell phones to investigators if the victims wish to preserve their privacy rights and privileges in the information on their cell phone."

And that is what we tried to address in the recommendation whose language we all agreed to, that the Secretary of Defense should remove any impediments, but those are why some of them are not doing it and their reasons for not doing it.

And then finally, the last bullet, everything that I could find and learn told me that in order to image and search a cell phone, you need the following in order to image it, even
if your image is later going to just take certain
pieces of it.

So that's total speculation that those
techniques can minimize the legitimate concerns
about cell phone searches, because if the
legitimate concerns are privacy concerns, they've
got to have your cell phone in order to image it
even if they're only imaging the first half.

So I just thought that's speculating
about something. We don't need to speculate
about it, and I couldn't find anything that
supported that you could image part of a person's
phone without getting the phone, and so those
individuals are not going to want to turn it
over.

CHAIR HOLTZMAN: Okay, just to
accommodate Ms. Friel, Captain, is it correct
that the only special expertise with regard to
these points that she would have to offer is
related to the last bullet point, or am I wrong
about that?

CAPT TIDESWELL: No, I think you're
correct, ma'am, and it's also how we obtain the
evidence, what's possible technologically with
the cell phones, how long it might take. I think
we could leverage her expertise on how she's seen
it done in the civilian sector.

CHAIR HOLTZMAN: Okay.

CAPT TIDESWELL: I think those are the
types of issues.

CHAIR HOLTZMAN: So maybe we should
just address - so there's nothing aside from the
bullet point saying, "Modern forensic techniques
for imaging and searching cell phones can
minimize, if not eliminate, victims' legitimate
concerns about cell phone searches." That's the
only thing we need her guidance on?

MS. FRIEL: The only other thing is
that obviously you will all consider whether you
want to hear my views on this, but that I might
be able to offer some insight into, in my
experience, the effects of having to use a search
warrant to search -

CHAIR HOLTZMAN: Okay, fine.
MS. FRIEL: - what we would think of as a prosecutor as our victim's phone.

CHAIR HOLTZMAN: Okay.

MS. FRIEL: I think there are certain negative effects on your relationship with the victim and your ability to get all the information that you want.

CHAIR HOLTZMAN: Okay, so let's go through the -

MS. FRIEL: So I'm willing to talk a little about that too if anybody is interested.

CHAIR HOLTZMAN: Great, okay, so let's start from the beginning so we can have the most of your expertise, okay, the best use of your expertise. Okay, so does anybody have any comments with regard to the first bullet?

I guess my concern would be just relating to exactly the point that Ms. Friel just raised, which is suggesting that, "The MCIO investigators who have access to military search warrants have nonetheless reported difficulty." It suggests that, you know, kind of like why are
they reporting difficulty? They've got these search warrants, and so why aren't they using them? Forget about the difficulties. Just go to the search warrant.

I don't know if that was your intention, Mr. Stone, in inserting that language, but maybe, Ms. Friel, you could address the problem, since this is something you just brought up, of using the military search warrants.

MS. FRIEL: Yes, so I will say this, I am by no means an expert on the difficulties in getting a military search warrant, though I am aware of some of them, and I'll say this.

There are clearly practical limitations on investigators' abilities to get search warrants depending on whether the person is a civilian or military personnel, where they are at the time they're possessing this thing they want to search.

Are they on military property? Are they off on civilian property? And so there are some real practical difficulties, but let's
assume that all of the stars align for those
things and you could get a search warrant.

I think the amount of time that it
takes, and it certainly takes a certain amount of
time for an investigator to do this, in a world
where there are limited investigative resources
that are already strained.

So if there are other ways to
accomplish getting this necessary evidence that
would not further strain resources, it seems to
me that that makes sense, and certainly that's in
a civilian world why you ask for consent first
before you go through the rigamarole of trying to
get a search warrant.

So that's one thing I would bring up,
and I think to have the bullet the way it reads,
to just say who will have access to military
search warrants without a lot of explanation of
some of the things I just talked about is a
little misleading.

The other thing I'd point out is there
are timing issues with doing that. When you do a
typical interview of a victim, you start talking to them chronologically beginning to end of what happened here, and as you go through chronologically, the fact that somebody texted back and forth is going to come up in the chronology of events.

And at the time it comes up, you say to the person you're interviewing, "Pull out your cell phone and bring that up, and let's go through all this in chronological order." And then you have the ability to say to them, "Oh, you used these words. What did you mean by that?" or, "So and so sent this back to you. That doesn't make sense to me. What does that mean by that?" and you continue on in a logical chronological order.

I'm concerned that you lose the ability to do that if we don't try to set up the system where people are more apt to consent and agree to let you see their text messages. And I also am well aware that there is a big issue about your ability to do a second or a third
interview.

In the civilian world, I can keep having somebody come back again and again. That is not practical in the world - in the military, at least right now. So that concerns me about this emphasis on, you know, why bother to try to encourage victims to consent? Let's just use a search warrant all the time.

The other thing I'd point out is to get a search warrant, as we all know, you need to have probable cause. So if the victim says to you in your interview, "He texted me afterwards and he said, 'I'm really sorry for raping you,'" and obviously that's an exaggeration, but that would give you probable cause to say, "Yes, there is key evidence in this phone and I can get a search warrant.

But oftentimes, the back and forth exchange is not that explicit and not that obviously relevant evidence, and your victim may not realize that the back and forth exchanges that he or she had with the alleged perpetrator
is actually relevant evidence and probative evidence.

And I've had this come up in any number of recent investigations I've just done here at my job here at the NFL. Your victims are not trained investigators, sexual assault investigators, or sexual assault prosecutors. They're not lawyers usually, and so they don't recognize how something might be probative.

I'll give you an example. We got a victim's phone. If you asked her, you know, what was relevant in there that would have had to do with the date of the incident, this particular alleged perpetrator was denying they had any relationship, "except we had sex every once in a while, not my girlfriend, not anything more serious," and it went to the nature of the relationship and his credibility as well.

MS. FRIEL: We looked through all the text messages. There were all kinds of text messages in which he used the word girlfriend, in which he said all kinds of things that proves,
one, he was lying about the nature of their relationship, and two, were really relevant to help us see what had happened during the incident. So, that's the problem with your search warrants, where you need probable cause.

I also want to go back to something we talked about when I testified there the first time and it's the nature of acquaintance sexual assault. There is rarely, if ever, any witness in the room when these things happen and the defense is almost always consent.

And so, what we're trying to do in that situation -- and also, there's rarely any injury that proves that there was a lack of consent. And so, what a prosecutor is always trying to do is to come up with as much consistent, corroborative evidence of, oftentimes, things that happened before you got in the room and things that happened after you got in the room.

There is a wealth of that evidence in someone's cell phone, that's just the nature of
how we communicate in today's world, how
voluminous the text messages are and how quickly
and how often we do them.

And so, you would use your text
messages to say, okay, I may not have direct
evidence of exactly lack of consent in that room,
but everything else he or she told me happened
between these people right up until you walked in
the room is totally consistent and I can prove it
with the text messages, any other evidence you
can get, and the same afterwards.

So, I don't want to see your
prosecutors limited in their ability to
corroborate these cases, because it's the best
thing you can do in an acquaintance case. I used
to say to my prosecutors all the time, do not let
your defense attorney get away with saying it's a
he said, she said case.

You have all kinds of other evidence,
even if it's not in the moment of the act, that
takes it out of he said, she said and
corroborates that case. So, you would lose a
really important part of it if we can't encourage
the victims to let the investigators see their
cell phone.

The other thing I think we also have to
realize is that, sometimes, the evidence in those
cell phones does contradict what a victim says.
And if that's not turned over to the investigator
or the prosecutor before trial, then no one's had
an opportunity to ask the victim for an
explanation of why does this apparently
contradict what you've told us.

I can tell you, oftentimes, in talking
that out with a victim, you've got a reasonable
explanation, one that you could use at trial if
the victim was prepared to testify to at trial.
But if the prosecutor doesn't know, then they
can't prepare the victim and talk to the victim
about it.

And I've seen this happen, the
victim's on the stand, they get hit with
something that they didn't expect to come out,
the prosecutor didn't know about it, and
certainly it can happen in text messages, and the victim looks like a doe in the headlights.

And they might have had a reasonable explanation, but in the shock of, oops, they asked me that, and I don't have an opportunity to talk this out in calmer surroundings with the prosecutor and think about why I said that and think about how I would articulate my explanation, the case gets seriously damaged.

So, there's another issue with, if we don't get people to agree to give us these text messages. And the last one, I'd say is, sometimes the evidence in the phone also disproves the allegation. And I think that's just as important as everything else.

And if that doesn't come out until the witness is on the stand, because the accused's attorney sat on it, understandably, tactically, and said, I got all those text messages out of the accused's phone, his or hers, and I'm going to hit them with it at trial, that's my best way to protect the accused, well, we've gone through
this whole thing, which is awful for your
resources, terrible for the alleged victim,
terrible for the alleged perpetrator, when an
effective and thorough investigation on the front
end could have obviated all of that.

So, my whole feeling is that you want
to look at what the impediments are, and the
Subcommittee certainly heard some of them and you
saw them in the report, the fear of the financial
loss, the fear that you won't have your phone for
a period of time, and then, the fear about
everything in it, and address those, what are
legitimate concerns.

So, to Mr. Stone's point about,
technically, how can you image the phone?
Someone can sit in a room with --

(Telephonic interference.)

MS. FRIEL: -- and in a period of hours
in their presence, make a full image of the
phone. They never have to lose --

CHAIR HOLTZMAN: Can you just tell Ms.
Friel that we just want to deal with the first
point? We'll deal with the second point later.

MS. FRIEL: Was it something I said?

(Laughter.)

CAPT TIDESWELL: No, ma'am. But if you
don't mind, the Panel would like to focus on that
first bullet that you see underneath the
recommendations.

CHAIR HOLTZMAN: Right. Let's get to
the technical issue about imaging when we finish
the first one. Is that okay?

MS. FRIEL: Okay.

CHAIR HOLTZMAN: I just --

MS. FRIEL: Okay.

CHAIR HOLTZMAN: -- want to do one
thing at a time.

MS. FRIEL: In the first bullet, the
way it's revised, with all due respect to Mr.
Stone, I agree with Ms. Holtzman that it makes it
sound like you can easily get a search warrant
and they're just not bothering to do it. And I
think there are lots of difficulties with getting
a search warrant.
And the last one I didn't mention is that it puts you in a real adversarial position as an investigator or prosecutor. You've presumably asked the victim, do I have your consent to look at your phone, to image your phone, to get things out of your phone?

They have said, no, for whatever their reasons are, and now you go get a search warrant and say, okay, we're taking it from you anyway. I don't think that's the atmosphere that we want to create.

I think that's a difficult atmosphere and I do think we can do more to have people understand, one, how probative the evidence in the phone is, and, two, that there are ways that we can limit your legitimate concerns about giving us an image of the phone and the things in your phone.

CHAIR HOLTZMAN: Okay. I think that was very helpful. Mr. Stone, do you want to --

MR. STONE: Yes.

CHAIR HOLTZMAN: -- argue and --
MR. STONE: Yes. Sticking just with
the first bullet --

CHAIR HOLTZMAN: Right.

MR. STONE: -- I have no problems
saying, MCIO investigators who have access to
military search warrants have nonetheless
reported practical and timing difficulties
obtaining warrants for cellular phones or other
digital devices.

I hope that incorporates -- was not
meant to overlook, that's exactly what the
difficulties are. They're practical, maybe
resources, it may be people, it may be whatever,
and timing difficulties, even if you have that,
you may not get it on the moment when you need it
or it may take you two days, even if you don't
need it at that moment.

So, if you want to say, practical and
timing difficulties obtaining warrants for
cellular phones or other devices, that's fine.
That was the purpose of that sentence, to explain
why we're saying more, that they can't always get
warrants.

And they don't -- and for practical and timing reasons, they may not work for them. That's the point of that sentence. So, if somebody else has another suggestion to how to clarify that that is what we're saying there, that's fine, but I think that makes that point.

CHAIR HOLTZMAN: I guess my concern is what Ms. Friel just alluded to, which is the allusion to the military search warrants may not really be necessary. I think you can clarify that what we're talking about in Sentence 1, if you say, reported difficulties in obtaining, in voluntarily obtaining cell phones or other digital devices, period, and leave out the whole issue of search warrants.

I don't know that that -- that really just complicates the matter. What we're talking about is, the voluntary. I mean, we know that you can get a search warrant in many cases. But what we're talking about is the voluntary access to cell phones and digital devices.
That would be my suggestion, adding the word, voluntary, and leaving out the access to military search warrants. But I don't know how my colleagues feel about that.

MR. STONE: Well, if you're going to do that, then you've got --

VADM TRACEY: I would recommend -- that's a good fix to the first sentence. I think following it up with the fact that there are practical and timing difficulties -- well, while the opportunity exists to get military search warrants, there are practical and timing difficulties that they present and, in the end, they create an adversarial relationship --

CHAIR HOLTZMAN: Right.

VADM TRACEY: -- between the investigator and, ultimately, the prosecutor and the victim, that may inhibit a --

CHAIR HOLTZMAN: An effective --

VADM TRACEY: -- an effective prosecution.

CHAIR HOLTZMAN: Right, an effective
prosecution.

VADM TRACEY: So, I think capturing both of those thoughts I think gets to your concern. But I like the turning it around and beginning with the point that the preference is to get it voluntarily. There's lots of goodness in getting it voluntarily.

CHAIR HOLTZMAN: Right.

JUDGE JONES: I agree.

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

MR. STONE: I'm fine, just come up with words.

CHAIR HOLTZMAN: Okay. Well --

MR. STONE: As long as we don't -- I don't want the people who get this to think, didn't those guys know there were such things as military search warrants?

VADM TRACEY: I'm with you. I think --

MR. STONE: Yes.

VADM TRACEY: -- that's wise. Yes.

MR. STONE: That's all
CHAIR HOLTZMAN: Fine, okay. So, depending on the language --

MR. STONE: Yes, just somebody --

CHAIR HOLTZMAN: -- Meghan, do you have it or do you need to write it down? Does somebody have it?

MR. STONE: Ms. Peters, you got it?

MS. PETERS: I have --

CHAIR HOLTZMAN: So, let me --

MS. PETERS: -- probably 70 percent of it --

CHAIR HOLTZMAN: Sorry, let's try --

MS. PETERS: -- but I think the --

CHAIR HOLTZMAN: -- it again.

MS. PETERS: -- difficulties or the problems with --

CHAIR HOLTZMAN: Okay.

MS. PETERS: -- the warrant, to include the adversarial relationship, is where I --

CHAIR HOLTZMAN: Okay.

VADM TRACEY: Okay. So, MCIO investigators report having difficulty obtaining
--

CHAIR HOLTZMAN: Voluntarily obtaining.

VADM TRACEY: -- voluntarily obtaining cellular phone or other digital devices from victims. While the opportunity to obtain military search warrants exists, there are practical and timing difficulties that impede the investigation.

CHAIR HOLTZMAN: That impede the ability to obtain the search warrant.

VADM TRACEY: And the investigation.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: Furthermore, obtaining the access to the cellular phones and digital devices involuntarily creates an adversarial --

MR. STONE: Can create, can create.

VADM TRACEY: -- can create an adversarial relationship between investigators and --

CHAIR HOLTZMAN: And the victim.

VADM TRACEY: -- ultimately prosecutors and the victim --
CHAIR HOLTZMAN: Right. Inhibiting --

VADM TRACEY: -- inhibiting --

CHAIR HOLTZMAN: -- effective prosecution.

CAPT TIDESWELL: -- effective prosecution.

CHAIR HOLTZMAN: There probably is a way of saying that in fewer words.

MS. PETERS: The last sentence, I am still tripped up on. It's getting to the adversarial relationship --

VADM TRACEY: Okay. So, where are you?

MS. PETERS: -- I'm sorry. I think I'm the only one taking --

CHAIR HOLTZMAN: You are, okay.

VADM TRACEY: Where are you?

MS. PETERS: I am, after -- everything after, that impedes the ability to obtain the warrants and that may impede the investigation, there are words to that affect. The next sentence talked about --

VADM TRACEY: Furthermore --
CHAIR HOLTZMAN: Well, maybe we could have the Court Reporter just read it back, how's that?

CAPT TIDESWELL: Madam Court Reporter, can you find it or --

COURT REPORTER: I have partial sentences, but --

VADM TRACEY: Okay. Why don't we try it again?

MS. PETERS: Yes, ma'am.

VADM TRACEY: Furthermore, obtaining access to cellular phones or other digital devices involuntarily may create an adversarial relationship --

MR. STONE: Do you want to say atmosphere?

VADM TRACEY: Atmosphere, I like that, atmosphere between the victim and investigators and, ultimately, the prosecutor, inhibiting effective --

CHAIR HOLTZMAN: Prosecution of the case.
MS. PETERS: Okay. I have it, thank you.

CHAIR HOLTZMAN: Okay. The second sentence there, as I gather, Mr. Stone, has been -- that bullet has been transferred to someplace else, so we don't have --

MR. STONE: Yes, the fourth bullet.


Bullet 2.

MR. STONE: Yes. The victims' and defendants' cell phones may contain -- and I'm just describing the kinds of reasons we want them -- among their other contents, a wealth of evidence, such as photographs, text messages, or social media information, which may aid investigators and prosecutors to make their decisions about investigating and charging sexual assault crimes.

CHAIR HOLTZMAN: May I ask one question? Why are we including defendants here?

MR. STONE: Because -- there's two reasons. The first is, we're talking about a
policy on MCIOs getting tangible evidence and the
same rules, legal rules that apply to cell phones
from one person apply to cell phones from every
person. Getting them from a victim, they're
going to have the same rights in privacy that a
defendant would have.

And then, you also have the issue that
sometimes you may get the phone and decide that
the person is the defendant instead of the
victim. So, I think that -- we're talking about
getting phones, we're not talking about really
who they are from.

The investigators want them -- they
may be from passersby too. Passersby nowadays
pull out their phone and start taking a movie of
what's going on. I mean, even at a party, if
they -- they may want a picture of the party that
somebody else who threw the party gave, because
it shows the two who are complaining now that
there was or wasn't a rape and what they were
doing during a party, because they were taking
cell phone pictures. So, maybe you just want to
-- but I was trying --

CHAIR HOLTZMAN: Maybe just witnesses, victims' and witnesses' cell phones may contain. I just think getting into defendants is a whole other ballgame here and what they're really talking about, what the Subcommittee was talking about is having the MCIOs doing a better job of dealing with getting victims' cell phones and not addressing the whole issue of defendants. I mean, that's a -- am I wrong, Lisa, in that?

MS. FRIEL: No, that was exactly what I would have said. What we were hearing about and what the Subcommittee wrote as the issue that they heard about in their site visits had to do with victims' phones and no one else's. Whether they have difficulties with other phones, I don't know, but we didn't hear anything about it, we only heard victims.

CHAIR HOLTZMAN: All right. So, maybe just deal with victims. That would be my view.

But --

MR. STONE: Lisa, this is Victor Stone.
Didn't --

   MS. FRIEL: Yes?

   MR. STONE: -- the issue of them not wanting to turn over their phones also relate to the fact that the phones might have evidence of fraternization that was a collateral violation or underage drinking that was a collateral violation?

   MS. FRIEL: Definitely. It was financial, it was loss of having it when you needed it, and then there were privacy concerns, and that would be the fourth one, yes, concerns that there was information that could get them in trouble.

   MR. STONE: Right. And that's why it turns out sometimes that they'll turn into a defendant, because it --

   VADM TRACEY: But then, Bullet 3 --

   MR. STONE: -- turns out they were fraternizing with a subordinate.

   VADM TRACEY: Yes. And in Bullet 3 talk about self-incrimination.
CHAIR HOLTZMAN: But let's not put the defendants.

VADM TRACEY: Yes.

CHAIR HOLTZMAN: My view is, defendants doesn't belong right here in the -- talking about victims. I think it relates to Bullet 3 and we can put them in there, about self-incrimination --

MR. STONE: All right. You want to strike victims and defendants and just say, cell phones may contain?

JUDGE JONES: No. I would prefer to leave it, because we're talking about victims here.

CHAIR HOLTZMAN: Right.

CAPT TIDESWELL: The language in Recommendation 50 is specific to sexual assault victims, in the blue box, the actual recommendation itself.

CHAIR HOLTZMAN: Right. Yes, so that -- okay. Well, let's -- Mr. Stone, do you want to vote on this or do you want to -- if you don't
agree, let's just have a vote on it.

MR. STONE: Well, I would just say, cell phones, because they can wind up as defendants if this stuff that incriminates them -- a lot of the time, it's their underage drinking.

VADM TRACEY: Yes, but they're going to be --

CHAIR HOLTZMAN: Okay.

VADM TRACEY: -- obtained as a victim.

CHAIR HOLTZMAN: Right. So --

PROF. TAYLOR: If I could just --

CHAIR HOLTZMAN: Mr. Taylor?

PROF. TAYLOR: A friendly amendment and that is to keep the words, in sexual assault cases, in there, instead of deleting them, because this is all about, as Captain Tideswell says, sexual assault victims. It's not about other victims.

CHAIR HOLTZMAN: Right. But before we get to that, we're still on victims and defendants --
PROF. TAYLOR: Okay.

CHAIR HOLTZMAN: -- in the first two sentences.

PROF. TAYLOR: I thought maybe you'd want to have the --

CHAIR HOLTZMAN: Mr. Taylor, you're ahead of me.

PROF. TAYLOR: -- whole sentence at one time. Thank you.

CHAIR HOLTZMAN: You're just way ahead of me.

PROF. TAYLOR: Okay.

CHAIR HOLTZMAN: And then, maybe Mr. Stone and everybody else here, just way ahead of us, so let us catch up to you, one second. Okay. So, Mr. Stone wants victims and defendants, those in favor of that proposal, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no's.)

CHAIR HOLTZMAN: The no's have it, the amendment is not agreed to, so it will simply
say, victims' cell phones may contain. Then, we have another amendment, among their other contents --

MR. STONE: No, we have what he just said, victims' cell phones in sexual assault cases.

CHAIR HOLTZMAN: No, that's at the very end. It's --

JUDGE JONES: It's a little later.

CHAIR HOLTZMAN: You struck it, it's still way down. It's on the next line, Mr. Stone, you see, in sexual assault cases, you struck that out.

MR. STONE: Okay.

MS. PETERS: Ma'am, the original language had it after the word evidence, it had --

CHAIR HOLTZMAN: Oh, okay.

MS. PETERS: -- in sexual assault --

CHAIR HOLTZMAN: Right.

MS. PETERS: -- and it just got moved in the editing process. So --
CHAIR HOLTZMAN: So, where is it now?

MS. PETERS: I think, it was -- I don't

-- Mr. Stone, your edit did not intend to move it
to the end of the sentence, where it existed
beforehand was, cell phones may contain a wealth
of evidence in sexual assault cases, period.

CHAIR HOLTZMAN: Okay.

MR. STONE: Period, okay.

VADM TRACEY: So, the way that it has
been edited now actually, I think, addresses Mr.
Taylor's concern. It says, victims' cell phones
may contain, among their other contents, a wealth
of evidence -- then lists the examples -- which
may aid investigators and prosecutors in making
their decisions about investigating and charging
sexual assault crimes. Would that get your
sexual assault cases?

PROF. TAYLOR: No, I was just trying to
make it clear that this only applies to sexual
assault cases. And Mr. Stone had struck that.

VADM TRACEY: But I think it's at the
end of the paragraph now.
PROF. TAYLOR: Oh, I see what you're saying.

CHAIR HOLTZMAN: Well, you could start out by saying, in sexual assault cases, victims' cell phones may contain, because I think the point is, too, that in these cases, it may have special relevance.

PROF. TAYLOR: Right. Okay. I'm fine with that.

VADM TRACEY: Bear with me, I think the sentence as Mr. Stone structured it actually is important, it specifies for people who may not have thought about it, what are the kinds of things we're talking about and that in fact, we need that information to aid investigators and prosecutors in making their decisions about charging, investigating and charging sexual assault cases. So, you've got it, it's in a place that --

PROF. TAYLOR: All right.

VADM TRACEY: -- lets you not have to do surgery on the sentence again.
PROF. TAYLOR: Well, with all respect, the way it was written the first time does that. If you go to the original language, which we all voted on and Mr. Stone abstained from last time, it says, cell phones may contain a wealth of evidence in sexual assault cases.

When a victim refuses to turn over relevant evidence, such as photographs, text messages, or social media information contained in the victim's cell phone, investigators and prosecutors make decisions about investigating and charging without possessing all available evidence. That was the original language that we voted on last time. I think it's complete as it is.

MR. STONE: Well, I wanted to take the question about refusal and move it to the fourth bullet, so they understand that the refusal is not just an arbitrary or obstructive move, that there's some -- I just wanted the refusal stuff all moved into the fourth bullet.

So, that's why that line was moved
into the fourth bullet, because I wanted to figure out how to say it and not yet get to the refusal business. I just wanted to get to why people want the cell phone.

JUDGE JONES: I think the original way is fine, they're going to read the whole thing --

CHAIR HOLTZMAN: Me, too.

JUDGE JONES: -- anyway. So, we'll get to it.

CHAIR HOLTZMAN: Me, too. All right. So, Mr. Stone's, let's take the balance of Mr. Stone's suggestions, which are spelled out there, which you can see them, striking and the materials contained in yellow, those in favor of adopting those suggestions, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed?

(Chorus of no's.)

CHAIR HOLTZMAN: So, the original, I guess the original language stands. The no's have it. Okay. Bullet 3.

MR. STONE: Okay. Bullet 3 just
clarifies what we had before to make it clear
that the disclosure is going to include personal,
confidential, and privileged diary-type
information.

These aren't vague privacy concerns,
they're exactly what the Supreme Court spoke
about being privileged in unanimous opinion in
Riley v. California, 134 Supreme Court 2473, in
2014, where they unanimously said, those -- they
listed those as the kinds of issues that happen
on a smart phone.

And I think we needed to be a little
more specific, because in the next bullet, we're
going to talk about what does or doesn't happen.
So, it seems to me, people have to know that
those are what are involved, it isn't just
privacy concerns, it's personal, confidential,
and privileged material that can be on a cell
phone. I didn't quote the Supreme Court case,
because last time, when I said I wanted to --

CHAIR HOLTZMAN: Why don't --

MR. STONE: -- everybody said, let's
not quote a case.

CHAIR HOLTZMAN: Why are we taking out, privacy concerns?

VADM TRACEY: We're not.

MR. STONE: No, privacy concerns is in.

CHAIR HOLTZMAN: Oh, so, also -- so, the way it would read is, many victims -- center on the financial loss to the victim when the investigators retain the phone for forensic analysis. Do we want to add, and also the loss of the use of the phone, in that case?

MR. STONE: I assume that's part of the financial loss, because --

CHAIR HOLTZMAN: Maybe not --

MR. STONE: -- they have to go get another phone.

CHAIR HOLTZMAN: Well, okay, I don't know. Is that, our subject matter expert, is that the same thing? Were you following us?

MS. FRIEL: I'm sorry, can you say that again?

CHAIR HOLTZMAN: In Bullet 3, it talks
about the financial loss to the victim when the
investigators retain the phone. I was saying --

MS. FRIEL: Right.

CHAIR HOLTZMAN: -- isn't there also
the concern you raised about not having the phone
available? And Mr. Stone's point is, that that's
subsumed under the financial loss. I'm just
asking --

MR. STONE: Because they're going to
have to run out and have to buy a phone, a
temporary phone at Walmart or one of these
limited phones, to take its place until they get
their phone back.

MS. FRIEL: I would have to say, I
didn't hear it put exactly that way and in my
experience, before we were able to do this this
fast and right in their presence, when we did
have to hold onto a phone for a couple of days,
let's say, they generally just didn't have a
phone for a few days.

So, that's the way I've heard it
explained, that I won't have a phone for a few
days. So, I don't think it's necessarily subsumed in the financial loss.

CHAIR HOLTZMAN: Yes, it may also be information that's on the phone. It's not only the financial loss, but there may be information on the phone that they won't have for a few days, like --

MR. STONE: Their phone numbers, yes.

CHAIR HOLTZMAN: Yes, stuff like that.

MS. FRIEL: Right.

CHAIR HOLTZMAN: So, maybe we could --

MS. FRIEL: Contacts, et cetera.

CHAIR HOLTZMAN: So, maybe we could add that point. Anybody have an objection to that? I don't have the language here, but maybe Meghan could give it to us.

MR. STONE: Call it, the information loss? I don't know what else to say, the --

CHAIR HOLTZMAN: No. And also, the victim's -- when investigators -- the financial loss to the victim and the loss of the use of the phone, when investigators retain the phone for
forensic analysis. That would be -- that sort of

MS. FRIEL: That works.

CHAIR HOLTZMAN: That works? Okay.

And also, the victim's privacy concerns relating
to disclosure of -- I agree with striking over --
the vast amount of the victim's personal,
confidential, and privileged -- I don't know what
diary-type personal information means. You also
have personal --

MR. STONE: Do you have a calendar on
your phone? Most people use it as a diary today.
Where they've been, who they've seen, and a lot
of them put in their evaluations in there too.
Went here, went there, the same thing that people
used to put in a diary. That's language --

CHAIR HOLTZMAN: Yes --

MR. STONE: -- right from the --

JUDGE JONES: Why don't we just --

MR. STONE: -- Supreme Court case.

JUDGE JONES: -- say, personal,
confidential, or privileged information?
CHAIR HOLTZMAN: Right.

MR. STONE: Okay. I thought that explained what the privileged --

CHAIR HOLTZMAN: Yes, to me, it was confusing.

MR. STONE: -- when you say, what's the privileged? Well, it's a diary-type document today.

JUDGE JONES: Unfortunately, you're dealing with a bunch of people who aren't quite sure what diary-type is.

CHAIR HOLTZMAN: Yes, like me.

MR. STONE: Okay.

CHAIR HOLTZMAN: I was -- I didn't know --

MR. STONE: All right, just put privileged.

CHAIR HOLTZMAN: -- what that meant.

JUDGE JONES: I'm joining you --

MR. STONE: I'm fine with --

JUDGE JONES: -- Ms. Holtzman.

MR. STONE: -- just privilege.
CHAIR HOLTZMAN: Okay, thank you. So, with that change, striking diary-type --

MR. STONE: Yes.

CHAIR HOLTZMAN: -- do we -- any objection to Mr. Stone's revisions in Bullet Point 3? There are no objections, so that Bullet Point 3 as amended is approved. All right.

Bullet Point 4. Wait a minute, where are we going to put incriminating? Is that going to be in Bullet Point 3?

VADM TRACEY: That would go in 3 if we think we need to put it in there.

CHAIR HOLTZMAN: Well, do you want to put, incriminating?

MR. STONE: We can put that in there.

CHAIR HOLTZMAN: Where would it go?

VADM TRACEY: So, it would go, privileged, or self-incriminating information?

CHAIR HOLTZMAN: Yes, or potentially, maybe not --

VADM TRACEY: Potentially.

MR. STONE: Okay.
CHAIR HOLTZMAN: Yes, or potentially self-incriminating.

MR. STONE: Okay.

CHAIR HOLTZMAN: Okay. So, with that amendment, that amendment is approved to Bullet Point 3. Okay, Bullet Point 4, Mr. Stone?

MR. STONE: Okay. This is both setting out and, at the same time, explaining that SVCs and VLCs do tell the victims that there are risks when they turn it over and why they tell them there are risks.

They tell them -- SVCs and VLCs reported that, as allowed by current law -- and that, again, is the Supreme Court case Riley v. California -- they advise clients that, unless there is a valid military search warrant for a cell phone, victims, just like defendants, should not voluntarily turn over their cell phones to investigators if the victims wish to preserve their privacy rights and privileges in the information on their cell phone.

So, that's what they -- actually, I
think they're probably obligated as SVCs and VLCs
to make that point, because that's their client
and they have to let them know that that could be
an issue. And that goes back to the bullet
above.

So, they might say to them, I don't
know if you have personal information and you're
worried about self-incrimination, I don't know if
you have confidential information that people
wouldn't ordinarily give, I don't know, maybe you
flunked this military training course, I don't
know if you have privileged information, like
stuff about your medical records, but I have to
tell you, if you turn it over, you're going to
waive that privilege.

So, therefore, they have to -- other
than if there's a warrant for it, then you're out
of luck, you've got to just turn it over. So, it
seems to me that that shows that it does happen,
that they do advise their clients, and even if
the client becomes a defendant, that's what
they're doing.
And that's part of the reason you're suggesting that the Secretary remove any of the impediments. But I don't know how they can not advise their clients that way --

CHAIR HOLTZMAN: Right, but --

MR. STONE: -- and not do it.

CHAIR HOLTZMAN: Mr. Stone, just one point from my --

MR. STONE: Sure.

CHAIR HOLTZMAN: -- point of view to this, I understand that an SVC or VLC might want to advise their client that they have a right not to voluntarily turn it over, but I think they also -- the point I think we're trying to make or the Subcommittee was trying to make and JPP was trying to make was that if they fail to turn it over, there are consequences for the victim.

There are consequences for the victim of turning it over and there are consequences of not turning it over, and those consequences need to be spelled out. Namely, the fact that the case could be lost. So --
MR. STONE: I thought we just put that in the extra language in the first bullet and the second bullet, about the case being lost in the first bullet and in the second bullet, it's going to be --

CHAIR HOLTZMAN: Right.

MR. STONE: -- difficult for the investigators and prosecutors to make their decision about investigating and charging. If you want to add another sentence that says it again here, by all means, we can say, not voluntarily turning it over, of course, also has its risks, or something.

CHAIR HOLTZMAN: Right, but what --

MS. FRIEL: Can I -- I'm sorry to interrupt.

CHAIR HOLTZMAN: Yes, Lisa, go ahead.

MS. FRIEL: I just had two thoughts on what you're saying. One, Mr. Stone, I hear what you're talking about, about what the Supreme Court case said and things of that nature, but the fourth bullet, what you wrote here, is not
something that the Subcommittee heard in their site visits. That, in fact, this is what they were doing. So, that goes beyond what the Subcommittee's report was and the recommendation was based on.

I also think there's a big difference between telling somebody, okay, you have a right to not do this, here are some of the reasons that you should think about to not do it, here are some of the reasons that you should do it.

The way you wrote it, you're saying they should not voluntarily turn them over, I think that's exactly the problem that the military is having, is that it's weighted to should not turn them over. And I think that's hurting your cases.

MR. STONE: Well, whether it is or it isn't, the victims have a right to counsel and, while your Subcommittee may not have heard testimony, we had panels before us where you were not present and we as the JPP heard SVCs and VLCs say that, yes, they have to advise their clients
about their self-incrimination rights and their
privilege waivers if they turn them over, and
confidential material.

So, we definitely heard evidence on
them and we're not writing the Subcommittee
report now, we're incorporating and going beyond
your Subcommittee report to address the problem
that the Subcommittee heard about.

And one of the things in addressing it
is, we have to acknowledge what is going on that
we have heard from the panels over the last three
years. Now, if we want to put, as was mentioned
here before, something that sounds more like --
that lays out the concerns, again, after that
that we already mentioned in 1 and 2, okay, then
maybe we can repeat they can or should also
advise their client that turning over -- but I
can't imagine they're not doing that, too.

They would be violating their
attorney-client responsibilities if they didn't
say to the client, here's the negatives, here's
the positives.
CHAIR HOLTZMAN: But the problem, Mr. Stone, with that point that you're assuming, is Bullet Point 5, which has been eliminated, because some of them may not know about these forensic techniques, so that when they're advising their clients, they're not saying, hey, we could solve the problem by these new techniques of imaging and so forth.

So, that's why, in a way, maybe we should go to -- I mean, as I read Bullet Point 4, it's setting up Bullet Point 5, which is, okay, here, the MCIOs need this information, it's important for the prosecution of the case, victims have these concerns about, legitimate concerns about turning over the information, SVCs are telling victims, yes, these are legitimate concerns and you have rights, but, hey, people, right out there, there are ways of solving this problem.

And that, it seems to me -- so, this whole thing, in a way, is kind of a lead up to Bullet Point 5. Am I misreading this?
PROF. TAYLOR: Well --

CHAIR HOLTZMAN: So, I think we have to
maybe explain Bullet Point 5 or expand it, so
that that feeds into Point 4, which is, yes,
SVCs, I agree with you should be giving the
upsides and the downsides. But if they're not
sufficiently trained in the upsides, that is the
problem in this equation. Ms. Friel, am I
getting it correct?

MS. FRIEL: Yes.

CHAIR HOLTZMAN: Okay. Mr. Taylor, you
had something you wanted to say?

PROF. TAYLOR: Yes. I was just going
to agree with Ms. Friel, when she talked about
what the JPP Subcommittee actually heard, in
terms of what counsel actually do. Because, I
mean, my memory is not that clear that we had
crystal clear testimony that SVCs and VLCs would
say that they advised clients that, unless
there's a valid military search warrant for a
cell phone, just like defendants, they should not
voluntarily turn it over.
I just don't remember that level of
detail, as opposed to a more general statement
that we said in the first time, which was that
they do advise clients not to turn over their
cell phones in general, even when they're likely
to contain potential evidence.

So, I just wanted to support what Ms.
Friel said about that. But I also would say, and
I agree with what the Chair just said about the
thrust of this, again, we need to take out, just
like defendants, because this becomes --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- more of an argument,
an advocacy argument, than it does, in my
opinion, a statement of what we think ought to be
a good recommendation.

MR. STONE: So, what do you want it to
say? The whole bullet?

PROF. TAYLOR: Well, for one thing, I
would take out, as allowed by current law,
through, phone.

CHAIR HOLTZMAN: What about, they
advise clients?

PROF. TAYLOR: Yes. Reported that they advise clients that they should not voluntarily turn over their cell phones, if they wish to preserve their privacy. Which, by the way, is sort of the way we had it in the original version.

CHAIR HOLTZMAN: But you would keep Mr. Stone's last line, their privacy rights and privileges?

PROF. TAYLOR: Well, I have no problem with that one.

CHAIR HOLTZMAN: Yes. Well, how do you feel about that, Mr. Stone?

MR. STONE: Well, originally, I was okay with that, but I wanted to add, see Riley v. California. I wanted to put in that there's a Supreme Court unanimous decision, which pretty rare these days, of 2014, which is pretty recent, that says that they do have those -- if they want to preserve privacy rights and privileges on cell phones, they have to do it.
So, I'm okay with that, if you say, see Riley v. California. I don't want the Secretary of Defense to think we didn't have any cognizance of the fact that there's problems doing this. This is a tough thing to figure out.

CHAIR HOLTZMAN: Well, let's get the bullet point -- can we just -- well, all right. I mean, we could do two things. One is we could discuss Point 5, which I think resolves many of the concerns that you have. Or we could try to vote on Point 4. So --

PROF. TAYLOR: I would say we go ahead and talk about 5.

CHAIR HOLTZMAN: Okay. So, Ms. Friel, you want to unburden your vast store of knowledge to us, of your brain of that vast store of knowledge, so we can be educated as to these techniques, please?

MS. FRIEL: Sure. So, the technology exists for a forensic examiner to sit in a room with someone with their cell phone and in a matter of hours, make a complete digital image of
that cell phone.

So, you don't have the financial loss and you don't have the loss of not having it, for more than a couple of hours. So, that's the first thing I think people need to understand.

Now, one thing, though, that I thought the way we phrased our recommendation didn't get to, is there may be practical difficulties with having the right type trained forensic examiner come out and do that in a short period of time.

That's something that we're asking people to look into. If you decide that's the way to go, then how practically can you do that in the military? But certainly that capability exists and not just in law enforcement, I mean, we're doing it here at a private organization, a private business.

Two, you can, by agreeing to certain search terms, limit what you're going to look at in that vast amount of private information in one's cell phone. And different branches are using consent forms that actually set out what
they'll look for and they won't go beyond that.

I didn't see anything as detailed as what we've been using, but you can sit there and say, we're going to only look for the words hit, strike, rape, sexual assault, you can list a whole bunch of search terms that we generally do by having the investigator, who's familiar with the kind of subject matter, the kind of investigation, with the digital expert, who understands how the search is going to go about, and they put together search terms.

And then, you could go back to a victim and say, okay, we're going to agree, you're going to sign that we can image the phone, we can search it for these search terms and that's all we're going to look for. Or you could say, we're going to add photographs of injuries.

So, there are things you can do to limit looking at everything on someone's cell phone. You can agree in such a form, that the military came up with a form that had the blanks for what the search terms are, you will not go
beyond a search for what we've just agreed on in writing.

And if you see the need later in the investigation, because, and this has happened, you realize there's a new word or a new name that you need to search, then you have to go back to the victim and her counsel and say, here's the reason we would like to do another search, just using this term or that term or this name.

CHAIR HOLTZMAN: And how do you ensure, Lisa, that those are the only terms that are being looked at and that people who have the cell phone aren't looking at everything else?

MS. FRIEL: Because they'd be violating an agreement and could get sued for doing that. And I expect there would be military penalties for doing that, if you were to go beyond the limits of consent.

If somebody signs a consent to search a physical place, if in the military, somebody says, yes, you can search my bedroom and my closet, but you can't search the entire house,
there are obviously repercussions if the military
police search the entire place. So, they would
seem to apply here as well.

CHAIR HOLTZMAN: And is that how it
works? I mean, I haven't been a prosecutor in
quite a while.

MR. STONE: You don't have any cases
that say that, do you? Because the case law I'm
aware of, including the Supreme Court, suggests
that, when you let somebody search your phone,
even if you only give them partial consent, the
defense counsel is going to have the right, for
completeness to say, as was suggested here, well,
you searched for these terms, but we're entitled
to have the whole phone searched, because we
think you didn't do those terms.

You didn't say, this, that, or the
other thing, so we want the rest of the phone to
be able to search it, because they might have --
this comes up in drug cases all the time, they
avoided using the name of the word cocaine and
instead they used popcorn.
MS. FRIEL: Right.

MR. STONE: And the only way we're going to find out is by looking at the whole phone. So, the first problem you have, and I don't think there's any cases that I'm aware of, maybe you are and I'd love to hear them, that say that once you open that door, the defense counsel will not have the right later, on completeness grounds, to see the rest of the document, or in this case the cell phone.

And as a result, once you waive your privacy and self-incrimination interest, that's what you're waiving. And if that search term shows that you engaged in underage drinking at the party, it's out there, you can't then claim it again, you've waived it. And that's what the issue is.

And unlike, I might add, the circumstances you described before, the military is very different in treating its victims. They always are told they have their own counsel, when they come to that interview with the investigator
or the prosecutor, they're entitled to come with counsel.

They don't inadvertently decide not to turn over their cell phone, they have the person with them who's trained who says, we need a time out, who drags them outside and says, here's the pros and cons of what you've just been asked, don't inadvertently think that you're going to help yourself, you might be hurting yourself in this case. I have to advise you and here's the pros and cons.

So, they don't have that situation.

And they also are less likely, as a result of having counsel right through the trial, to have what you called the deer in the headlights experience, because if their counsel is doing his job, he says to them, by the way, everything on your cell phone, which you can show me without waiving your privilege and you ought to, may turn out to be something on the defendant's phone that he's then going to impeach you with.

So, why don't you give me your cell
phone, just like you would your diary, and let me
take a look and see if you're making a huge
mistake, because I can figure out very quickly
what they're going to impeach you with, and we
should moot court you on the kinds of questions
they're going to ask, that they got from this.

So, it's a very different
circumstance, because in civilian practice, you
don't automatically have a right to counsel from
the outset and even if you have the resources to
go hire one, you rarely get people with
experience as a victim's counsel in sexual
assault cases. And we've made sure in the
military that they get that.

So, some of those concerns you
expressed are a little different here. They're
constantly worrying, which the civilian counsel
aren't, about whether or not you should have used
alcohol on the base, whether or not there are
fraternization concerns.

Because in civilian practice, you know
that no prosecutor is going to go after you
because you're under 18 and you had a can of beer
and maybe you were having sex with your
neighbor's wife, that's not going to be an issue.

    But in the military, your whole career
could be derailed by that, so the consequences
are much more serious. You have an ongoing
concern and there's lots of -- many other parts
of your life are regulated, your whole life is
regulated.

    So, the results are that saying, we're
going to image a piece of your phone and we're
going to search for these words or others, I
think that there's no question, I'm not aware of
any cases, that you're not waiving your right.

    And we could put in that, modern
forensic techniques to imaging and searching cell
phones can minimize, if not eliminate, victims'
financial concerns, but there's no question
they're still going to have privacy and privilege
and self-incrimination concerns that could derail
their entire career, the career that they went to
school for, if they went to a Service academy,
that they pursued at their military occupational
specialty, the whole thing is on the line.

That's one of the reasons we have such
difficulty with them coming forward, because a
lot of the times, they say, I'll keep my mouth
shut, because my whole career is going to change,
the morale, the people I work with, the people I
live with communally in the barracks.

And we had victims before us tell us,
even when their girlfriends, some of these were
women, even when their girlfriends knew they had
been raped and were sympathetic, afterwards,
their girlfriends wouldn't talk to them, because
they had -- reporting it and proceeding, even
getting a conviction destroyed the morale of the
entire unit.

Ultimately, the person who did it
wound up kicked out of the military, the unit was
broken up, they might have been moved. I mean,
there's these larger consequences for them that
are very different.

That's part of the reason they get
counsel and it's part of the reason that it's going to be difficult for the Secretary to work through Recommendation 50, but that doesn't mean he shouldn't try.

VADM TRACEY: So, I think we had a couple concerns. One is, we're not sure that the military is paying attention to the fact that there are technical capabilities that change this dynamic a bit. They're not a full solution, but they make the problem a little different from the way that it's perceived.

I think there's a more fundamental concern and that is, we think that neither victims and, we believe, SVCs, really understand how the MCIO could use this information to formulate a better prosecution and that that's a gap in the way -- we don't expect the victim to understand that, but we don't think the SVC is necessarily fully prepared to advise around the power that could come from making that information available.

CHAIR HOLTZMAN: Partially, it may be
because they don't -- they're not really aware of these technical fixes.

VADM TRACEY: Correct.

CHAIR HOLTZMAN: So, for example, and I take very seriously the concerns you raised about the search of the phone, because I raised that issue. But couldn't it, I mean, Lisa, I've never been through this, but couldn't it be also that the search terms could first be tested by the SVC himself or herself?

So, if you put in the search term, I don't know, Johnny, and it brings up that you were drinking with Johnny, and you're on the base or illegally, then the SVC could see that and say, well, maybe we don't turn over this message on 3:27 on June 3.

So, there are ways that you might be able, if the SVC herself or himself took the search terms and looked first, they may be able to cleanse or make sure that --

MR. STONE: Spinning this out --

MS. FRIEL: They can't do that.
CHAIR HOLTZMAN: They can't?

MS. FRIEL: It's your forensic examiner who can do that, who runs the search terms and then, generally --

CHAIR HOLTZMAN: Okay. So, let's say -- okay. So, wait, so the forensic --

MS. FRIEL: -- compiles digital files that somebody else then takes a look at.

CHAIR HOLTZMAN: Okay. So, if the search -- if the forensic examiner, who presumably is a neutral party here, prints out the results, can they go first to the Special Victim's Counsel to review before they're turned over to the prosecution, so that the forensic examiner is, in a way, working for the SVC?

MR. STONE: Can the SVC veto and say, no, I don't want to turn over and --

CHAIR HOLTZMAN: Yes.

MR. STONE: -- then, the forensic examiner says to the investigator, I can't turn it over to you? I think that would be a conflict.
CHAIR HOLTZMAN: Well, it depends who
--

MR. STONE: The investigator's --

CHAIR HOLTZMAN: It depends who the
forensic person is hired by, doesn't it? I don't
know, I'm just asking --

MS. FRIEL: Well, you have military --

CHAIR HOLTZMAN: -- the question.

MS. FRIEL: -- forensic examiners,
military personnel who can do this. I don't know
how many, I don't know where they're based, but I
certainly know that you have military personnel
who do this. Whether you want to use some third
party outside the military --

CHAIR HOLTZMAN: No, but I'm talking
about --

MS. FRIEL: -- that's another question.

But I think all our conversation kind of leads
back to why the recommendation was written the
way it was. I think the basic point to get
across is, there is key evidence that really
helps an investigation and if it is a legitimate
claim, as most of them are, really helps a prosecution.

And it seems that the investigators and the prosecutors are not able to get their hands on this information, as much as would be helpful to these prosecutions. And so, somebody's got to look at all the legitimate things Mr. Stone and other people brought up, the impediments and what kinds of things can you do to make victims feel more comfortable turning over what --

CHAIR HOLTZMAN: Right.

MS. FRIEL: -- is important evidence. Because it's going to help your convictions.

CHAIR HOLTZMAN: Well, it seems to me -- so, what you're saying is, really, that the questions I'm asking you are really the questions the Secretary of Defense ought to be asking, which is, how can -- am I right, Admiral?

How can we utilize modern technology to solve this problem? Maybe the Secretary of Defense appoints an advisory committee just to
look at this issue, I don't know. But it seems
to me -- so, we can't really solve all the
points.

I think Mr. Stone has raised valid
issues about privacy, self-incrimination, and so
forth, but I think the thing that we're trying to
argue for here is that the techniques could
solve, if not all of these problems, some of
these problems, and they need to be looked at in
a serious and systematic way.

MR. STONE: Let me make a suggestion on
that last bullet that I think takes this into
account. Instead of striking it, what if the
beginning of that bullet just says, perhaps
modern forensic techniques for imaging and
searching cell phones can minimize, if not
eliminate, victims' concerns -- I would have said
financial concerns, but financial and practical,
but why don't we just say, victims' concerns
about cell phone searches?

By putting perhaps in there, we don't
know there's an actual technique, we don't know
if we have the examiners, we don't know if it's
going to get through the whole thing, but we're
raising what you want to raise. We're
highlighting that as something for the Secretary
of Defense to look at.

MS. FRIEL: What if you said, modern
forensic techniques and well-crafted consent
forms might, blah, blah, blah. Because I think
it's a combination of both.

MR. STONE: Well, then you've got say,
may minimize --

CHAIR HOLTZMAN: Yes, I don't have a
problem with that. And ought to be examined.
Right.

MR. STONE: Right, ought to be
examined, something like that.

MS. FRIEL: Yes.

CHAIR HOLTZMAN: Modern forensic
techniques for imaging and appropriate -- and
searching cell phones and --

MR. STONE: Well-crafted consent forms.

CHAIR HOLTZMAN: -- well-crafted
consent forms may minimize, if not eliminate, victims' legitimate concerns about cell phone searches and, therefore, should be --

VADM TRACEY: Explored.
CHAIR HOLTZMAN: -- explored --
MR. STONE: Period.
CHAIR HOLTZMAN: -- thoroughly explored, seriously, systematically --

VADM TRACEY: Period.
CHAIR HOLTZMAN: Period? Okay. All right. Well, so -- okay. So, we've done Bullet 5. Where are we on Bullet Point 4?
MR. STONE: Okay. You want less verbiage and just --
CHAIR HOLTZMAN: Yes.
MR. STONE: -- have a reference to the Supreme Court case?
CHAIR HOLTZMAN: I don't know that we really --
MR. STONE: I mean, we have to have some --
CHAIR HOLTZMAN: I don't think -- we
keep saying, their legitimate privacy rights, all the way through here, I don't think that we're in any way saying that they don't have them. I don't think we're attacking that in any way, shape, or form. I think we're -- I'm sorry, Mr. Taylor, you have something?

PROF. TAYLOR: So, here's some proposed language. Some SVCs and VLCs reported that they advised clients that victims should not voluntarily turn over their cell phones to investigators if the victims wished to preserve their privacy rights and privileged information on their cell phone, even when they are likely to contain potential evidence against an accused and to provide useful information to prepare the victim for future testimony that would enable a successful prosecution.

CHAIR HOLTZMAN: I have no problem with that, but does that get to the point? The point that Mr. Stone wants to say is that the privacy rights are like granite, they can't be taken away and that we're not trying to -- he wants somehow
for us to imply here that we're not minimizing these privacy rights.

And I don't know how we can -- I thought we had made it very clear. We can say, again, to preserve their legitimate and well-established privacy rights and privileges. Does that solve your problem, Mr. Stone?

MR. STONE: It might, yes.

CHAIR HOLTZMAN: Okay.

PROF. TAYLOR: Well, what I was trying to do with these two additions --

CHAIR HOLTZMAN: I know, you were just adding. I was addressing --

PROF. TAYLOR: Yes.

CHAIR HOLTZMAN: -- his point and you've got this third point.

PROF. TAYLOR: Yes. It was to address the two issues that we hadn't really --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- explicitly done,

which --

CHAIR HOLTZMAN: Right.
PROF. TAYLOR: -- is that the evidence would be helpful against an accused and it will prepare the --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- victim for examination.

CHAIR HOLTZMAN: Right. Okay. Does anybody have any problem with Mr. Taylor's proposal? Hearing no objection, it's adopted. Does any --

MR. STONE: With your language too?

CHAIR HOLTZMAN: Right. I was going to get to that.

MR. STONE: Okay.

CHAIR HOLTZMAN: Yes. And then, the proposal I made, which is, their legitimate and well-established privacy rights --

MR. STONE: And privileges.

CHAIR HOLTZMAN: -- and privileges.

MR. STONE: Okay. I think we're done --

CHAIR HOLTZMAN: We're done.
MR. STONE: -- with this recommendation.

CHAIR HOLTZMAN: Lisa, thank you for helping us walk through this and sharing with us your expertise, you were very helpful. And --

MS. FRIEL: You're welcome, I'm glad it was helpful.

CHAIR HOLTZMAN: -- if we hang up on you, it's not because we're rude.

MS. FRIEL: Okay. Well, enjoy the rest of your summer. Thanks so much.

CHAIR HOLTZMAN: Okay. I think we'll take a ten minute break and figure out what we're going to do next. What are we going to do next?

CAPT TIDESWELL: Yes, ma'am. Well, we have two options. One is wine and cheese. Or the other is, I believe Ms. Saunders has drafted some additional language for --

CHAIR HOLTZMAN: How can we --

CAPT TIDESWELL: -- you to consider.

CHAIR HOLTZMAN: How can we keep her waiting?
CAPT TIDESWELL: It's a tough call.

CHAIR HOLTZMAN: And I'm waiting with baited breath to hear this.

JUDGE JONES: The question is, is her additional language going to be better or worse after the wine and cheese?

MS. SAUNDERS: Well, that's very true.

(Laughter.)

MS. SAUNDERS: That's a legitimate point.

CHAIR HOLTZMAN: I think, let's just take a little break now, that's okay.

MR. STONE: What, five minutes?

CHAIR HOLTZMAN: Yes.

(Whereupon, the above-entitled matter went off the record at 4:16 p.m. and resumed at 4:25 p.m.)

CHAIR HOLTZMAN: Okay. Should we do this paragraph by paragraph?

MS. SAUNDERS: I would note that this bottom paragraph, it begins the Court of Appeals for the Armed Forces --
CHAIR HOLTZMAN: Right.

MS. SAUNDERS: If you were -- if you feel this is all too lengthy. That could potentially be put into a footnote. That's just an option.

CHAIR HOLTZMAN: Well, I'll consider that suggestion. Okay. So, let's go to the first bullet. Which is, you know, the black bullet, the kind of framing bullet.

Any objection to that?

MR. STONE: I don't know what receive media attention. Why don't you say reported in the media. Reported by the media.

VADM TRACEY: How about the JPP has media coverage of two sexual assault court martial appellate cases?

MR. STONE: Good. I like it.

CHAIR HOLTZMAN: Okay. So with that amendment by Admiral Tracey, is there any objection to the framing bullet?

(No audible response)

CHAIR HOLTZMAN: Hearing none, it's
accepted. Okay. Bullet one. Is there any objection to bullet one?

MR. STONE: Yes. The problem with bullet one is the convening authority didn't submit. In the first case, unless these are varied, the defense counsel submitted a declaration in which the convening authority's statement actually at issue as it states, because we have a declaration now.

CHAIR HOLTZMAN: Okay. Well, maybe there's some way of doing that so they're using the first thing. A declaration of the convening authority was submitted that states.

MR. STONE: Yes. That's the reason the defense had submitted a declaration of the convening authority.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Okay. Any other problem Mr. Stone?

MR. STONE: Just the citation to Barry hasn't been fixed. I have the citations if people want them to the Barry opinion. And no
one can find it.

I mean, that just says it was decided.

But it's actually, let's see, this is the --

MS. GALLAGHER: We could get that for you afterwards.

MS. SAUNDERS: Yes. I'm sorry. I really didn't -- I didn't stop and fix that.

MR. STONE: Okay.

MS. SAUNDERS: I was just concentrating on this.

MR. STONE: Okay. Because the CAAF one is.

CHAIR HOLTZMAN: Okay. But --

MR. STONE: 76 MJ 242.

CHAIR HOLTZMAN: With the -- with the agreement of the staff to include your citation or proper citation --

MR. STONE: Yes. The reconsideration.

CHAIR HOLTZMAN: Do we have any other objection to -- Mr. Stone, do you have any other objection to paragraph -- bullet one?

MR. STONE: Only that it says that,
duh, duh, duh, then it says, he further stated.
I think we should say either it further stated or
the convening authority further stated.

Right? We're avoiding --

CHAIR HOLTZMAN: Okay.

MR. STONE: Personal comments if you
want.

JUDGE JONES: The convening authority.

CHAIR HOLTZMAN: The convening
authority further stated. Okay. Anything else?

MR. STONE: I'm not quite sure how we
can't -- I don't know that we need to cite to the
declaration footnote two. Because nobody can get
that anywhere.

Oh, I guess they could get it in --
from the -- they could get it from the -- from
CAAF. Which is where we got it.

CHAIR HOLTZMAN: Okay. Mr. Stone, do
you have any other concerns?

MR. STONE: So I think the footnote
just is there.

CHAIR HOLTZMAN: Okay. So bullet one,
Mr. Stone, you have no objections. I would like to add -- do we need after -- in the second line, I perceive that if I were to disapprove the findings in, when it says the case, can I say the sexual -- I would add in brackets, the sexual assault case.

So it's clear what we're talking about. Any objection to that?

MR. STONE: No.

PROF. TAYLOR: I agree.

CHAIR HOLTZMAN: All right. So, with those several amendments, bullet one is approved.

Okay. Bullet two which contains two paragraphs. Should we take them separately and do paragraph one in bullet two?

Mr. Stone, do you have any objections to this?

MR. STONE: Yes. I was a little concerned because as I read the opinion, and we can look at page three. We all now have it.

At the bottom, Judge Franklin is saying this all came out of the different sexual
assault case, United States v. Oropeza, where he explained his dual process prior to dismissing the charges in the Wilkerson case.

So that's, I think, what they're -- what it stems from.

MS. SAUNDERS: Okay. That's a -- sir, I think that's actually further procedural background. If you recall, General Franklin was the convening authority who overturned the findings and sentence in the Wilkerson case. Which gained a lot of media attention at the time.

And so, I think in the -- in this Oropeza case, they -- they're just simply quoting from General Franklin to where he explains, you know, his thought process in dismissing those charges.

And then it's really more on page four where they get into the procedural history that precedes this case.

MR. STONE: All right. Well, fine. Here's the objections that I make. On line two,
again, okay -- on line two, the Court of Appeals
for the Armed Forces that should say, reversed
and remanded for retrial, a sexual assault case
based on an appearance of unlawful command
influence.

And this goes back to Ms. Holtzman's
comment before, instead of stemming from because
senior civil and military leaders reportedly gave
the convening authority, blah, blah, blah.

At least that's accurate. And we
don't need the footnote for to the Wright case,
because it's not clear that's why any of this
happened.

MS. SAUNDERS: Okay.

MR. STONE: And I'd strike the
footnote. I think that's correct right too
there.

MS. SAUNDERS: Would it be --

CHAIR HOLTZMAN: But the problem is
that we have because twice. So, that's going to
be a problem in that sentence.

MR. STONE: Do you want to say due to?
Due to his failure, on the second one? Due to his failure.

MS. SAUNDERS: Maybe our technical writer has a thought?

MS. FALK: I would say owing too rather than due to.

CHAIR HOLTZMAN: Okay. Owing to or for his failure. Would for his failure be okay?

PROF. TAYLOR: It sounds good.

MR. STONE: Okay.

CHAIR HOLTZMAN: Okay. And then what about the second paragraph?

VADM TRACEY: I don't understand why we need all that?

CHAIR HOLTZMAN: Yes. All right.

MS. SAUNDERS: I could put that in a footnote. Or we could get rid of it all together. It just -- it sounded like you wanted more quotes from that case.

CHAIR HOLTZMAN: Right.

MR. STONE: No.

CHAIR HOLTZMAN: Are you -- is
everybody okay with just eliminating it?

MR. STONE: Just striking it. Yes.

PROF. TAYLOR: Yes.

CHAIR HOLTZMAN: Great. Okay.

Fantastic.

MS. SAUNDERS: At the bottom of the -- that first paragraph, you're going to keep, would it help to clarify things to say, because of his failure to refer an earlier, unrelated case to court martial?

CHAIR HOLTZMAN: No.

MR. STONE: No.

CHAIR HOLTZMAN: I think it's fine just the way it is.

MR. STONE: No. Just the way it is.


CHAIR HOLTZMAN: We'll guild the lily.

Okay. So now we are done with the investigations report. Because this was the only issue that was outstan -- am I correct?

MR. STONE: No. Well, this is not the investigation. This is the --
CHAIR HOLTZMAN: Oh, sorry.

MR. STONE: This is the administration report.

CHAIR HOLTZMAN: No, right. Sorry, sorry, sorry.

JUDGE JONES: I have one question though. Does -- I don't care about getting rid of this second and third paragraph here.

But, if you just read the U.S. -- the second bullet, don't we still have to say because of his failure to refer --

CHAIR HOLTZMAN: Yes. It says --

JUDGE JONES: A prior sexual assault case to court martial?

CHAIR HOLTZMAN: You want to say a prior?

JUDGE JONES: I mean, we -- you had prior.

CHAIR HOLTZMAN: Okay.

JUDGE JONES: Yes. Because he's -- it's not being --

MR. STONE: Okay. Add the word prior.
JUDGE JONES: Yes.

CHAIR HOLTZMAN: Fine. Okay. But it wouldn't be because, it would say for his failure.

MR. STONE: Right.

JUDGE JONES: Well, right. Whatever. Yes.

CHAIR HOLTZMAN: Okay. All right. So, this is to take the place of -- what pages were we --

MS. SAUNDERS: This is following recommendation 56.

CHAIR HOLTZMAN: Okay. So, with this amendment as amended, and as approved, do we have the -- I guess we should vote on approving the report regarding Fair Administration of Military Justice in Sexual Assault Cases. We're up to that now.

Okay. All in favor say aye.

(Chorus of ayes)

CHAIR HOLTZMAN: Opposed?

(No response)
CHAIR HOLTZMAN: Okay. So we --

MR. STONE: Can we -- can we -- I

can't vote yet. Because I -- we made so many
changes, I'd kind of like to see them. Can I --
can I call this a tentative vote?

I want to -- I want to see them. I

mean we made a zillion changes.

CHAIR HOLTZMAN: That's a completely

unreasonable request.

(Laughter)

CHAIR HOLTZMAN: When you're talking

about seeing and knowing what you voted for.

(Laughter)

MR. STONE: Exactly. From the

beginning the end we changed this one. Are we

able to vote by email?

MS. SAUNDERS: I can do my best --

CHAIR HOLTZMAN: Okay. Can we have it

by tomorrow?

MS. SAUNDERS: I think we should be

able to have it by tomorrow.

CHAIR HOLTZMAN: Okay. Well, we
should have -- what do you want to see -- what do
you want to see, Mr. Stone?

MR. STONE: Just their Administration
ones. The one we did all the extensive changes
on.

CHAIR HOLTZMAN: Oh, so that's what
you want.

MR. STONE: The other two we --

CHAIR HOLTZMAN: You want all of them.

Okay.

MR. STONE: I wouldn't mind seeing
also the language that we just worked over on
that -- about the cell phone stuff. That would
be nice too.

CHAIR HOLTZMAN: All right. Let's
try. I mean, I think the problem is staff has
done a miraculous job. And they're only human.

MR. STONE: Well, that's why I was
asking whether we're able to, and maybe this is
for --

CAPT TIDESWELL: Yes sir. I mean, we
can. I think we've all tried to take copious
notes. And as a team we're able to accomplish --

MR. STONE: No, I meant can we take
evotes by email after this? Even if we -- if it's
not ready by tomorrow afternoon?

CAPT TIDESWELL: I don't think so.

No.

MR. STONE: I don't want to make those
people hate me.

CAPT TIDESWELL: No sir. My only
concern is, is we typically go back to the
transcript to get the exact language. And we
very methodically take hours --

MR. STONE: Right.

CAPT TIDESWELL: To make sure we have
the language that you all have voted on.

CHAIR HOLTZMAN: But if we have it
before us tomorrow, that should solve the
problem. And we don't need the transcript.

CAPT TIDESWELL: We could -- yes. I
mean, we could do our best.

CHAIR HOLTZMAN: Because if we're
voting on it, we're voting on it whether it
matches what we did yesterday, I mean, the day
before this.

        CAPT TIDESWELL: That's the risk.

        CHAIR HOLTZMAN: I'm prepared to take
that.

        CAPT TIDESWELL: And the other option
is, is to hold a phone meeting. Where we would
give notice in the Federal Register.

        MR. STONE: That's what I was
thinking.

        CAPT TIDESWELL: In sort of a sweep up
event. Have everybody connect over the
telephone.

        MR. STONE: And --

        CHAIR HOLTZMAN: But when would we do
that?

        CAPT TIDESWELL: Well, it would be up
to when all of you are available.

        MR. STONE: Schedule it.

        CHAIR HOLTZMAN: Let's see what we
have tomorrow morning.

        CAPT TIDESWELL: Yes, ma'am.
CHAIR HOLTZMAN: And see how far we can get with that.

CAPT TIDESWELL: Okay.

MR. STONE: Aren't we going to have to do that on the final report? Because I don't even have a draft that I -- tonight if I stay up, I can't go line by line because we have missing pieces.

So, we're going to have to have a phone meeting?

CAPT TIDESWELL: Yes, sir.

CHAIR HOLTZMAN: I think we have to look at it tomorrow.

CAPT TIDESWELL: Right. I guess one theory was, if what we came up with were just minor edits from the members, and everybody was comfortable and we weren't seeing substantive changes or things that looked like they needed to be deliberated on, I would talk to Maria Fried to see whether or not we actually have to bring everybody back up.

I think we're going to have to.
Because you're going to want a final vote on the report.

   MR. STONE: And we don't -- and there's holes in it now, right?

   CAPT TIDESWELL: There are holes. Because we had to wait for the decisions that were being instead.

   MR. STONE: Right. I get it.

   CAPT TIDESWELL: Yes, sir. But I think there's going to have to be a phone call, I think, is the bottom line. By the 30th of September.

   CHAIR HOLTZMAN: Oh, so this could take place in September. Well, no. It's a problem because you have to print up the report.

   CAPT TIDESWELL: Right. So probably the end of August or early September so we can close down the panel as required by law.

   CHAIR HOLTZMAN: Oh, I see now.

   MR. STONE: And that's why -- while we're still in session. That's why I wasn't sure if tomorrow morning is useful because we don't
have something to vote on anyway.

   CAPT TIDESWELL: Yes, sir. So --

   CHAIR HOLTZMAN: Well --

   CAPT TIDESWELL: I'm sorry.

   CHAIR HOLTZMAN: What I would like to do is give everybody to the extent the staff can make the changes, give us a clean copy of what we did on the investigations report and on barriers report, review that tomorrow morning.

   We can review the outline of the -- of the final report. See whether really there's anything aside from word smithing issues. It may just be word smithing issues that we're dealing with.

   MR. STONE: You're right.

   CHAIR HOLTZMAN: And if that's the case, you know, that makes it a lot easier. Word smithing, I don't know, Mr. Sprance is that -- can word smithing be done on the phone? Or will you still need a public meeting for that?

   MR. SPRANCE: We could do word smithing. Well, it -- convention rule
deliberations, ma'am, that's what I'm concerned about. And if it does, then there needs to be a meeting.

CAPT TIDESWELL: But we could conduct the meeting over the telephone.

MR. SPRANCE: We could do the meeting over the telephone.

CHAIR HOLTZMAN: Okay. Fine. All right.

MR. STONE: We're going to have to. Because we don't have -- we're not going to have by tomorrow all the missing pieces, the final report.

CAPT TIDESWELL: No, sir. I won't.

MR. STONE: So that meeting, you could throw in and vote on everything that we haven't voted on.

CAPT TIDESWELL: Yes, sir.

CHAIR HOLTZMAN: Well, I think that's not a good idea. Because the more we finish now, the more we can submit -- I mean, we can't leave everything to the last minute.
It has to be printed up. Presented to this -- to Congress and the Secretary of Defense. And who knows what happens to people's schedules and stuff like that.

So, I'd really like to get as much finished as we can tomorrow morning. I don't think we'll go past noon. Right? Maybe even less time than that.

MS. GALLAGHER: Most of the -- ma'am, most of the holes in the final report are going to be straight lifts out of the prior reports that fill in almost verbatim.

CHAIR HOLTZMAN: Oh. So there's nothing -- no substance that's going to happen. You're just going to tell us where you're going to --

MS. GALLAGHER: Right.

CHAIR HOLTZMAN: So we've already voted on those reports.

MS. GALLAGHER: Right.

CHAIR HOLTZMAN: So if we vote --

MS. GALLAGHER: Absolutely.
CHAIR HOLTZMAN: To include what we've already voted on --

MS. GALLAGHER: It's here's your recommendations verbatim from prior --

MR. STONE: Well, let me ask you a crazy question. As long as you've got all of that, I know military people typically start early.

If we didn't come in and start until 10:30 let's say, would you by then have today's changes and maybe most of the holes filled by cutting and pasting?

CAPT TIDESWELL: I mean, we could try. What I could do is I could have the staff stay later tonight. We can go through the various reports that are pending.

Come up with what we believe the language to be without the benefit of the transcript. And then present that to you in the morning.

I mean, this is a heavy lift. And then if you all want to come in a little later
and then we could try and see if we could fill in
the holes to the final report.

Because there's really the two
sections. She's right. It's really just the
recommendations that are pending.

I know there's another chapter that
talks about things referring to other panels.
Which really in this case is the DAC-IPAD.

So we would just lift the
recommendations that you made, referring to the
DAC-IPAD. And just lift those and put them in.

MS. GALLAGHER: And the other holes
that -- really, the language in that has been
what our press releases have said about the
reports.

So it's really a summary, a statement
of what the sexual assault reports said. What
the concerns to fairness report said.

And it's -- it's really not
substantive unless you're quibbling with the
language of the summary. And then really, it's -
- I don't know that it's all that controversial.
You know, so it should be easy to ferret through the summary language tomorrow to read the report, I would think.

PROF. TAYLOR: I'm very -- I apologize, but I am very skeptical that that's a fair thing to ask the staff to do.

JUDGE JONES: Right.

PROF. TAYLOR: You know, for us to do in the morning. I think that if you want it bad, you get it bad.

   And I'm sorry --

CAPT TIDESWELL: Yes, sir. And I'm worried about not having a transcript as well.

PROF. TAYLOR: I agree.

CHAIR HOLTZMAN: So let's --

PROF. TAYLOR: So I think we need to stick with the Chair's original schedule.

MR. STONE: And if -- yes.

CHAIR HOLTZMAN: So, which is what now? That we look at the -- that you try to do the investigations? Recommendation 50, what we voted on?
CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: And as much of this other, you know, barriers report, or whatever it's called now, as we can.

MS. SAUNDERS: If I had -- if there's some sticking point where I don't have the transcript and I am unable to determine what it was that was decided upon, I guess we could bring that up tomorrow.

I'm hoping that won't be the case.

MR. STONE: I will be the case.

Because I just realized there is one piece that we were going to find out from Maria even by telephone, this business about whether --

MS. SAUNDERS: Oh, adopting?

JUDGE JONES: The adopting.

MR. STONE: Adopting -- what we adopt with modifications. Or whether we attach.

MS. SAUNDERS: Um-hum.

MR. STONE: And maybe somebody can -- maybe she'll tell us by telephone. Because I mean, she knows the issue.
But it really -- that gets -- it's not something we were able to resolve.

MR. SPRANCE: I'll see what I can do.

Talk about that.

CHAIR HOLTZMAN: Okay. All right.

Anyway, I think we should meet tomorrow at nine o'clock, normal time. And see how far we get.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: And then we'll -- whatever we can't finish, we'll do over the phone in a public meeting either early September.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: I guess. Or maybe the end of July. I don't know when you'll get the extra record.

JUDGE JONES: So wait a minute. When do we have to have this done?

CHAIR HOLTZMAN: September 17 is when --

MR. STONE: September 30th.

CAPT TIDESWELL: Well, the panel ends on the 30th of September.
CHAIR HOLTZMAN: Oh, the 30th.

CAPT TIDESWELL: There are some sweep up functions. And we can't take it all the way to the end.

So I think comfortably it's probably no later than the first week of September we should be done.

CHAIR HOLTZMAN: Right. Because you have to print it.

JUDGE JONES: Print it yes.

CAPT TIDESWELL: They go to the editor. Then they go to the graphics designer. Then they go -- we send them out to you all. We have a transmittal letter that needs to be signed.

CHAIR HOLTZMAN: Right.

CAPT TIDESWELL: Which is something I'd like to discuss. Instead of forcing you all to actually sign something and scan, perhaps I could just -- if I could get your permission over an email, we can drop your signatures in.

But I would not do so without
permission. But that is an option. So you don't have to sign the actual document and scan it on the transmittal letter. Which would make it easier.

JUDGE JONES: Do you want blank signatures today?

(Laughter)

MR. STONE: We've got them in our forms, I think.

CHAIR HOLTZMAN: All right. Well, I think -- Mr. Sprance, are we ready to?

MR. SPRANCE: Ready, ma'am? Yes.

CHAIR HOLTZMAN: Yes, sir.

MR. SPRANCE: The meeting is adjourned.

(Whereupon, the above-entitled matter went off the record at 4:43 p.m.)
decisions 8:16 55:14
69:4 161:15 172:2
173:15 177:6 179:1
181:14 269:19 270:11
273:1 287:11 307:11
332:17 340:15 341:16
342:14 400:6
definition 96:1
385:15 387:5
399:19
delayed 7:2
deliberation 123:11
124:12 255:19
deliberated 6:21
206:14
deliberation 3:13
5:12,20 25:5
deliberated 3:6,8,10
14:12 228:2
22:11
d自信
155:7
determination 25:6
157:10 165:20 193:14
detention 19:6
difficulty 144:16
311:21 21:20
328:15 329:7
334:16 362:8
dig 118:22
digital 305:11,20 324:9
325:15,22 329:4,14
331:12 361:22 363:9
373:7

dignity 86:11 90:13
92:5
direct 318:5
directing 148:19
direction 173:22 175:12
directly 16:2 243:16
288:18
Director 1:20
disagree 55:15 131:2
152:5 156:19 276:19
disallowed 301:18,19
disapprove 50:8
275:15 276:14 278:5
282:20 285:13 388:3
disapproved 283:21
disapproves 50:6
disapproving 28:19
disbelieve 152:20,21
152:22
discipline 26:11
disclosure 307:18
344:2 348:6
discontent 286:16,19
287:2
discussed 26:11 27:13
196:19 361:9 409:18
discuss 8:6 24:7
62:1 65:7,12 86:13
158:7 163:9 257:9
305:2
discussing 28:11 137:8
discussion 9:11 42:20
43:9 52:10 71:20
80:10 127:17 130:15
155:2 159:2 185:13
204:17 291:18 292:20
discussions 7:1
193:14
dislike 26:13
dissimilar 389:2,16
disparaging 128:17
disparity 260:7
disposition 21:20 27:19
63:16 177:5 179:1
267:6 269:19 270:11
273:1
disproof 50:22
disproves 320:14

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<table>
<thead>
<tr>
<th>8</th>
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<tbody>
<tr>
<td>8 16:14 161:11 168:15</td>
</tr>
<tr>
<td>875 1:11</td>
</tr>
<tr>
<td>8th 47:8</td>
</tr>
</tbody>
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<tr>
<th>9</th>
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<tbody>
<tr>
<td>9 7:13,14 11:12 161:11</td>
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<td>170:19,22 176:18</td>
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<td>183:17</td>
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<td>9-27 22:14</td>
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<td>9th 47:8</td>
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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 07-26-17

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