

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO
ADULT SEXUAL ASSAULT CRIMES PANEL
VICTIM SERVICES SUBCOMMITTEE

PLANNING AND DELIBERATION SESSION

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WEDNESDAY
JANUARY 29, 2014

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The Subcommittee met in the Dean's Conference Room at The George Washington University Law School, 716 20th Street, N.W., Washington, D.C., at 8:30 a.m., Mai Fernandez, Chair, presiding.

PRESENT:

Mai Fernandez, Chair
Dean Michelle Anderson
Bill Cassara*
Meg Garvin*
Honorable Elizabeth Holtzman*
Honorable Barbara Jones
Honorable Christel Marquardt

STAFF:

Bill Sprance, Designated Federal Official
Colonel Patricia Ham, Staff Director
Julie Carson
Joanne Gordon
Colonel Lisa Schenck
Commander Sherry King
Terri Saunders

* present by teleconference

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

2 10:03 a.m.

3 MR. SPRANCE: This is Bill Sprance,
4 the Designated Federal Officer.

5 And this meeting of the Victim
6 Services Subcommittee is now open.

7 CHAIRPERSON FERNANDEZ: Good morning.

8 Thank you, everybody, for showing up
9 in such horrible weather.

10 And thank you for everybody who is on
11 the phone who is trapped or otherwise ill for
12 being here.

13 Bill, is that you?

14 MEMBER CASSARA: I am here.

15 CHAIRPERSON FERNANDEZ: Oh, okay. You
16 sounded far away in the distance. Okay. Now
17 you're okay, though.

18 MEMBER CASSARA: That's what my wife
19 says.

20 (Laughter.)

21 CHAIRPERSON FERNANDEZ: I think that
22 one of the first things that I would like to do

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1 this morning is look at our agenda and figure out
2 the process that we want to take on in moving
3 through this agenda because I think that we all
4 need to be on the same page with regards to how
5 exactly we're going to tackle the amount of
6 information in front of us.

7 So, what I would like, first of all,
8 is for the staff to tell us what their thinking
9 was on how to get through this material and what
10 structure they had in their minds when they were
11 putting this all together, so that we can sort of
12 follow, have an idea of how this should move
13 forward.

14 So, with that, Sherry, can we turn it
15 over to you, so you can talk us through how we
16 should be looking at all this?

17 CDR. KING: Sure. We set aside this
18 entire day for deliberation, because that is what
19 I think the hope entire group thought that you
20 felt like you needed to talk about --

21 CHAIRPERSON FERNANDEZ: Right.

22 CDR. KING: -- what we had so far and

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1 where you want to go from here, and whether you
2 need more witnesses or more information.

3 Since the last discussion, I think I
4 sent you out a new outline. In that, I did
5 yesterday include the topics, the other concerns,
6 that I have gotten from Dean Anderson. I think I
7 included those where I thought they were
8 appropriate. But you may want to put them in a
9 different place.

10 As we have gone through this, we have
11 looked at it a couple of different ways.
12 Originally, we thought we were going to work in
13 the outline, take things from the transcript, and
14 then, give you information. One of the problems
15 with that was that, for the CVRA and Victims
16 Rights, we didn't get a lot of testimony.

17 Originally, at the last meeting we had
18 planned to have several DOJ people present, as
19 well as Doug Beloof and other people who would
20 talk about the states and perhaps not necessarily
21 an opposing view, but a more expansive view of
22 victim rights than the Department of Justice

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1 takes. Unfortunately, the DOJ couldn't be there.
2 And so, the information we had, except for from
3 Doug Beloof, was really all on paper. It is from
4 the Attorney General guidelines that we had, the
5 UCMJ, and we have a couple of other articles, and
6 that's all we had.

7 So, instead of trying to fill out the
8 transcript and use the outline, we decided to
9 start writing a draft for you, not to do your
10 writing, not to put in any opinion, but kind of
11 to show you what we do have and help you try to
12 fill in where you want to go with those.

13 And so, we started with victim
14 services or victim rights for a couple of
15 reasons. First of all, it is the first one in
16 the outline. But, more important is I think
17 victim rights is what really is the basis for the
18 rest of your discussion. Victim rights kind of
19 is going to play into when you talk about the
20 services and adequacy of services for the SARCs
21 and the victim advocates and the victim liaison,
22 and maybe the prosecutors and how they enforce

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1 and uphold victim rights. The basis for that is
2 going to be what the victim rights actually are
3 and what rights they have, and should those be
4 expanded or not. So, that is why we thought that
5 this would be a good place, at least in our
6 minds, to start.

7 And one of the things we are required
8 to do is compare victim rights that are in
9 policy, CVRA, and in the NDAA. And so, we did
10 that. When you decide to do this and actually
11 write the report, you may want all the rights
12 listed and all this discussion mostly in
13 appendices and not in the report itself, because
14 it makes it quite long. I don't know. But we
15 put it in here for now, just so that if you are
16 reading through it or reading it or want to refer
17 to it, it is all at least in the same place.

18 Essentially, that is the first half of
19 the report. Up to page 11 is just going through
20 the rights. Some of the what the legislature set
21 out for us to do was superseded by the NDAA
22 because of the rights are included.

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1 But, when we started looking at it, we
2 came up with still several issues that we thought
3 you might want to discuss. And so, we made a
4 list of the issues. That's not certainly a
5 limitation on what you should discuss or even
6 saying that you have to discuss all those things.
7 Those were just things that we thought came up.

8 Basically, as far as the rates go, I
9 don't know if you want me to go through them and
10 do a discussion of that.

11 CHAIRPERSON FERNANDEZ: Well,
12 beforehand, can we go through the outline
13 again --

14 CDR. KING: Yes.

15 CHAIRPERSON FERNANDEZ: -- and talk
16 about anything that was added from when we had
17 the conversation on the phone?

18 CDR. KING: Right.

19 CHAIRPERSON FERNANDEZ: Because there
20 were also a few things that we said that should
21 be added on the phone call, and I just wanted to
22 know if those were added into --

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1 MEMBER ANDERSON: Are we looking at
2 potential issues for deliberation? Is that what
3 we are calling the outline?

4 CDR. KING: No.

5 MEMBER ANDERSON: I'm sorry.

6 CDR. KING: Potential issues for
7 deliberation is a two-page --

8 MEMBER ANDERSON: Yes, I've got that.
9 I also have something else that looks like an
10 outline, but --

11 CDR. KING: You don't have the whole
12 thing. Oh, yes, that is the whole thing.

13 MEMBER ANDERSON: Yes.

14 CDR. KING: That is the outline.

15 MEMBER ANDERSON: Yes, that's what I
16 thought.

17 MEMBER HOLTZMAN: That is a two-page
18 document called "Issues for Deliberation for
19 Victim Services Subcommittee"?

20 CHAIRPERSON FERNANDEZ: It is more
21 than two pages.

22 CDR. KING: It's three pages.

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1 CHAIRPERSON FERNANDEZ: It is
2 basically the outline.

3 CDR. KING: Ma'am, there's an
4 outline --

5 MEMBER HOLTZMAN: Yes.

6 CDR. KING: -- that starts with the
7 mission statement, the Subcommittee mission
8 statement.

9 MEMBER HOLTZMAN: No, I don't have
10 that. When did you send that?

11 CDR. KING: I think I sent that
12 separately.

13 STAFF MEMBER: Yes, we didn't resend
14 that since we brought it here, but it has been
15 sent out previously. I'm trying to think of
16 when.

17 MEMBER HOLTZMAN: I would just like to
18 be on the same page as you are.

19 CDR. KING: Absolutely.

20 MEMBER HOLTZMAN: So, if you can tell
21 me what document that you are looking at, I will
22 see if I have it and I'll try to read it.

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1 MEMBER ANDERSON: So, it must have
2 been circulated after the telephone conversation,
3 the email, because it includes some of the
4 materials in that.

5 CDR. KING: Yes.

6 MEMBER ANDERSON: So, it is a fairly
7 recent situation.

8 CDR. KING: Right. Yesterday I
9 included the things that you had emailed me.

10 MEMBER ANDERSON: Yes, yes. So, at
11 the top it says "29 January 14 Draft".

12 CDR. KING: Right. We put that for
13 today.

14 MEMBER ANDERSON: Okay. Yes.

15 CDR. KING: Most of this isn't
16 significantly --

17 MEMBER HOLTZMAN: Do you know what
18 would be really helpful, is if someone could just
19 email me that document, because I have to go back
20 into my office email and, then, look for it. I
21 mean, if someone could just email it to me right
22 now, that would be really great.

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1 CDR. KING: We are looking for it.

2 MEMBER HOLTZMAN: Sorry?

3 CDR. KING: We are looking for it,
4 ma'am.

5 MEMBER HOLTZMAN: Oh, okay. Thank
6 you.

7 MEMBER CASSARA: And when you do that,
8 if you could copy me, because I'm not in my
9 office? I'm trying to do this remotely and it is
10 not easy.

11 CHAIRPERSON FERNANDEZ: Michelle, you
12 don't have it on your --

13 MEMBER ANDERSON: Well, you know, the
14 thing is, my email is connecting. I was looking
15 to send it to Liz right now. But, for some
16 reason, my email is not connecting.

17 (Whereupon, the foregoing matter went
18 off the record at 10:12 a.m. and went back on the
19 record at 10:17 a.m.)

20 CDR. KING: If we can just get back to
21 this discussion for a little bit?

22 If we can just get back to this

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1 discussion a little bit, one of the things we did
2 was, first of all, lay out all the instructions
3 and all the rights. That is the whole first
4 section, like I said. So, we did not at this
5 point go through each of the individual services'
6 instructions.

7 What happens in the military is that
8 the DoD sets out a policy that is fairly general
9 in my understanding of what all the services need
10 to comply with and implement. And then, each of
11 the services writes up an instruction that
12 basically --

13 CHAIRPERSON FERNANDEZ: Sherry, let me
14 stop you there. Let's just go through the whole
15 outline before we go piece-by-piece --

16 CDR. KING: Okay.

17 CHAIRPERSON FERNANDEZ: -- just to
18 make sure that we cover, that on the outline are
19 all the topics that this group wants to cover.
20 And then, let's take a deeper dive.

21 CDR. KING: Okay. The only thing I
22 was just saying is that's why we didn't include

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1 all the specifics from each of the services,
2 because they basically encompass the same thing
3 as the DoD instructions, just in more detail in
4 how you implement them and things like that.

5 The CVRA in the outline that we listed
6 the rights enumerated, and that is something we
7 included in this draft report. Remedies, we
8 included a little bit in the back, but that is
9 one of the things that we had some problem
10 getting information on right now, because we
11 didn't have the U.S. Attorneys and DOJ people
12 come to talk about that.

13 Restitution, we did not include
14 anything at this point in the discussion.
15 Although that is something certainly that this
16 group can look at, it is also something that the
17 NDAA legislation sent over to the Judicial
18 Process Panel to specifically look at. So, you
19 may decide you want to or you may decide you
20 don't have enough information and don't want to
21 look at that at all.

22 Enforcement mechanisms, we did not

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1 discuss that at all in this paper, other than a
2 little bit of the discussion in the back on --
3 that Doug Beloof gave us information on.

4 And then, we didn't discuss shortfalls
5 or issues with the CVRA at all because we really
6 don't have a lot of information on that. That is
7 really more analysis than it is just the actually
8 taking the policy and synthesizing it down. So,
9 there's nothing on that.

10 The 2014 NDAA provisions, we
11 discussed, we set out what the provisions were.
12 We did not do a lot, we didn't do any particular
13 analysis, but what we did do is in the second
14 part of the report, we took -- it is No. 3 on
15 page 11 -- we took some of the issues or some of
16 the rights in the NDAA and did not analyze
17 whether they are good or bad, but more a factual
18 description of what can happen in the military or
19 what the military process is.

20 Most of it is from a congressional
21 study that we have that I know we sent you at one
22 time or provided in your materials. A little bit

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1 of it was from the discussion that you may or may
2 not have been present for in June at the RSP from
3 Captain Crow on military procedure. And then,
4 some of it, I don't know that we have anything
5 other than the UCMJ right now, which at some
6 point we will need to get other information from
7 perhaps to give you or to have a discussion on
8 it.

9 So, we didn't talk in detail about any
10 of these things, but we did list expedited
11 transfer as something that a Commander can do as
12 far as reasonable protection from the accused.

13 MEMBER CASSARA: Hey, Sherry, I'm
14 sorry to interrupt. Can I ask you to speak a
15 little bit closer to the phone? I can't hear
16 you.

17 CDR. KING: Oh, sure. I'm sorry.

18 We also discussed MPOs and other means
19 of restricting the accused, including pretrial
20 confinement, not from a discussion of whether it
21 is good, bad, or how to implement it. We just
22 wrote up the process and the UCMJ provisions that

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1 apply, and the ways a Commander has to order
2 confinement or lesser means of restriction, as
3 well as how confinement works in the military.

4 We also described the pretrial
5 confinement hearings in this section for you,
6 discussed Article 32 hearings as far as what they
7 are and how the legislature changed the standard
8 from being more of a discovery tool to a
9 determination of probable cause, which certainly
10 that is a point for you to discuss as far as the
11 victims' participation should or should not have
12 to be.

13 We did not go into clemency or release
14 or escape of the accused at all at this time. If
15 those are issues you do want to discuss and have
16 something that you think you should be in the
17 report, we will put it in there. But this is
18 just a draft setting out some of the very basic
19 things. It looks long, but it is really more
20 basic things.

21 We discussed some on the right not to
22 be excluded in any public proceeding, and not

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1 from the standard of trial so much, but from the
2 standard of what are public hearings and what is
3 decided in places that are not public, such as
4 confinement.

5 We wrote up a description of how
6 pretrial confinement happens, and that is a
7 Commander who orders pretrial confinement, makes
8 a basis for finding that it is necessary. And
9 then, there is a review officer who conducts a
10 hearing, but it is not a public hearing in a
11 courtroom like it is in other state or federal
12 courts. It is a limited hearing where the
13 accused is present along with an attorney. And
14 then, the hearing officer considers other
15 writings, but it is not a public proceeding.

16 And I thought that was something you
17 might be interested in discussing because,
18 typically, when you think of a protection hearing
19 or a bail hearing to decide if someone stays in,
20 that is something that would be --

21 CHAIRPERSON FERNANDEZ: Can I just
22 make another comment here? Again, I appreciate

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1 that we are going to go into what you have
2 written here. My sense is, though, that this is
3 a conversation that we so need Meg more, that I
4 would rather look to see what else is in this
5 outline that I think that we were all present.

6 I mean, there's a couple of problems.
7 A) You guys did a good job to try to supplement
8 us because we didn't hear the hearing on the CVRA
9 because they weren't able to come. So, we are
10 sort of looking at this on first blush. We
11 haven't had the background of a hearing.

12 Second of all, our Subcommittee expert
13 on this isn't present. So, I may be able to say,
14 "Yes, that does sound really good to me" or "That
15 doesn't." I'm just not sure that this is the
16 area that we should be tackling right now. I
17 would rather look at the other parts of this
18 outline and see if there are other areas that we
19 can tackle, but I just would like to hear from
20 the rest of the panel members, if they think that
21 that is right or if they would like to tackle
22 this area. I mean, I need to hear from all of

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1 you.

2 MEMBER JONES: This is Barbara Jones.

3 When I read through the outline, I
4 guess actually the 26-page submission that was
5 prepared by the staff, it lays out what is in the
6 Crime Victims' Act. Actually, it is not an
7 analysis, but by comparing in one column what is
8 in the Crime Victims' Act and in another column
9 what is in NDAA '14 and, then, what is in the
10 directives.

11 I am reasonably satisfied that we
12 might be able to begin talking about two
13 questions, it seems to me. One, what is in the
14 National Crime Victims' Act that is still not in
15 the military regime because it is not in NDAA
16 1701? And then, the other question is, after we
17 figure out what those are -- and I think we
18 pretty much can tell just by looking at the
19 statutes and the directives -- then the next
20 question is, do we think they should be added?

21 Now, honestly, I have been in and out
22 of the Subcommittee hearing. So, I am not

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1 exactly sure what additional conversations or
2 information you have. But, from my reading of
3 the submissions thus far, I think that we ought
4 to be able to at least begin a discussion and
5 answer a couple of questions that are, I guess,
6 our mandate here, which under NDAA 2014 they are
7 asking us, basically, I think to figure out
8 whether or not -- and they single out, the
9 Congress has singled out two provisions of the
10 National Crime Victims' Act.

11 One is, do we think that military
12 victims should be given standing to seek
13 enforcement, the way they are in the National
14 Crime Victims' Act? And then, the other one
15 relates to plea, I believe.

16 But I guess all I am saying is I think
17 you can read the directives, you can read the
18 NDAA '14, and you can read the crime victims
19 statute, and have a conversation, and maybe even
20 some thoughts and deliberation and decision on --
21 let's start with the second one first -- do we
22 want to recommend or do we find that victims in

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1 the military should be allowed to enforce the
2 rights they have just been given in NDAA '14? I
3 mean, that is one question.

4 And then, the other one is the
5 specific one about, I gather, the one thing that
6 Congress left out in terms of an ability of the
7 victim to be present is plea. And that is
8 complicated because plea is so different in the
9 military than it is in the civilian world. So,
10 it is understandable that you might not want to
11 go there without a fuller discussion of it. I
12 don't mean us; I mean Congress even in that
13 regard.

14 But I think it might be worth talking
15 about the Victims Crime Rights Act. What I have
16 discovered -- or Crime Victims' Act -- what I
17 have discovered, just with some deliberations
18 that we have had in the other Committee is that,
19 as you talk, it helps to generate what most
20 people agree with or other questions that people
21 have, which I think is what you are suggesting,
22 too.

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1 I mean, I don't know that that is all
2 we can talk about today, but I really think we
3 should probably get into that today. And I think
4 it will probably be very helpful. Because I
5 don't think this one is as global as some of
6 these other mandates. I mean, that's my two
7 cents on this.

8 MEMBER HOLTZMAN: This is Liz
9 Holtzman.

10 I am just following up on what Barbara
11 had said. I agree with you. I think that that
12 is an excellent starting point.

13 And, you know, if we reach a
14 conclusion, we could have tentative conclusions
15 and ask for Meg's input. She may have some
16 different thoughts, and that may change
17 everybody's mind, but it may not. So, I would go
18 as far as we can go today without her, which
19 could be to the conclusion on this one point, I
20 mean on this section.

21 There are two holes. Barbara, you
22 pointed to one that we need to address. And that

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1 is the difference between the NDAA -- I mean,
2 sorry, that is what Congress asked us to look at.
3 But the second is, what is the difference between
4 -- I mean, assuming that we thought the Crime
5 Victims' Act should be completely replicated in
6 the military, is there something, in addition to
7 the Crime Victims' Act, that needs to be added to
8 make sure that there are full protections for
9 victims?

10 In other words, the Crime Victims' Act
11 may not be nirvana or utopia, or whatever. We
12 may have some thoughts or people may have some
13 suggestions of other things that should be in
14 there. I mean, the last hearing we had, people,
15 our witnesses alluded to that, but we didn't get
16 anything concrete. So, I would just like to add
17 that as an item to the agenda, at some point,
18 whether we can get to it today or some other
19 time. I think we have to look at whether the
20 Crime Victims' Act needs to be supplemented for
21 purposes of the military, not just reconnect,
22 suspension, and that is a question that we should

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1 also ask.

2 I also think that there is one other
3 area, aside from plea, in terms of where there
4 should be a question about the involvement of the
5 crime victim. That is at the time of the
6 decision about referral for prosecution, and
7 whether there should be some right to be heard by
8 the command, and whether in person or a
9 submission through papers, or whatever, whoever
10 is making the prosecutorial decision as to
11 whether or not there are charges and what the
12 charges are.

13 MEMBER ANDERSON: So, I think we all
14 very much wish that Meg were here. And I think
15 she will enrich our understanding of this when
16 she can join us, whether in these deliberations
17 today or in our next set of deliberations.

18 But I read what I think is excellent
19 work by the staff to lay out the basics and
20 compare the different systems. Just extremely
21 helpful for us in terms of trying to identify the
22 gaps in victims' rights in the military.

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1 And I guess I just think that this is
2 possibly an easier topic than might require the
3 full day. If we have a presumption that the
4 rights in the Crime Victims' Act federally should
5 apply to the military -- and maybe that is not
6 the right presumption, but that is one way to
7 look at it -- that would be a fairly easy
8 direction to ask the staff to go in terms of
9 drafting.

10 And then, we may hear from Bill or
11 from others that, except for this or not this,
12 and then, the question I think is the one that
13 Liz raises, which is I think the right one: are
14 there other things that we might need because of
15 the circumstances that are unique to the
16 military? I think that is, for me, another
17 opportunity to talk about victims' concerns and
18 why victims don't report or choose to only make
19 restricted reporting.

20 So, I think those issues are also
21 connected. That may give us an opportunity to
22 deliberate a little bit on those questions.

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1 MEMBER MARQUARDT: This is Christel
2 Marquardt.

3 I think we ought to go through this
4 outline and, then, quickly start our
5 deliberations. If we can come to some
6 conclusions on some of these issues, I think that
7 is a good thing. But I agree with those who have
8 said that we can present this stuff to Meg and
9 she can tell us if we are overstepping where we
10 need to go. And then, we can talk about it
11 again. But I think we should proceed to
12 deliberation today on all of these issues.

13 CHAIRPERSON FERNANDEZ: Bill? Oh-oh,
14 did we lose Bill? Or is he on mute?

15 MEMBER CASSARA: I'm sorry. I'm here.
16 I keep hitting the mute button and forgetting
17 when to put it off and on.

18 (Laughter.)

19 Technology and me are not friends.

20 No, I agree with Judge Marquardt. I
21 think that I would like to start getting our foot
22 wet, so to speak, in terms of getting something

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1 on paper. And I think the only way to do that is
2 to begin our deliberations. And if it turns out
3 that we are on the wrong path, I am sure Meg will
4 be more than willing and able to correct us. But
5 I think that is where we need to be going.

6 And I like the fact that Sherry was
7 going through the outline as quickly as we can,
8 so we can start talking. I love to talk;
9 thinking is hard for me.

10 (Laughter.)

11 CHAIRPERSON FERNANDEZ: That is what
12 I wanted. Can we just go through the outline and
13 see what all the things that we need to go
14 through, make sure that all of Dean Anderson's
15 suggestions are on there, and then, go back to
16 the victims' rights section? Just so we make
17 sure that we have captured everything that we had
18 talked about on the conference call and, then,
19 the stuff that Dean Anderson had sent yesterday
20 or the day before.

21 CDR. KING: Okay. So, do you want me
22 to finish it?

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1 CHAIRPERSON FERNANDEZ: Sure.

2 CDR. KING: Okay. So, also on here,
3 I think -- and this includes some of your
4 discussion -- is the right to be reasonably heard
5 at any of the hearings, public, pretrial,
6 confinement hearings, and that is where I was
7 pointing out that they are not all public,
8 actually, in the military, and sentencing and
9 maybe clemency. And then, reasonable right to
10 confer with the trial counsel, and we included
11 some information about victim impact statements.

12 The right to be heard on the plea, I
13 think that is where Judge Jones mentioned that
14 that is not one of the rights allotted at this
15 time, but that is one of the rights that you may
16 want to discuss, whether it should be included
17 and, if so, how would it happen in the military
18 since it is the two different systems in the
19 civilian. And then, post-trial clemency, you may
20 want to have some discussion about that regarding
21 victim rights or not.

22 Restitution, as we said, that is

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1 really specifically for the JPP panel, but you
2 could discuss it, if you want.

3 And then, enforcement mechanisms.
4 Other than the list of things here, we didn't do
5 a whole lot of analysis on that. We can do more
6 analysis and find more information, depending on
7 what you are interested in.

8 And then, we included the question, as
9 you were discussing, whether there should be
10 additional rights for military members.

11 And then, the next section is really
12 victim services. We have made a request, even
13 though we have gotten a lot of the information to
14 the services, to get all the sexual assault
15 initiatives that have been put in place or
16 recommended since 2007, since that is the term of
17 our requirement, and the current status of them.

18 And we also did a request, as you were
19 discussing cost, to try to get some of that
20 information. Whether we can get anything that is
21 helpful to you or not, we haven't received
22 anything yet. And so, once we get things, that

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1 will give you more room for discussion, and you
2 will be able to decide whether it is helpful or
3 not or if you want to make additional requests
4 for information.

5 And then, the outline goes into the
6 different support people in the military, the
7 victim advocates and SARCs, their role in the
8 investigation, prosecution, and adjudication,
9 which is right in the terms. Staff and manning,
10 we have heard some of them about who it is, how
11 they are appointed, how many of them there are,
12 if they work full-time or they are part-time
13 people who have another job in the military.

14 And then, civilian comparisons, I'm
15 not quite sure why we have two there exactly, but
16 maybe is supposed to be federal and one state;
17 I'm not sure.

18 Family advocacy, we added that because
19 family advocacy typically has always been family
20 domestic violence. But, as I think you have
21 heard lots of people talk about, the family
22 advocacy, domestic violence also includes sexual

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1 abuse. And, right now, as far as I think some of
2 our witnesses talk to us, we have two tracks, one
3 if you were assaulted by someone who is not a
4 family member or someone who falls under domestic
5 violence and, then, support from family advocacy
6 for people who happen to be married or in a
7 relation that qualifies with a person who
8 assaulted them.

9 And so, you have been given some
10 information on that, but you may want to talk
11 about that more and decide if that is the
12 appropriate way to keep handling that, in two
13 separate tracks, or if you want to join them or
14 do something else with that, because that is
15 certainly something I think you have heard some
16 about.

17 And then, medical/mental health in the
18 military system, who gets treatment and how it
19 works. You have talked quite a bit about that.
20 I don't know if we have all the issues that you
21 may want to discuss, but we have kind of laid
22 them out as far as medical treatment and, then,

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1 mental health counseling.

2 COL HAM: If I could just jump in one
3 second, there's a typo. It should be 2014 NDAA
4 under security clearance concerns. If you
5 recall, there was some discussion on whether
6 someone who seeks mental health counseling as a
7 result of a sexual assault has to reveal that on
8 the security clearance form.

9 The NDAA 2014 resolved that issue and
10 says someone can answer truthfully no to that
11 question on the security clearance form
12 questionnaire. So, that was one issue that was
13 out there that the NDAA answered. Of course, you
14 are free to say anything else, any other
15 suggestions on that.

16 Why not maybe just step back for a
17 second? As the outline sets out, there are
18 really three major areas that you have been
19 tasked to examine that Mai talked about with the
20 staff. One is victims rights; one is victim
21 services, including special victim counsel, and
22 the other is kind of some of the catchall stuff.

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1 My thought would be that it would be
2 helpful to divide up primary points of contact
3 amongst the Subcommittee to deal with some of
4 those and carve out special victim counsel to go
5 in with the reporting options and all that kind
6 of stuff, to kind of even out the workload.

7 So, I guess as an umbrella, as Sherry
8 is going through the more details, an umbrella,
9 it kind of divides up into three areas: again,
10 the Victim Rights Act, which was one reason we
11 thought you might want to tackle some of that
12 today; the victim services area minus special
13 victim counsel, and then, the special victim
14 counsel reporting, et cetera, areas, and
15 everything you can think of in that.

16 And then, Dean Anderson, I think what
17 Sherry tried to do was put in everything that you
18 had sent in an email somewhere in there.

19 CDR. KING: It may not be the exact
20 place you think they should go. But when I was
21 going through here yesterday, I just tried to put
22 them in in a place that I thought it might

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1 logically fall. I don't know if they do or not,
2 but your concern had been about medical records
3 or treatment. You might go over it when we get
4 there. When you are ready to discuss that, go
5 over what it says in the NDAA, and then, you can
6 decide if you think that is sufficient or you
7 want to make other recommendations.

8 And then, we have the Victim-Witness
9 Liaison service. That is really where you
10 address the role of support personnel during the
11 court-martial process. And it may be that you
12 think what we have now is sufficient or that you
13 want to make a suggestion that some of the other
14 people support the victim through that process.
15 Also, the SARCs are victim advocates or that they
16 have another group of victim advocates. I don't
17 know. But, anyway, that is another system.

18 And that is kind of where I included
19 your concern, Dean Anderson, about basically sort
20 of valuing or believing the accused over the
21 victim, since that would relate to the charging.
22 I don't know; I couldn't figure out where to put

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1 that exactly, but --

2 MEMBER ANDERSON: Well, you know, it
3 is interesting because that one -- and everyone
4 should be perfectly fine if someone believes the
5 accused over the alleged victim. I think that is
6 what the criminal justice system is designed to
7 do.

8 This is actually slightly different.
9 As I understand it, being a good military soldier
10 provides itself a defense or having essential
11 military skills. Maybe I am wrong about that,
12 but let's clarify that because I think, at least
13 in some of the testimony, that is the sense that
14 I got.

15 I'm sorry, I didn't mean to --

16 MEMBER JONES: I think the NDAA '14
17 basically abolished that as a defense, but you
18 can correct me if I'm wrong on that.

19 CDR. KING: In charging, I think. As
20 far as considering whether the charge --

21 COL HAM: Let's lay out what exactly
22 the NDAA did, and you can decide if it is

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1 adequate.

2 I don't want to go too much in the
3 weeds, but you may decide it is enough or isn't
4 enough. Court-martial is divided into parts,
5 some of which are by Executive Order, some of
6 which are by statute. And then, there are things
7 that are called discussion, which are not
8 statute, which are not Executive Order, which
9 case law typically calls the, quote, "non-binding
10 discussion," meaning not binding on the court,
11 not binding on anybody.

12 So, there is a list in the, quote,
13 "non-binding discussion" of considerations a
14 Commander could take into account in determining
15 how to handle an incident. One of those was the
16 character and service of the accused.

17 So, the NDAA would say that's got to
18 be taken out. The issue for you is, is "non-
19 binding" what was in there? So, is it non-
20 binding while it is not in there? In other
21 words, did what Congress do achieve/address the
22 concern that you perhaps might want to comment

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1 on?

2 CHAIRPERSON FERNANDEZ: But if it is
3 not in there, how can we take it into
4 consideration?

5 COL HAM: Because it is non-binding.

6 CHAIRPERSON FERNANDEZ: Either way?

7 COL HAM: Uh-hum.

8 MEMBER MARQUARDT: You could say that
9 they cannot take it under consideration.

10 COL HAM: Yes, yes, yes.

11 MEMBER MARQUARDT: Yes.

12 COL HAM: Just make it explicit.

13 MEMBER HOLTZMAN: Well, of course,
14 then, you have the question of whether it is to
15 be taken into account with regard to sentencing.

16 COL HAM: That is a separate question.

17 MEMBER HOLTZMAN: Right, that is a
18 separate question.

19 And by the way, I got an email. I'm
20 on my home computer. There is an email from Meg
21 Garvin. I think someone should respond to her.

22 Hello?

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1 CDR. KING: We are all looking. Oh,
2 there we go.

3 MEMBER HOLTZMAN: Someone should just
4 tell her that she can call in or whatever. I
5 think she can. Isn't that right?

6 COL HAM: I sent her the information.

7 MEMBER HOLTZMAN: So, I would send it
8 again.

9 COL HAM: I'll send it again.

10 MS. SAUNDERS: No, it is in her email,
11 that chain.

12 MEMBER HOLTZMAN: She just sent that
13 out and sent it again.

14 MS. SAUNDERS: She responded to your
15 email.

16 COL HAM: I sent it. So, she has the
17 call-in information.

18 MS. SAUNDERS: So, we will just tell
19 her, please go ahead and call in now, if she can.

20 MEMBER HOLTZMAN: Uh-hum. That's
21 right.

22 MEMBER ANDERSON: It sounds like in

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1 some ways it is reassuring, that a number of the
2 concerns that I listed have been at least
3 possibly modestly, maybe entirely, addressed by
4 the NDAA. I think it would help maybe to focus
5 on those at some point or if the staff could
6 direct us to some of those specific provisions,
7 so that we could look at some of those.

8 Because I think these are concerns
9 that are floating around and are certainly
10 historically valid and may be continued concerns
11 that we want to forthrightly address in our
12 materials, in our report.

13 CDR. KING: I think our intention was
14 to -- we wrote a draft for this section on the
15 CVRA. And so, our intention is to take your
16 input as to how you want it, the format you want
17 it and what you like. And then, we will go
18 through and do that for each of the other
19 sections. That is why I included your issues
20 where kind of I thought they might be, where we
21 would include that information, among other
22 information.

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1 COL HAM: We did send out, Dean
2 Anderson, a summary of all the NDAA provisions,
3 and we can pull from that. We can summarize it
4 further for which provisions we think apply to
5 the Subcommittee. Would that be more helpful?

6 MEMBER ANDERSON: Yes. I think I
7 haven't connected necessarily that summary to the
8 concerns that I had. So, just in doing that,
9 maybe recirculating that and, then, we can take a
10 look at that, those materials, and deliberate
11 more carefully on it.

12 CHAIRPERSON FERNANDEZ: I wonder if we
13 can at least just flag that, that we need to just
14 look at the NDAA provisions and discuss whether
15 we think that that is sufficient or not
16 sufficient.

17 MS. SAUNDERS: And the NDAA provisions
18 are at the beginning of the outline, too. Under
19 Subcommittee Effect and Scope, that was from the
20 original provisions from the 2013 NDAA. And
21 then, right below that is new NDAA provisions for
22 RSP. So, that would have been what came out of

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1 the 2014 NDAA. That is right at the beginning of
2 the outline.

3 COL HAM: Right. But she is talking
4 about the specific provisions that apply to her
5 concerns, I think.

6 CHAIRPERSON FERNANDEZ: I think we
7 just flag that for the time being. Can we do
8 that?

9 MEMBER ANDERSON: Yes. I'm not sure;
10 I think we should spend a little time
11 deliberating on those.

12 CHAIRPERSON FERNANDEZ: Absolutely.

13 MEMBER ANDERSON: Because it seems
14 like I'm not sure that they all fit in the
15 section, obviously.

16 CHAIRPERSON FERNANDEZ: They may not.

17 MEMBER ANDERSON: But I do think that
18 it goes to some fundamental questions about
19 whether or not victims have faith in a system and
20 are willing to report at all or are willing to
21 make restricted reports or unrestricted reports.

22 I think maybe it is a separate

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1 section. Maybe it is at the beginning; maybe it
2 is at the end. Maybe there is a way we can
3 integrate some of these concerns throughout.

4 But I do think that it is worth
5 spending some time talking about these, from the
6 perspective of the victims and victims advocates
7 that we heard from, what are the concerns with
8 the system.

9 CDR. KING: Right. And there is no
10 magic formula to this outline. We just kind of
11 put it together.

12 CHAIRPERSON FERNANDEZ: Right.

13 CDR. KING: We can revise it.

14 CHAIRPERSON FERNANDEZ: Yes, yes.

15 CDR. KING: If you tell us you want it
16 revised, we will revise it. You know, it is not
17 a hard-and-fast outline that isn't subject to
18 change. We just tried to put something together
19 that included the things you have to discuss.

20 CHAIRPERSON FERNANDEZ: Right, and my
21 hope is that, while we are going through this, we
22 can just highlight and flag issues as we are

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1 going down that we are going to have to go back
2 and deliberate on.

3 CDR. KING: Yes, yes, that sounds
4 good.

5 Representative Holtzman?

6 MEMBER HOLTZMAN: Yes, ma'am.

7 CDR. KING: We have the current
8 outline that we are going on with the added
9 changes from yesterday available by email. But
10 we don't have your home email or where you --

11 MEMBER HOLTZMAN: No, no, I'm on my
12 office email system.

13 CDR. KING: Okay.

14 MEMBER HOLTZMAN: So, if you send
15 me --

16 COL HAM: And we sent it.

17 CDR. KING: Oh, okay. So, they sent
18 it to that email. If you have the brand-new one
19 that we just sent you a few minutes ago?

20 MEMBER HOLTZMAN: The brand-new what,
21 outline?

22 CDR. KING: Yes.

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1 MEMBER HOLTZMAN: Oh, I'm looking at
2 the old outline. That's no good?

3 CDR. KING: Well, it is good except
4 for the additional changes from Ms. Anderson,
5 from Dean Anderson, that we included yesterday.

6 MEMBER HOLTZMAN: Oh, I see.

7 CDR. KING: That's where the
8 discussion is and that is in the new version.

9 MEMBER HOLTZMAN: Oh, okay.

10 CDR. KING: So, that is the only real
11 difference I think right now from the one you
12 have.

13 MEMBER HOLTZMAN: Oh, okay.

14 MEMBER GARVIN: I am announcing my
15 presence. This is Meg Garvin. I just joined.

16 CHAIRPERSON FERNANDEZ: Hi, Meg. Hope
17 you're feeling better.

18 MEMBER GARVIN: I'm getting there.

19 CDR. KING: Okay. Meg, we were just
20 going through the outline right now, just to kind
21 of talk about what is in there. And then, I
22 think we are going to talk about where you want

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1 to go and what you really want to discuss today.

2 But I was going through the outline,
3 and I think we are on the second page or third
4 page, no, fourth page, where we are talking about
5 the Victim-Witness Liaison. And then, I am just
6 getting to the special victims counsel.

7 MEMBER GARVIN: Okay.

8 MEMBER HOLTZMAN: Excuse me. Sherry,
9 are you there?

10 CDR. KING: Yes, I am, ma'am.

11 MEMBER HOLTZMAN: This is Liz
12 Holtzman.

13 I am just trying to understand. So,
14 the document that you just sent me at 10:15 which
15 says, "Victims Services Subcommittee Outline,"
16 that's the outline that we're working from?

17 CDR. KING: Yes, ma'am.

18 MEMBER HOLTZMAN: Okay. Thank you.
19 I wanted to make sure. I think I was on that,
20 but okay.

21 MS. SAUNDERS: Did you send that,
22 Julie?

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1 MS. CARSON: I sent it, uh-hum.

2 MS. SAUNDERS: It should have come
3 from Julie Carson.

4 MS. CARSON: It came from Julie
5 Carson.

6 MS. SAUNDERS: So, I sent you one
7 earlier, and then, Julie Carson sent you a more
8 recent version.

9 MS. CARSON: I can tell you what time
10 I sent that.

11 CDR. KING: There's not that much
12 difference.

13 MEMBER HOLTZMAN: The only document I
14 just got from you is something that was sent at
15 10:13.

16 CDR. KING: And that came from me,
17 from Sherry?

18 MEMBER HOLTZMAN: Yes.

19 CDR. KING: Okay. Julie Carson
20 also --

21 MS. CARSON: I sent it at 10:24.

22 CDR. KING: -- sent you one at 10:24.

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1 MEMBER HOLTZMAN: I don't have that.
2 I don't have that. No, I don't have that in my
3 email.

4 MEMBER GARVIN: I received one -- this
5 is Meg -- just now from you.

6 CDR. KING: We'll send you the new
7 one.

8 MEMBER HOLTZMAN: Okay.

9 CDR. KING: In any case, you're not
10 missing much off the one you're going by.

11 MEMBER HOLTZMAN: Okay.

12 CDR. KING: So, just to get through
13 the rest of the outline, one of the issues is
14 special victims counsel. That is going to
15 overlay a lot, I think, with victim rights. And
16 there's a different issue that we have here. You
17 probably may have more. But the way we listed it
18 is a special victims counsel role in the
19 investigation, prosecution, and adjudication
20 standing; what type of appeal rights there should
21 be. And then, that is where we put in the case,
22 that LRM case.

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1 Another issue you may want to discuss
2 is discovery rights and, then, what the post-
3 trial role may be and, then, the role of special
4 victims counsel with respect to victim collateral
5 misconduct. And I think you have heard some
6 testimony about that. Services are handling it
7 different. So, that may be something you really
8 want to look at and make a recommendation as to
9 whether they handle it consistently among the
10 services or not.

11 And then, a little bit more with the
12 victim counsel is their training and experience,
13 what their experience level is or what their
14 background is, and the training they get as a
15 special victim counsel, and, then, just the
16 staffing and structure for military counsel and
17 how that is organized. Right now, you have heard
18 that maybe it is different among some of the
19 services.

20 And then, implementation issues. One
21 of the issues that has been at least mentioned is
22 the costs and whether they are sustainable or

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1 not. And, then, measuring success, how do we
2 decide if it is a good program, if it should be
3 continued, and if it is helping in some way, and
4 what best practices are. That may be best
5 practices in the civilian community as well as
6 the military.

7 And then, we stuck expedited transfer
8 in here. I am not sure this is the place for it.

9 CHAIRPERSON FERNANDEZ: Under
10 implementation issues, that means, is that just
11 another word for money? I think rather than
12 calling it "implementation issues," just "ongoing
13 financial resources". Just make it a little bit
14 more clear what we are talking about.

15 MS. SAUNDERS: Resources is above --

16 CHAIRPERSON FERNANDEZ: Oh, it is?
17 Okay.

18 CDR. KING: It also might be how they
19 go about advising a victim that they have a
20 victims counsel.

21 CHAIRPERSON FERNANDEZ: Okay. I'm
22 sorry. I'm sorry. That was my fault. I didn't

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1 get that -- I heard you say it, but I didn't see
2 it. Okay. So, cost of resources. Okay. That's
3 fine.

4 CDR. KING: It could be a number of
5 things. Somebody mentioned it here, how victims
6 get advised that they can get counsel, when they
7 get it, who assigns them --

8 CHAIRPERSON FERNANDEZ: Got it.

9 CDR. KING: -- things like that.

10 And then, expedited transfer,
11 obviously, there's probably not exactly a
12 civilian comparison to that, but I suppose there
13 could be in federal employment law, if you really
14 wanted to compare it to something. But that is
15 certainly a big issue for victims and something
16 we have heard a lot about, as far as if victims
17 are accused or transferred, how it should work.

18 And that is where some of the stuff we
19 put in here about other safeguards for defendants
20 and MPOs and restriction and things like the
21 other safeguards that are less than transferring
22 a person could perhaps be valuable there also.

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1 And then, sexual assault report, this
2 is where mostly I put your issues, Dean Anderson,
3 whether it applies or not. They kind of are
4 concerns, and they are really only concerns if
5 you make an unrestricted report or a report that
6 people know about, because, otherwise, no one
7 knows, I guess. So, that was my thinking, why I
8 put them in there.

9 But we didn't have any issues in here
10 that we could come up with, although I am sure
11 there are some, issues regarding reprisal,
12 including discharges of some kind, whether by the
13 command, by peers, collateral misconduct again.
14 And certainly, that is something I think you have
15 heard a lot about and have had some discussion
16 on.

17 And last, control by the victim,
18 deciding when they want to keep it an
19 unrestricted report or change it to something
20 else or get it out of the system totally. And I
21 didn't know exactly where to put that in, but it
22 is certainly something that could be moved, if

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1 that is not the appropriate place.

2 MEMBER ANDERSON: Well --

3 CDR. KING: Restricted -- oh, I'm
4 sorry.

5 MEMBER ANDERSON: Yes, let me just
6 jump in on this because I think there is another
7 category. And that is the choice not to tell
8 anyone.

9 CDR. KING: Uh-hum.

10 MEMBER ANDERSON: And so, here we have
11 unrestricted reporting, which is the most wide
12 open. We have restricted reporting and
13 confidential reporting, but what we don't have is
14 a large percentage choosing not to report at all.

15 MEMBER MARQUARDT: The repercussions
16 if you tell someone other than reporting.

17 MEMBER ANDERSON: Well, see, that is
18 another really interesting thing, Christel, is
19 this thing of the people want -- it seems to me
20 that, if someone suffers from sexual assault,
21 they're most likely to tell their closest friend.
22 And their closest friend is under a command

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1 structure in which they are obligated to report.

2 MEMBER MARQUARDT: Right.

3 MEMBER ANDERSON: Now that comes up in
4 this, but, again, I think you all have done a
5 terrific job in terms of laying out what the
6 military does and the structures that are already
7 there.

8 I think what I wonder about is how the
9 structures affect the incentives that victims
10 experience when they're trying to make a decision
11 about who to tell and whether to tell. And so, I
12 think there is another category here, which is
13 the decision not to tell anyone, and why someone
14 might make that decision. And then, that is a
15 lost opportunity for the military in terms of
16 readiness, in terms of mission.

17 CHAIRPERSON FERNANDEZ: In essence,
18 these are the two military choices. There could
19 be a third personal choice --

20 CDR. KING: Right.

21 CHAIRPERSON FERNANDEZ: -- and I don't
22 know how you call that. I mean, you might want

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1 to call it individual choice. If you have A and
2 B and C --

3 CDR. KING: But we included -- C is
4 not really, I mean, it is not a statutory choice
5 at this point, but we have heard quite a bit
6 about the confidential, being able to report to
7 your friend.

8 CHAIRPERSON FERNANDEZ: Right. Yes.

9 CDR. KING: So, we kind of just
10 included it for your discussion. But --

11 CHAIRPERSON FERNANDEZ: It is a type
12 of reporting.

13 CDR. KING: Right, it is a type of
14 reporting that occurs.

15 CHAIRPERSON FERNANDEZ: Right.

16 CDR. KING: I wasn't quite sure --

17 CHAIRPERSON FERNANDEZ: Sort of sub?

18 CDR. KING: Right.

19 CHAIRPERSON FERNANDEZ: Yes, does that
20 capture the complaint non-reporting? I mean,
21 this says nothing to anybody.

22 MEMBER ANDERSON: Yes, I mean, I think

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1 each of these are choices. Well, actually, some
2 are choices that are forced upon the victim --

3 CHAIRPERSON FERNANDEZ: Right.

4 MEMBER ANDERSON: -- by virtue of who
5 they happen to tell --

6 CHAIRPERSON FERNANDEZ: Right.

7 MEMBER ANDERSON: -- and the structure
8 and the obligations to tell.

9 CHAIRPERSON FERNANDEZ: Right.

10 COL HAM: The other subsection is not
11 reporting it.

12 MEMBER ANDERSON: That's what I think.
13 I think there is the decision not to report all
14 the way up through unrestricted reporting, which
15 is the most wide-open, committed to the criminal
16 justice process that there is. But a decision to
17 step out --

18 CHAIRPERSON FERNANDEZ: Usually,
19 there's a D.

20 MEMBER ANDERSON: Yes, and I'm not
21 sure that it's D. It might be A. It depends on
22 how we want to sequence these.

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1 If we talk about, any time you're
2 talking about incentives, you're assuming perfect
3 knowledge, which, of course, we don't have in the
4 real world. But, assuming perfect knowledge
5 about what happens to these reports once they are
6 made, then the structures of reporting create
7 certain incentives by victims about whether to
8 report or not.

9 And even absent perfect reporting or
10 perfect knowledge, there's informal information
11 that people have about whether or not it makes
12 sense to make a report if one is victimized.

13 CHAIRPERSON FERNANDEZ: So, in some
14 ways, you are saying this is the world. I mean,
15 I'm drawing circles for matters which is non-
16 reporting. That's the biggest category that
17 you've got.

18 And then, unrestricted is probably --

19 MEMBER ANDERSON: The smallest.

20 CHAIRPERSON FERNANDEZ: -- the
21 smallest. And then, going all the way down to
22 confidential.

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1 So, in some ways, if you explain it
2 that way, I think that each level of restriction
3 gets you a smaller number of people and the
4 problems with that. Because we have the most
5 structures and the most services available to the
6 smallest number of people.

7 MEMBER ANDERSON: Well, and that's
8 right. That's right. So, in some ways, it is
9 non-reporting, the potential for a restricted
10 report, and then, the potential for an
11 unrestricted report, and what are the sequences
12 and concerns --

13 CHAIRPERSON FERNANDEZ: Yes, I got
14 that.

15 MEMBER ANDERSON: -- that can motivate
16 people to choose different slots.

17 CHAIRPERSON FERNANDEZ: Right. I
18 think that's --

19 COL HAM: Those addressed -- your
20 Subcommittee didn't hear a specific briefing on
21 the survey. All that information is available to
22 you, and there was a big briefing to the full

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1 panel in the first public meeting.

2 But the reasons people do report are
3 (A) it is the right thing to do; (B) closure; (C)
4 protect themselves or others. Those are the top
5 three reasons to report, military reports. The
6 top three reasons to not report are, one, they
7 did not want anyone to know; two, they felt
8 uncomfortable making a report, or, three, they
9 thought the report would not be kept
10 confidential.

11 On the 27th of June, the full panel
12 also heard of reasons from the National Crime
13 Victimization Survey of why people don't report
14 so they can compare. And as I recall, the No. 1
15 reason that non-military victims do not report is
16 they fear reprisal from the offender.

17 So, there is that comparison for you
18 if you --

19 MEMBER ANDERSON: In some ways, I
20 think, Colonel Ham, that is so important --

21 COL HAM: Yes.

22 MEMBER ANDERSON: -- that we may want

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1 to start the section on the reporting that these
2 are the background reasons why people choose and
3 not choose to report in the civilian world
4 generally and, specifically, we have some
5 evidence in the military world as well.

6 COL HAM: But that is what you're
7 talking about?

8 MEMBER ANDERSON: That's exactly
9 right. I think the subtlety of what it means
10 when you say, you know, these are categories,
11 right, it's a survey, so check a box, and those
12 categories mask a lot of subtlety. But the
13 testimony that we received provides further
14 subtlety to what it means when someone says, "I
15 thought it was a private matter" or "I didn't
16 want anyone to know." Right? What could that
17 mean? Well, that could mean reprisals. That
18 could mean, you know, any number of other things.

19 And so, that provides us with the
20 background against which people make decisions
21 about whether or not to make restricted
22 reportings and unrestricted reportings.

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1 So, I think that would be a great
2 place --

3 CHAIRPERSON FERNANDEZ: But in some
4 ways --

5 MEMBER ANDERSON: -- I mean, just
6 structurally, I think that would be a great place
7 to start the section and would capture a lot of
8 the concerns that I think I articulated and you
9 were trying to put into the materials.

10 CHAIRPERSON FERNANDEZ: Well, and in
11 some ways, if you are looking about order and
12 structure, it sounds like we should have the
13 reporting before we talk about actual services.

14 MEMBER MARQUARDT: Absolutely. That's
15 what I was thinking. The reporting section
16 should go upfront. It should be first.

17 CHAIRPERSON FERNANDEZ: It should go
18 upfront because, then, we can also talk about
19 lack of services easier because you're talking
20 about that category that never -

21 MEMBER MARQUARDT: Exactly.

22 CHAIRPERSON FERNANDEZ: -- we only

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1 provide services for the people that we know
2 about.

3 MEMBER ANDERSON: And some services
4 only come for unrestricted --

5 CHAIRPERSON FERNANDEZ: Right.

6 MEMBER ANDERSON: Which makes sense,
7 but, you know, these are different --

8 CHAIRPERSON FERNANDEZ: That is an
9 area that we could end up talking about. You've
10 got all these people out there. If your largest
11 percentage of victims are ones that never report,
12 then in some ways there is a category of services
13 that we need to think about, so that we can
14 somehow access those individuals and, then,
15 ultimately, hopefully, get them to report, if
16 that is their goal.

17 COL HAM: I guess the final thing to
18 add from that, I just reviewed it again, the 27
19 June. It was Dr. Lynn Addington who provided
20 that presentation from American University.

21 The numbers of non-reporting female
22 sexual assault victims are almost exactly the

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1 same in the civilian world as in the military
2 world. I think it was 66 percent in the
3 military, 64 percent in the civilian.

4 MEMBER ANDERSON: Which lends some
5 credibility, I think, to us reviewing the random
6 sample surveys of the civilian population about
7 why you don't report and, then, talking about the
8 surveys of the military population, because they
9 are the same percentage. So, that is helpful.

10 So, maybe we're thinking about the
11 structure being about concerns, reporting, and,
12 then, services and victims' rights, because
13 victims' rights kick in once the --

14 CHAIRPERSON FERNANDEZ: You don't have
15 a right unless you report. So, in some ways, you
16 are going like this.

17 MEMBER HOLTZMAN: It is like the tree
18 falling in the wilderness with no one present.

19 MEMBER ANDERSON: Could you say that
20 again, Liz? We didn't hear it.

21 MEMBER HOLTZMAN: I said, putting the
22 victims' right last, you know, because the victim

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1 doesn't have a right unless she or he reports it,
2 it is a little a very tricky philosophical
3 question. It is like the tree falling in the
4 wilderness with no one there to hear it. Does it
5 make a sound?

6 MEMBER ANDERSON: We should point that
7 out.

8 CHAIRPERSON FERNANDEZ: Well, yes and
9 no. I mean --

10 MEMBER HOLTZMAN: I mean, there are
11 rights for victims. I mean, the fact that the
12 victim at the moment doesn't report doesn't mean
13 that he or she doesn't have a right, an inherent
14 right, and that will in some way at some point be
15 expressed in claims. That's all I'm saying.

16 Anyway, I don't know or care about the
17 order. I think we should just get this stuff.
18 The order could change at any time, too.

19 MEMBER MARQUARDT: I didn't see
20 anything in the outline about going to a SANE
21 person to do an examination. And does that
22 trigger some other kind of repercussions? I

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1 mean, even if you don't remember, if you go to
2 see SANE for an examination, does that
3 automatically put you in the system?

4 MEMBER ANDERSON: I thought I saw SANE
5 in the outline.

6 MEMBER MARQUARDT: There is something
7 in the outline. It is D --

8 MEMBER ANDERSON: Yes, it is D --

9 MEMBER MARQUARDT: It is D.i.1,
10 Medical Treatment.

11 COL HAM: You can make a restricted
12 report to medical personnel.

13 CDR. KING: On page -- what is it?

14 MEMBER MARQUARDT: Yes, I've got it
15 here.

16 CDR. KING: One of the things, a lot
17 of the same issues are going to be discussed by
18 the Comparative Services Subcommittee. I know
19 they have done a lot of it.

20 MEMBER MARQUARDT: Okay.

21 CDR. KING: Because they are
22 evaluating the types and the quality of the SANES

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1 and the quality of the place.

2 One of the things I think that you
3 might get to look at that a little bit is when
4 you go to some of the multidisciplinary centers
5 or something where they include the SANE there,
6 so that you can look at the quality of services,
7 at least for the victims who get the examination.
8 Like, is it in a safe place? Is it in a place
9 that they are comfortable going to that gives
10 them supportive services at the time?

11 So, that's what at least I was
12 thinking, not necessarily, you know, if there is
13 a report made, but I think that is pretty clear
14 in the regulations, that if you have a restricted
15 report, the same report is kept, but it is not
16 given to anybody else unless you change your
17 report. I think you heard some testimony on that
18 at a November hearing.

19 MEMBER MARQUARDT: We saw where they
20 went into a building that identified them as
21 going in for an examination. You know, if there
22 is a particular location where you go, everybody

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1 would you go in.

2 CDR. KING: Right, and that is kind of
3 what I would think we would want to talk about,
4 is more like that --

5 MEMBER MARQUARDT: Right.

6 CDR. KING: -- not necessarily the
7 quality of the service.

8 MEMBER MARQUARDT: Yes. No, I
9 wasn't --

10 CDR. KING: You know, the quality of
11 the exam, the Comparative Services are looking at
12 that, I know.

13 MEMBER MARQUARDT: Right.

14 MEMBER ANDERSON: Yes, one of the big-
15 picture takeaways that I had, at least -- and
16 maybe I am getting into deliberations, but are we
17 still trying to get through the outline or are we
18 done getting through the outline?

19 (Laughter.)

20 CHAIRPERSON FERNANDEZ: I think we
21 finally got through the outline.

22 MEMBER ANDERSON: Okay, okay. One of

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1 the big-picture takeaways that I felt that, after
2 seeing so much, is that where the military has
3 acted, it has done a very good job in terms of
4 delivering services. There is a lot of good-
5 faith work that is being done across the
6 different services to support those who choose to
7 report. There are things that can be done better
8 that we need to talk about. But there is a
9 tremendous good-faith effort on the part of folks
10 to try to response to this.

11 Now we were seeing Lackland, which is
12 going to be a model, one hopes, a model
13 installation on these issues. And it is.

14 But I think, for me, one of the
15 questions is, well, what is the sustainability of
16 that positive effort? How deep does it reach
17 throughout the services and in non-model military
18 installations?

19 CHAIRPERSON FERNANDEZ: Does that go
20 under the resources section, the cost of
21 resources?

22 MEMBER ANDERSON: Yes.

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1 CHAIRPERSON FERNANDEZ: Because I was
2 concerned about that, too.

3 MEMBER ANDERSON: Well, that's why I
4 flagged that, is sort of cost over time and
5 potential for commitment over time. Because I
6 think where there is a focused energy, the
7 military can do anything.

8 CHAIRPERSON FERNANDEZ: Yes, because
9 the cost in resources is only under the special
10 victims counsel. I think we need to look at cost
11 of resources overall on victim services.

12 CDR. KING: Yes, I don't think we
13 included that, but in the report we shouldn't
14 forget to add that.

15 MS. CARSON: Yes, we did put the RFI
16 out to get the information.

17 CDR. KING: Right. So, the rest of
18 the information is just not in the outline.

19 CHAIRPERSON FERNANDEZ: I think maybe
20 after six legislative initiatives, it is a
21 general cost of resources. And there is the
22 spread of -- what is the word I'm looking for? --

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1 MEMBER ANDERSON: Distribution?

2 CHAIRPERSON FERNANDEZ: -- the
3 distribution, yes. More than distribution, it's
4 that it is present uniformly and there is equal
5 access. If you are at a military base in
6 Lackland or you are in the military based who
7 knows where, that you have the same kind of
8 access. Because, if not, you're making tiers of
9 victims.

10 CDR. KING: I think one of the things
11 -- and this is just my opinion -- but one of the
12 things the military has a problem with, or the
13 way that I have seen them do it, is they have a
14 standard, that this is a basic standard, and that
15 everybody has to meet it. So, if someone is on a
16 ship in the Indian Island, they're going to at
17 least have somebody who is qualified as a basic
18 level, like, for instance, to do the SAFE exams.

19 CHAIRPERSON FERNANDEZ: Right.

20 CDR. KING: They don't have nurses
21 there. They have forensic examiners, so that
22 they can have them available. Now that might not

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1 be exactly the same as someone who works at a big
2 hospital where they have, obviously, other
3 services or Joint Base Lewis McChord, where they
4 have a multidisciplinary center and they can put
5 them all together. But I think that is why they
6 say this is the minimum or this is the standard
7 that everybody has to meet, and then, hopefully,
8 many places where there's more people doing it --

9 MEMBER ANDERSON: It adjusts to the
10 circumstance.

11 CDR. KING: Right.

12 CHAIRPERSON FERNANDEZ: I mean, I
13 think that is fine, but I think a declaration
14 that that needs to be out there, I don't think
15 that that is out there now, and the NDAA I doubt
16 addresses that.

17 COL HAM: The NDAA addresses one of
18 the issues of SANE and the different ways that
19 you have seen installations handle SANE, either
20 contracting --

21 MEMBER CASSARA: Could I get whoever
22 is speaking to speak up, please?

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1 COL HAM: Sorry.

2 MEMBER CASSARA: That's okay.

3 COL HAM: Mr. Cassara, this is Colonel
4 Ham.

5 The NDAA 2014 deals with SANE nurses
6 in that it requires every installation that has a
7 24/7 emergency room to have a qualified SANE.
8 How that will work out is to be seen.

9 CDR. KING: We are handing out a
10 summary of the NDAA provisions that Julie brought
11 with her. She also emailed it to everybody on
12 the phone, I believe. So, if you don't have it,
13 can you let us know? Just since we are
14 discussion NDAA provisions, that gives you a copy
15 of it.

16 MEMBER CASSARA: I think I've got it.
17 When did it go out?

18 CDR. KING: She just sent it out a few
19 minutes ago.

20 MEMBER CASSARA: Oh, okay. I'll let
21 you know.

22 CDR. KING: Yes, you had it before,

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1 but we just passed it out again here. So, I
2 wanted to make sure all the people on the phone
3 had received it, had it available somewhere.

4 MEMBER ANDERSON: So, structurally, it
5 sounds like there needs to be something, maybe
6 after legislative initiatives, that talks about,
7 to the extent that we have information from the
8 various services, about cost over time, the
9 dedication of resources over time, and what it
10 will take to continue the high level of resources
11 that is being delivered today relative to what it
12 has been historically.

13 CHAIRPERSON FERNANDEZ: I know that we
14 talked more -- yes, and how that ties to the
15 assessment of the actual services.

16 MEMBER ANDERSON: Right.

17 CHAIRPERSON FERNANDEZ: So, it is sort
18 of like it should right after legislative
19 initiatives. There should be a link. If we see
20 that these things are working, then they should
21 be --

22 MEMBER ANDERSON: Have we talked about

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1 legislative initiatives? That seems slightly --
2 I don't know if it is -- it seems like it might
3 be slightly beyond our scope. Have we
4 deliberated on current legislative initiatives
5 that have not passed?

6 COL HAM: Of course, there were a
7 whole lot more when our Committee was formed.

8 MEMBER ANDERSON: Right.

9 COL HAM: There are two proposals
10 pending now, I believe, still. There may be
11 three. But I'll tell you what all three are.
12 There's Senator Gillibrand's --

13 MEMBER ANDERSON: Right.

14 COL HAM: -- bill on the convening
15 authority.

16 MEMBER ANDERSON: That is mostly just
17 about the convening authority.

18 COL HAM: Correct. Right.

19 MEMBER ANDERSON: Okay. So, that is
20 not our separate --

21 COL HAM: Yes.

22 MEMBER ANDERSON: Okay. Good.

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1 COL HAM: There is another bill
2 Senator McCaskill has offered that does have some
3 potential areas for victims' services that
4 supplements everything that already passed in the
5 NDAA.

6 And then, there is one in the House by
7 Representative -- I'm drawing a blank, the STOP
8 Act -- Speier, which is also a convening
9 authority, "who prosecutes" issue.

10 MEMBER ANDERSON: Okay.

11 MEMBER JONES: Not related, then, in
12 the services?

13 COL HAM: Right. Correct.

14 MEMBER JONES: So, it sounds like the
15 McCaskill bill --

16 MEMBER ANDERSON: Have you all already
17 circulated that? Probably you have.

18 COL HAM: We just got it. We just got
19 it the other day, and it was sent to -- yes, I
20 think you did get it. It was sent to all the
21 panel members and the Branch. We sent it to
22 everybody.

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1 MEMBER ANDERSON: That was recent.

2 COL HAM: Last week.

3 MEMBER ANDERSON: Okay. Good.

4 CHAIRPERSON FERNANDEZ: I am almost
5 thinking that there should be actually
6 reevaluation, you know, assessing the
7 effectiveness of the proposed legislation, but
8 more the -- I think that this is what we were
9 talking on the phone last week about. I think,
10 Liz, you brought this up, the assessment, the
11 effectiveness of the programs.

12 MEMBER HOLTZMAN: Right.

13 CHAIRPERSON FERNANDEZ: Then, there
14 should be a section on cost and resources and,
15 then, maybe a section on pending legislative
16 initiatives on victims' services.

17 MEMBER ANDERSON: Let me make a
18 suggestion --

19 CHAIRPERSON FERNANDEZ: Okay.

20 MEMBER ANDERSON: -- about pending
21 legislative initiatives because it sounds like it
22 is just the McCaskill bill that is within the

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1 jurisdiction of this Subcommittee.

2 And I'm thinking that we may want to
3 take the substantive recommendations in that bill
4 and simply incorporate them, rather than having a
5 separate section, just incorporate them where
6 they belong in our own outline.

7 I think I am a little worried about
8 the density of this material. Of course,
9 structurally, we will solve all of those problems
10 with drafting wisdom and move recommendations and
11 key findings to the beginning. But this is
12 already, at 26 pages in very preliminary work,
13 very dense material to get through.

14 So, since it is just one bill, maybe
15 we could just incorporate that stuff in the
16 document where it applies in footnotes, you know,
17 rather than spend a lot of time on it.

18 MEMBER MARQUARDT: One thing that
19 occurs to me, that all of these programs are
20 dependent on leadership, and at all levels of all
21 of the military commands. And so, the education
22 of the leadership on a continuing basis is very

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1 necessary. I am told, not through little
2 internet kind of things where you check boxes,
3 but one-on-one leadership all the way down the
4 command. So, I don't know where we emphasize
5 that, but I think that is one of the most
6 important things that we can do.

7 MEMBER JONES: I was just going to say
8 that the role of the Commander, it is really is
9 two mandates. The one, of course, is the
10 convening authority issue, but the other one is
11 what should Commanders be doing in setting the
12 tone from the top and being held accountable and
13 training, both the training they get and the
14 training they give all the way from the top to
15 the bottom of the chain of command, and, of
16 course, under the chain of command.

17 But that is all a section that or the
18 second part of what we have begun to look at,
19 especially accountability, for instance.

20 MEMBER MARQUARDT: Yes, but maybe we
21 could make a statement at the very beginning of
22 our report --

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1 MEMBER JONES: Oh, sure.

2 MEMBER MARQUARDT: -- that that is a
3 necessary thing that will drive the whole
4 program.

5 MEMBER JONES: Right.

6 MEMBER ANDERSON: Well, there is also
7 a way in which I think that it connects with
8 victims' concern. Because the ability to change
9 the culture, you know, the cultural change that
10 is necessary for more people to come forward is
11 so tied to what incentives victims have when they
12 are assaulted, about whether or not to report.

13 So, I think it connects with where we
14 already have decided we want to start, which is,
15 what are the concerns, why victims do and don't
16 report in the civilian world and in the military
17 world.

18 MEMBER JONES: And I think our point
19 is that, basically, in terms of prevention,
20 making sure these services are delivered and
21 setting the right climate; Commanders are
22 essential in doing all this, if that is your --

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1 MEMBER MARQUARDT: Yes.

2 MEMBER JONES: I think we are looking
3 at it, but, of course, that is a perfectly-
4 relevant statement to be made in this report. I
5 couldn't agree more.

6 MEMBER ANDERSON: There is this
7 interesting thing that happened at Lackland,
8 which I thought was just a fascinating set of
9 hearings that we had, where we talked mostly
10 about prevention, which is something that this
11 draft actually doesn't conceptualize. It doesn't
12 conceptualize a section on prevention because it
13 is about services after the fact.

14 But, in fact, prevention is key to
15 preventing, you know, to stopping the
16 victimization before it happens. And the change
17 in culture is so important.

18 And talking to the folks who
19 functioned as drill sergeants -- I apologize, I
20 don't know the name of the drill sergeant in the
21 Air Force; it is a different word -- MTI, that's
22 right. Right. But hearing from them about the

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1 ways that they seek to protect the recruits,
2 train the recruits, and then, the fear that they
3 have when the training ends, and they are going
4 into a military culture that is not as rigorous
5 and as protected, I thought that was fascinating.
6 Didn't you?

7 MEMBER MARQUARDT: I did. And, of
8 course, lunch with the recruits was great.

9 MEMBER ANDERSON: Yes, yes. And
10 talking to them about the ways in which I think
11 they are very protected at Lackland.

12 MEMBER MARQUARDT: But the command is
13 all important there.

14 MEMBER ANDERSON: Yes.

15 CDR. KING: So, one of the things I
16 just want to say is the outline we did was kind
17 of related to the charter and the scope of what
18 we have to do, which is to assess the "adequacy
19 of the military systems and proceedings to
20 support and protect victims in all phases".

21 So, that's why, you know, you may
22 decide that some of the rest of it is important

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1 and you want to -- and certainly, I think maybe
2 we can coordinate between the command services
3 and the basic services.

4 MEMBER JONES: Sure. Yes, this isn't
5 a situation of anybody stepping on anybody's
6 toes.

7 CDR. KING: No.

8 MEMBER JONES: This is a very relevant
9 statement.

10 CDR. KING: Right.

11 MEMBER ANDERSON: Yes, it is just a
12 different angle.

13 CDR. KING: So, that is partly why
14 that is not in here. So, we need you to tell us
15 if you really want those things to work on
16 besides the things we have to. That's why
17 they're not in there, because we took what we
18 have to do.

19 MEMBER ANDERSON: Directly from the
20 directives.

21 CDR. KING: Right. Exactly.

22 MS. SAUNDERS: And a lot of the

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1 prevention piece, though, I think has been
2 divided out to the role of the Commander.

3 CDR. KING: Right.

4 MS. SAUNDERS: Because it is the
5 Commander's role in educating and the preventive
6 piece. So, I think a lot of that has been
7 allocated to --

8 CDR. KING: And certainly, it is a
9 concern of victims, obviously.

10 MS. SAUNDERS: Yes. Right.

11 CDR. KING: Or potential victims.

12 MEMBER JONES: And I think that a key
13 part of the report, let alone the Subcommittee
14 report, is definitely what you were talking about
15 earlier, which is what is going on in civilian
16 society reporting/underreporting and what's going
17 in the military, reasons, et cetera.

18 And I don't know, because I haven't
19 been attentive to the Comparative Systems
20 Committee, but I think that is something that
21 they are delving into. It doesn't mean all of
22 this information is available to everybody. I

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1 think any comments or commentary that you may
2 want to make as you go along that may seem
3 outside your framework, I wouldn't worry about
4 it. Because when we put these together, it is
5 going to be one report.

6 I think, with a background on, for
7 instance, what I was just talking about, the
8 comparisons between the civilian and the military
9 victim, that might be at the very beginning of
10 this report as necessary background that we will
11 start with. And there is a lot of information
12 that we started getting way back on June 27th.
13 Put whatever you want in here that makes sense
14 for you in terms of your background, and we can
15 put them all together and make one report. And a
16 comment in yours that reflects a section on this
17 comparison will work perfectly, it seems to me.

18 MEMBER HOLTZMAN: Can I just follow up
19 on what Dean Anderson said about prevention? I
20 don't know exactly what you were referring to
21 because we broke up into different groups, but I
22 do think that some of what you are referring to

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1 is, for example, how they configured interview
2 rooms so that they were entirely private, how
3 they had monitors all over the place.

4 MEMBER ANDERSON: At Lackland.

5 MEMBER HOLTZMAN: Yes, at Lackland.
6 So, I think that that is a perfectly appropriate
7 issue to address because I am not sure we would
8 even focus on that in the role of the Commander
9 Subcommittee. So, I would just suggest that some
10 attention -- I don't know a whole lot -- but some
11 attention should be devoted to this. I don't
12 know the extent to which this is ad hoc or how
13 much thought has gone into it, and whether this
14 is only at Lackland or if they are doing these
15 kinds of things elsewhere. So, it probably is
16 worth some further consideration.

17 MEMBER ANDERSON: Great.

18 CHAIRPERSON FERNANDEZ: Liz, the other
19 subject that you have brought up several times,
20 which is the fact that we have seen that so many
21 individuals that have been victimized in the
22 civilian world then come into the military and

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1 they get victimized again. As far as a
2 prevention method, somehow identifying without,
3 again, you don't want to stigmatize, but somehow
4 providing early services to people who might be
5 more vulnerable to being attacked.

6 MEMBER HOLTZMAN: Right. Right.
7 Thank you so much for remembering that.

8 I do think that is a prevention issue.
9 That may be one way of dealing with it. But I
10 just saw in the White House report that has been
11 circulated to the Subcommittee on the role of the
12 Commander that, if you look at the statistics
13 also for victimization in the civilian world, it
14 is also a predictor.

15 CHAIRPERSON FERNANDEZ: Oh, yes, it is
16 completely a predictor.

17 MEMBER HOLTZMAN: So, somehow the
18 military, if they could have what I would call
19 early intervention -- and, of course, this is
20 people not necessarily reporting when they first
21 come in -- trying to identify these people and
22 provide services, although I don't know that we

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1 know what kind of services would be good, but
2 that could help.

3 COL HAM: One thing that might play
4 into that, Representative Holtzman, is the
5 information that has come out on people who were
6 victims before they entered service now reporting
7 that they are being trained on sexual assault and
8 realizing either that they were sexually
9 assaulted and they didn't understand that what
10 happened to them was a crime or that it convinces
11 them to come forward. That might be one issue to
12 address as something -- I don't know -- to
13 encourage somehow or monitor.

14 CHAIRPERSON FERNANDEZ: I like the way
15 that you are calling it an early intervention
16 because we are not calling it prevention, because
17 in some ways the act has already happened.

18 MEMBER ANDERSON: But we are
19 preventing in the future perhaps --

20 MEMBER HOLTZMAN: For victimization.

21 MEMBER ANDERSON: Right.

22 MEMBER JONES: I thought I heard some

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1 testimony -- and maybe everybody already knows
2 this -- that when someone does go in and report
3 previous sexual assaults not in the military, at
4 whatever point since they've joined, not having
5 occurred in the military, that they are
6 immediately offered services.

7 CDR. KING: They are. I think they
8 are talking about people who don't necessarily
9 self-identify as being a prior victim of rape --

10 MEMBER JONES: Right, right.

11 CDR. KING: -- who just to identify
12 them, and perhaps provide, figure out what kind
13 of services or support they might need --

14 MEMBER JONES: Or trying to detect who
15 they are without their own voluntary --

16 CDR. KING: Yes, or figure out what
17 they need before they ask for anything,
18 essentially.

19 MEMBER ANDERSON: Right. Because
20 appropriate screening questions can identify
21 people who don't themselves identify as "rape
22 victim," quotations around those words, but have

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1 been subjected to non-consensual sexual relations
2 of any number of ways in their life heretofore.
3 Sensitive questions upon admission can identify
4 those people, and we may be able to provide or
5 recommend that the services provide some kind of
6 response to that identification of prior
7 victimization.

8 CHAIRPERSON FERNANDEZ: In addition to
9 what Colonel Ham said, which is sort of when
10 people go, "Oh, these people care that this
11 happened to me" -- so, the more education you get
12 out there, also, so you can have a screening, and
13 that is a very individual thing. But, also, you
14 start hearing about this and you go, "Oh, that
15 did count" and "Oh, these people are willing to
16 give me help for this," I think all those things
17 are very important in that early-intervention
18 phase.

19 MEMBER HOLTZMAN: Yes, well, that is
20 one of the questions I have that is raised from
21 this conversation, which is, is it clear from the
22 military's materials that they publicize about,

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1 if you are a victim of a sexual assault or sexual
2 violence, is it clear that this applied to pre-
3 military life? And should those messages be, can
4 those messages be improved, so that it does
5 elicit more about people who have been victimized
6 previously, particularly if it makes them so
7 vulnerable?

8 COL HAM: Some information that you
9 have, Representative Holtzman, came from Colonel
10 Metzler in a briefing to the Commander
11 Subcommittee that is available to everybody. Oh,
12 I'm sorry, from General Patton, actually, at a
13 public meeting on November 7th, that the increase
14 in reporting for FY13 and why their initial
15 assessment didn't mean increased assaults,
16 although that is yet to be seen --

17 MEMBER HOLTZMAN: Right.

18 COL HAM: -- because they were
19 tracking the number of those reports that refer
20 to pre-service assault.

21 MEMBER HOLTZMAN: Right, but maybe I
22 didn't make my question clear. Are the materials

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1 that the military circulates, publicizes about,
2 are you a victim; you know, please report; are
3 you a victim; have you been victimized -- is it
4 clear that the military is also soliciting pre-
5 military reporting or reporting about pre-
6 military assault when they circulate this stuff?
7 Because maybe if they made it clear in these
8 materials, then more people would come forward
9 about prior reports.

10 Some people might say, "Well, what
11 does that have to do with the military? They're
12 not going to give me healthcare. They're not
13 going to give me anything? So, why should I
14 report?" I just don't know what the answer is.

15 CHAIRPERSON FERNANDEZ: A simple
16 sentence that says, if you've been assaulted in
17 the military or before you entered the
18 military -- I mean, that is an awkward sentence.

19 MEMBER HOLTZMAN: Right.

20 CHAIRPERSON FERNANDEZ: But something
21 like that.

22 MEMBER HOLTZMAN: Right. I don't know

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1 what the materials are that the military is
2 sending out. But one of the ways that they could
3 get at this other problem that you raise and that
4 I have raised is by making sure that they
5 publicize the availability of services for those
6 victims as a way of reporting it. And that would
7 also help them develop mechanisms -- I don't know
8 how they good they are -- to help strengthen and
9 support the victims, so there is no
10 revictimization.

11 CHAIRPERSON FERNANDEZ: Could all this
12 fall into sort of the category that Dean Anderson
13 was talking about before, about people who don't
14 come forward, and it is almost like a subcategory
15 under there of people who have been abused
16 outside of the military and how that impacts on
17 them being more likely to be victimized? I'm
18 just thinking about structure, where we could put
19 them and it would flow.

20 And part, then, of what you are
21 talking about, Liz, is, then, how do you get
22 those people to come forward and report? But the

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1 first thing they need to do is identify that the
2 military actually will give them services because
3 they may not --

4 MEMBER HOLTZMAN: Well, right.

5 CHAIRPERSON FERNANDEZ: Right.

6 MEMBER HOLTZMAN: And also, what are
7 those services? Do we even know? Do
8 psychologists know? Do mental health people know
9 what services give to strengthen somebody and
10 support somebody in that circumstance to prevent
11 revictimization? I don't even know. I mean, I
12 don't know about that. I don't know what the
13 answer is.

14 But the other question about that
15 would be, not only encouraging people to come
16 forward, but there might be some way in which the
17 military might routinely, after your screening,
18 you know, when you're accepted into the military,
19 they may just have a questionnaire as part of
20 your normal health -- I don't know; I guess you
21 could fill out some health stuff. I mean, maybe
22 as part of the general health questionnaire, that

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1 question is asked in a way that is non-
2 threatening. And so, that allows the military to
3 identify and, then, provide services.

4 MEMBER MARQUARDT: You could also ask
5 if you have ever been sexually assaulted and,
6 then, follow it up with a statement that the
7 military has services available for you.

8 MEMBER HOLTZMAN: Right. Right, but
9 not necessarily the relying on a person to come
10 forward with that, but as part of the routine,
11 standard mental, I mean health screening that
12 goes on in the military. But that might produce
13 a lot of people and, then, require a lot of
14 services. I don't know the answer to that.

15 CHAIRPERSON FERNANDEZ: One in four.
16 One in four women.

17 COL HAM: You know, everyone is who is
18 up a medical appointment, they ask you every
19 single time, they ask you if you have any
20 concerns about assault or abuse.

21 MEMBER ANDERSON: Domestic violence
22 comes up all the time.

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1 MEMBER HOLTZMAN: But is it an
2 explicit question --

3 COL HAM: Yes.

4 MEMBER HOLTZMAN: -- not about
5 concerns, but "Have you ever been the victim
6 of...?"

7 MS. SAUNDERS: I don't think that is
8 the case in the military. Maybe for the initial
9 screening --

10 MEMBER HOLTZMAN: I couldn't hear the
11 answer.

12 MS. SAUNDERS: I'm sorry,
13 Representative Holtzman. I was just saying I
14 think what Colonel Ham was talking about was
15 routine military medical appointments in which
16 domestic violence is often asked about, but I
17 don't think they typically will ask specifically
18 about sexual assault, but some of the initial
19 screening they may.

20 MEMBER HOLTZMAN: Well, we should find
21 out about that.

22 MEMBER ANDERSON: And possibly make

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1 recommendations about how the questions might be
2 framed. I have certainly at routine medical
3 examinations been asked questions that I thought,
4 "That was a poor question and will not elicit
5 much, I would imagine."

6 (Laughter.)

7 I never thought, "You know, that was
8 a good, subtle question. That is going to
9 capture quite a bit."

10 Again, I think in thinking about how
11 to relate to people who don't themselves identify
12 with the word "victim," I think that is
13 important.

14 MEMBER HOLTZMAN: Yes.

15 MEMBER GARVIN: I am sorry. This is
16 Meg. I don't think we're in deliberations yet;
17 I'm not sure if we're still on the outline or
18 deliberations.

19 But my only concern with that question
20 is we have to put it in context with everything
21 else, such as if they are subsequently sexually
22 assaulted in the military, making sure that the

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1 answer to that initial question is 100-percent
2 protected, so it doesn't come up in discovery
3 later.

4 MEMBER ANDERSON: So, that the initial
5 medical health screening records are confidential
6 or --

7 MEMBER GARVIN: Yes, absolutely
8 privileged, not just confidential. Absolutely
9 privileged and cannot be used or discovered
10 subsequently. Because the first time you have
11 someone who, then, it is used subsequently,
12 everyone answers the question again later.

13 MEMBER MARQUARDT: That is a
14 collateral issue that we need to mention.

15 CDR. KING: I think you could mention
16 it, but I think we would have a hard time finding
17 the language that courts would uphold absolutely
18 all the time on what records are absolutely 100
19 percent not available to the defense.

20 MEMBER JONES: Yes, I think we have to
21 flag it as an issue --

22 CDR. KING: Yes.

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1 MEMBER JONES: -- that we couldn't run
2 it to the ground, you know.

3 MEMBER GARVIN: Right. I am just
4 recommending that we flag it. So that we come
5 across this thing as best practice, ask the
6 question without flagging -- it is really best
7 practice, ask the question, if it is also
8 protected information.

9 CDR. KING: Right.

10 MEMBER ANDERSON: Aren't medical
11 records sort of presumptively confidential and
12 privileged information?

13 COL HAM: Protected under HIPAA, but
14 typical procedure in the military is, if there is
15 a reason to believe they may contain relevant
16 information, the judge examines them in camera
17 and determines what's really --

18 MEMBER HOLTZMAN: Isn't this a 412
19 issue? What law would be relevant? It's hard to
20 see how it would be relevant. I mean, you could
21 say something is not relevant to anything, but,
22 anyway, that is a good point.

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1 MEMBER MARQUARDT: Well, once a
2 victim, always a victim, and they could say that.

3 CHAIRPERSON FERNANDEZ: The reason why
4 you were assaulted is because you were a victim
5 before.

6 MEMBER ANDERSON: Well, you put
7 yourself in those situations.

8 CHAIRPERSON FERNANDEZ: I think that
9 is a tactic there, Bill?

10 MEMBER CASSARA: Look, I will tell you
11 that I just had a case in which an alleged
12 victim's pre-service record indicated that she
13 had admitted to a counselor that she had
14 fabricated an allegation of sexual assault
15 previously.

16 CHAIRPERSON FERNANDEZ: Yes, but that
17 is different. That's an actual she's a liar.

18 MEMBER CASSARA: Well, but the only
19 way that -- I mean, they were in her medical
20 records and her pre-service records. And so, you
21 know, again, I think we want to tread a little
22 bit carefully about should these records be

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1 completely off-limits as opposed to having a
2 military judge review them and determine whether
3 or not there is any information in them that
4 could be potentially exculpatory.

5 But, once again, I get to play the
6 role of the contrary input.

7 COL HAM: I had just started to say
8 the same thing, Bill. That's generally what the
9 judge is looking for.

10 MEMBER CASSARA: Yes.

11 COL HAM: And that is generally what
12 I have observed on appeal as well in appellate
13 records, because they are sealed and, then,
14 opened to examine on appeal to see if the judge
15 made the right decision.

16 MEMBER CASSARA: Right. I have a case
17 right now where a case was reversed on appeal
18 last year. Now we are doing a rehearing, and the
19 judge has denied us access to the confidential
20 material, you know, to the 412 appealed material
21 from the trial before.

22 And, you know, I have no qualms with

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1 that. I mean, if the military judge has looked
2 at them and said there's nothing in here that
3 would be relevant to the defense, I'm okay with
4 that. But I don't want to get to a position
5 where we are saying, under no circumstances would
6 an alleged victim of sexual assault, prior
7 military records or statement on a form that he
8 or she had or had not been a victim before, would
9 be off-limits to the defense. I just don't think
10 you can do that.

11 MEMBER JONES: I don't think we were
12 going there.

13 MEMBER CASSARA: Okay.

14 MEMBER JONES: I think we were just
15 going to cite the issue.

16 MEMBER CASSARA: And I apologize.

17 MEMBER JONES: No, no, no.

18 CHAIRPERSON FERNANDEZ: No, no.
19 That's fair. That is why you're on the
20 Subcommittee, Bill.

21 MEMBER CASSARA: One of the other
22 things that I wanted to address sort of in a

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1 global approach to this issue is I think we also
2 need to look at the issue that, like it or not,
3 you know, years ago when the deployment to Iraq
4 and Afghanistan started up, a number of
5 pregnancies happened which enabled people to get
6 out of deployment.

7 And I think we have to keep cognizant
8 of the fact that there is still a Commander out
9 there who is trying to fight a war, and part of
10 the issue we run across is (A) false reporting
11 which would take somebody out of a deployment for
12 six months at a time or, even ever bit as
13 problematic, in my opinion, is somebody
14 truthfully reporting a sexual assault that may
15 have happened pre-service, post-service,
16 whatever, takes them out of the Commander's pool
17 of resources for deployment and in many ways
18 hurts that soldier's further career progression
19 because, as Colonel Ham or anybody else will tell
20 you, the number of deployments that you have been
21 on is a factor that is considered when you are
22 considered for promotion. And if you have been

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1 out of the deployment cycle because of a sexual
2 assault report, that is going hamper your career
3 progression.

4 So, I am not sure how we factor that
5 into any of this, but I think it is something we
6 do need to keep in the back of our minds as we go
7 forward.

8 CHAIRPERSON FERNANDEZ: Bill, frame
9 this a little bit for me. I get what the issue
10 is. You know, somebody is allegedly raped and,
11 then, they get pregnant. So, they can't get
12 deployed. No?

13 MEMBER CASSARA: Well, I was talking
14 about the pregnancy not in relationship to this
15 necessarily. I was using it just as a little bit
16 of backdrop. Before the Gulf War and before the
17 Iraq and Afghani wars, you know, a number of
18 women became pregnant, and lots of their
19 Commanders thought that they had done it
20 intentionally to get out of deployment.

21 Similarly -- I was using it as an
22 analogy -- you have to consider (A) the

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1 possibility of a false report to get out of a
2 deployment or (B) a legitimate report that gets
3 you out of deployment and hurts your career
4 progression.

5 And again, I don't have any answers
6 for that. I'm not sure how we even factor that
7 in. But I think it is something that we need to
8 keep in the back of our minds, is that there are
9 still Commanders out there who are trying to
10 fight wars. I think anybody that you talk to
11 that is in the field right now is going to tell
12 you the number of reports has spiked considerably
13 in the last year. I mean, I have talked to CID
14 and NCIS agents who said, "We're out of
15 manpower."

16 I mean, I've got a case right now
17 where the person investigating it is a borrowed
18 MP who is a private, who is a specialist who has
19 been in the Army four years, and he is the
20 primary investigator on a fairly-complex sexual
21 assault allegation because they just have no
22 other resources.

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1 And so, as we get further along into
2 this, I think we are going to run into a problem
3 where Commanders are going to say, "I'm running
4 out of soldiers," or Airmen or Marines, or
5 whatever the case may be.

6 And again, I don't have an answer for
7 it, but I think it is something we need to keep
8 in the back of our minds as we are deliberating
9 this: what effect does this have? Whether we
10 take a Commander out of the military justice
11 equation, whether we alter the Commander's
12 involvement in the military justice equation, the
13 bottom line of the military is still to fight
14 wars. And I think we have to keep readiness as
15 part of the equation, as we are looking into all
16 of this.

17 CHAIRPERSON FERNANDEZ: But this is
18 for the staff, too. If you report an assault,
19 are you automatically not deployed?

20 COL HAM: I can tell you, if you are
21 pregnant, you are redeployed if you are already
22 deployed and you don't deploy if you were set to

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1 deploy.

2 Bill has more on-the-ground knowledge
3 of what happens --

4 MEMBER CASSARA: Yes, this happens in
5 what we call CONUS. And CONUS is in the U.S. and
6 OCONUS is out of the U.S. If it happens in
7 CONUS, you're not going to deploy, both because
8 of the amount of treatment that is available
9 while you're CONUS and, two, the fact that the
10 trial is going to take place in CONUS, and
11 prosecutors, defense attorney, and SVCs need
12 access to witnesses.

13 If it happens OCONUS, my experience
14 lately has been that, if there is a short amount
15 of time left on the deployment, in all likelihood
16 everybody involved is going to be deployed back
17 stateside for counseling and for trial. If it
18 happens at the beginning of a deployment, then
19 they are more likely to stay down-range and the
20 process will play out there.

21 But, Michelle -- I think it was
22 Michelle that asked the question -- the short

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1 answer to your question is, if this happens while
2 you're in the states, you are not going to
3 deploy. And if there is going to be ongoing
4 mental health counseling and mental health
5 treatment, that could take you out of the
6 deployment cycle for a few years, depending on
7 the severity of your PTSD or whatever --

8 MEMBER ANDERSON: Well, in some ways,
9 that is one of the things that I was flagging
10 about kind of wanting to facilitate or the
11 relationship between reporting and someone's
12 eventual military career. And I think I only
13 flagged it vis-a-vis mental health records
14 because that is what came up in one of the
15 victim's testimony.

16 But this is something that I think we
17 should touch on just in the question of
18 consequences reporting. So, I think it should
19 come up.

20 CDR. KING: And he is correct,
21 especially for deployments, and that comes up
22 more, I think, in the Army and maybe the Air

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1 Force and the Navy. Some of our people at least
2 go on ships where there are still maybe not
3 mental health services, but there are major
4 overseas commands where they also have mental
5 health services.

6 So, any time you are being screened
7 for an overseas command of any kind like that,
8 they look at your medical records, see if you're
9 in counseling or you or your family members need
10 counseling services or medical services before
11 they would send you overseas. They don't send
12 people over who need those. So, that is one of
13 the issues.

14 And certainly, that could be one of
15 the unintended side effects of getting more
16 people to report and avail themselves of
17 services, is that maybe they wouldn't be eligible
18 for certain jobs overseas or on deployments or
19 something. And it is a lot for us to look into
20 because each service does it a little bit
21 different, but in some services and some
22 specialized fields, especially deployments are

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1 really important; others they may not be quite so
2 important. But it is certainly something to
3 think about as you look at ways to increase
4 reporting.

5 COL HAM: Mr. Cassara, there is a flip
6 side as well. What are the current policies you
7 are seeing on, if a spouse at home alleges an
8 assault, what happens to her spouse who is
9 deployed? Is he redeployed? Is he brought out?

10 MEMBER CASSARA: Yes, I have only seen
11 that happen a couple of times, Colonel Ham, but,
12 you know, in my experience, if you are saying,
13 you know, three months after an alleged sexual
14 assault, the spouse or potentially any victim
15 reports it, the service member is almost in all
16 likelihood going to be brought back here for
17 prosecution.

18 Because you are not going to deploy --
19 you are not going to send a civilian to
20 Afghanistan or Iraq to be a witness in a
21 prosecution of a service member. So, if you are
22 dealing with a civilian spouse or any civilian

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1 victim, I think in almost every circumstance that
2 service member is going to be taken out of
3 theater and brought back to the states for
4 prosecution.

5 COL HAM: I mean if the spouse is the
6 victim. I have seen a common motive to represent
7 cross-examination set of questions, that a spouse
8 alleges a sexual assault --

9 CHAIRPERSON FERNANDEZ: By her husband
10 or by somebody else?

11 COL HAM: By someone else. And the
12 motive to misrepresent cross-examination is your
13 husband came home because you alleged the sexual
14 assault. You got him out of the war zone.

15 MEMBER CASSARA: I misunderstood your
16 question.

17 COL HAM: Okay. Have you seen that?

18 MEMBER CASSARA: Yes. I think in that
19 circumstance the spouse is going to be redeployed
20 to be a support mechanism for the alleged victim.
21 And, yes, I think I am going to question that
22 alleged victim on that motive.

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1 Does that answer your question?

2 CHAIRPERSON FERNANDEZ: Yes, yes.

3 MEMBER CASSARA: Am I the bad guy
4 again?

5 CHAIRPERSON FERNANDEZ: No, no. No,
6 no, no. I think you bring all the things that we
7 need to look at. I think it is, again, if I am
8 ambitious and I'm raped, I am going to opt not to
9 report if it is going to stop me from moving up
10 the ranks.

11 MEMBER CASSARA: I think that is a
12 common concern that we need to address along with
13 the flip side of it, the risk of a false report
14 in order to get out of a deployment or moving up
15 the ranks, you know.

16 CHAIRPERSON FERNANDEZ: Yes, you suck
17 it up. That's what you are going to be thinking
18 in your head.

19 MEMBER CASSARA: And I don't want to
20 get too far off-track, but, you know, when we
21 have got a military force that is shrinking
22 considerably, I see people all the time saying,

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1 "Can I just get out of the military?" And the
2 answer is no. And the question is, does that
3 lead to false reporting? Because being a victim
4 of a sexual assault is a fairly -- it is not an
5 easy way; that is the wrong term -- but it will
6 in many circumstances lead to your being
7 separated, if that is what you want. Why a
8 Commander wouldn't just let somebody out of the
9 military instead of requiring them to report a
10 sexual assault, of course, is another question.

11 So, I think that goes hand-in-hand
12 with what Colonel is saying. It is troop
13 deployment, troop strength, it may not be the
14 purview of our Committee, and I realize it's not,
15 but I think it is something that at least has to
16 be in the back of the minds as we have these
17 discussions.

18 CHAIRPERSON FERNANDEZ: Again, I think
19 it is a good issue to flag. The issue that
20 Colonel Ham just brought up about your husband
21 has been deployed. You're at home. And so,
22 you're going to say, "I was assaulted." I don't

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1 know if this is a category of defenses that we
2 need to look at and, then, figure out how it
3 affects reporting or the provision of services.

4 I'm going to be thinking about all
5 these things. Let's presume I've been raped.
6 I'm going to be thinking, "Oh, are they going to
7 be thinking that I just want my husband to come
8 home?" Or "Are they going to be thinking I'm
9 doing this to get out of the service?" So, I
10 don't know where we tease some of those things
11 out, but I think it is worth --

12 MEMBER MARQUARDT: I think it is worth
13 talking about, but I'm not sure it fits in our
14 report.

15 MEMBER ANDERSON: It may be in
16 footnotes. I mean, I think the question of what
17 the incentives are for someone who -- you know,
18 our Committee is charged with assessing support
19 and protection services for victims, not for
20 being who lie about victimization.

21 Now there is no evidence that more
22 people lie who are associated with the military

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1 than in the civilian world. And there is no
2 evidence in the civilian world that more people
3 lie about rape than any other crime.

4 So, it could be that some of the
5 questions about what are the incentives for
6 someone who is lying show up at most in footnotes
7 to what we are doing, because it does seem to me
8 that our charge is about how to deal with those
9 who have been legitimately victimized and how the
10 military responds to them.

11 CDR. KING: Well, it is not only about
12 lying. It is about the other side; there are
13 consequences to the forces. Like the wife who
14 says she was raped, her husband comes home. That
15 is the loss of a military person and his overseas
16 deployment. So, that is a difficulty for the
17 military, regardless of whether it is true or
18 false. So, the fact that it may be a defense or
19 may be a false report, or whatever, is not
20 necessarily the only consequence. It is the
21 consequence to the military as we --

22 MEMBER JONES: Right, and it was good

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1 to hear that concept brought up. But, again, I
2 think I agree with Christel that it is not really
3 a provision of a service to a victim, and I think
4 it may be a footnote.

5 When we have a first draft of the
6 report, it may well be something we want to
7 comment on, but it doesn't go to this mission
8 that we have right now.

9 CHAIRPERSON FERNANDEZ: It is 11:55.

10 MEMBER CASSARA: Are we still on?

11 CHAIRPERSON FERNANDEZ: Oh, yes.

12 (Laughter.)

13 MEMBER CASSARA: Okay.

14 MEMBER JONES: Could I just suggest
15 one thing before we break for lunch? We might
16 have two minutes.

17 I was thinking, if we thought, and
18 especially since we do have Meg, that we could go
19 through the Crime Victims' Act part of this and
20 take that up right after lunch. And I was
21 thinking we could just go to page 21 and go to
22 the comparison that staff has put there for us,

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1 and there we go.

2 MEMBER ANDERSON: Okay. That sounds
3 good to me.

4 MEMBER JONES: Thank you.

5 (Whereupon, the foregoing matter went
6 off the record for lunch at 11:56 a.m. and went
7 back on the record at 12:40 p.m.)

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1 MEMBER JONES: Liz, I'm having
2 trouble. Are you there?

3 MEMBER HOLTZMAN: Yes, I'm here. Is
4 that better?

5 MEMBER JONES: Yes, that's great.

6 If we go to page 21, where the
7 comparisons are laid out between the NDAA, the
8 CVRA, and what was already DoD policy, I just
9 thought we would go down each one of the
10 provisions.

11 The first one is the right to be
12 reasonably protected from the accused. That was
13 always in a DoD directive. It is in the Crime
14 Victims' Act, the 18 USC 3771. And now, it has
15 been codified in the NDAA for 2014.

16 And I don't think that is
17 controversial, although I don't know if anyone
18 has any comment about it.

19 MEMBER MARQUARDT: I have a problem
20 with the word "reasonably". I think that the
21 victim has a right to be protected from the
22 person that perpetrated the crime. I think

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1 "reasonably" leaves a lot of leeway.

2 MEMBER JONES: I mean, I think that
3 could be a comment. I think we are going to see
4 "reasonable" a lot of places.

5 MEMBER MARQUARDT: I know, it is in a
6 lot of places, but I think it leaves a loophole
7 in the notice provisions, you know, reasonably
8 noticed. I just have problems with it.

9 CHAIRPERSON FERNANDEZ: What does that
10 mean in practicality, Meg, do you know, or
11 anybody else, for that matter?

12 MEMBER GARVIN: Well, it has been
13 litigated in some of the CVRA provisions, like
14 the right to be heard includes the reasonable
15 components. That was litigated whether it meant
16 in writing or orally, and it came down to mean it
17 is both at the discretion -- well, not discretion
18 -- at the choice of the victim.

19 So, you know, it was pretty heavily
20 debated when the CVRA was drafted, whether and
21 where to include "reasonably," for the very
22 reasons that were just stated. But the flip side

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1 is that, without it, it could be used to argue
2 that you have the right to your own guard
3 protecting you, right, if there is no limit on
4 it?

5 So, under the CVRA, the language was
6 put in there. And then, some of the legislative
7 history in the CVRA indicates that it is supposed
8 to tilt in favor of the victim's needs and wishes
9 and their articulation of what they need. And
10 that is used in litigation. But it is part of
11 the litigation out there, is what does it mean to
12 be reasonably protected.

13 COL HAM: The CRS, the Congressional
14 Research Service, publication on the Crime
15 Victims' Rights Act, says, "A court observed
16 that, regardless of what this right might entail
17 outside the bail context, it appears to add no
18 new substance to the protection of crime victims
19 afforded by the Bail Reform Act, which already
20 allows a court to order reasonable conditions of
21 release or the detention of accused defendant to
22 assure the safety of any person."

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1 MEMBER GARVIN: Yes, and I think that
2 was in the context of analyzing it just in terms
3 of release conditions.

4 MEMBER ANDERSON: I guess the
5 question, maybe we could tighten the question.
6 It seems to me that the question is whether or
7 not the word "reasonable" changes the meaning of
8 a right for notice, a right to notice, a right to
9 be heard.

10 And, Meg, if you have seen these
11 things litigated, does the word "reasonable"
12 modify those rights in such a way as to diminish
13 them substantively?

14 MEMBER GARVIN: No, it is actually
15 operated relatively well under the CVRA, to have
16 "reasonable" in front of "protection" and
17 "reasonable" in front of "notice".

18 MEMBER ANDERSON: Then, we should
19 probably just mimic that language because it is
20 all over the three statutes. Okay. Well, that
21 is a helpful clarification.

22 MEMBER GARVIN: Yes.

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1 MEMBER JONES: Yes, very.

2 So, anyway, as I said, it is the same
3 throughout. It was always in a directive in the
4 military. It is now codified, and it is one of
5 the CVRA rights.

6 The second one -- and here is your
7 word again -- "the right to reasonable, accurate,
8 and timely notice of any of the following:" And
9 then, it lists -- and this is under the NDAA --
10 it lists five different events: a public hearing
11 -- and everyone can read them themselves. B is a
12 preliminary hearing under Article 32; C, a court-
13 martial relating to the offense; D, a public
14 proceeding of the Service Clemency and Parole
15 Board, and E, the release or escape of the
16 accused."

17 And this is a notice provision,
18 obviously. Those are the five events that prompt
19 notice that are now codified in NDAA 2014.

20 The Crime Victims' Rights Act says the
21 right to reasonable, accurate, and timely notice
22 of any public court proceeding or any parole

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1 proceeding involving the crime or of any release
2 or escape of the accused.

3 And I confess, I haven't actually
4 totted these two up to see if they cover
5 everything. Or it may be the NDAA actually is
6 broader.

7 CDR. KING: Ma'am, I'm not sure. Just
8 from my looking at it, I think perhaps the NDAA
9 is less broad, because, I mean, a court-martial,
10 at least to me, is what happens during a trial
11 after charges have been preferred.

12 MEMBER JONES: Right, uh-hum.

13 CDR. KING: And a public court
14 proceeding could be anything -- I mean, it is
15 obviously after charges have been brought. But,
16 for instance, a bail hearing would be a public
17 hearing. But in the military, or at least an
18 initial review hearing and issues on release or
19 bail -- well, we don't have bail, but issues on
20 release or not being released is not necessarily
21 a public hearing and it is not held at the court-
22 martial until after --

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1 MEMBER JONES: Let me just ask this
2 question then: is everything listed in A through
3 E the totality of what is public in the military?
4 In other words, everything in A through E under
5 NDAA 2014, everything that is a public court
6 proceeding? In other words, have they left any
7 public court proceeding under military out of the
8 NDAA 2014?

9 MEMBER HOLTZMAN: What about
10 sentencing?

11 CDR. KING: Well, that would be a
12 court-martial, I guess part of the court partial
13 perhaps, ma'am.

14 MEMBER HOLTZMAN: Do we know for sure?

15 CDR. KING: I would think so.

16 MEMBER HOLTZMAN: Yes?

17 CDR. KING: Yes.

18 MEMBER HOLTZMAN: Okay.

19 CDR. KING: Sentencing is a part of
20 the --

21 COL HAM: It adds a non-public --
22 well, the same as CVRA, the release or escape of

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1 the accused, of course, is not a public hearing.
2 So, just like the CVRA, if someone is released or
3 escapes, subject to the victim's choice to be
4 notified, they will be notified.

5 MEMBER ANDERSON: So, just to clarify
6 procedurally what this chart does for us, am I
7 understanding it correctly that, where things are
8 not highlighted, you are making an assertion to
9 us that there are roughly similar provisions?
10 But where they are highlighted, there are
11 disparities between these structures? Is that
12 true or is that not true?

13 CDR. KING: Where it is highlighted is
14 where there's no similar proceeding.

15 MEMBER ANDERSON: Okay. Okay. I am
16 just wondering if we need to go through each one.
17 It sounds like --

18 CDR. KING: Well, I don't think that
19 necessarily in this, especially as far as public
20 hearings necessarily, that they are exactly the
21 same. That was some of the things that we wrote
22 in the analysis.

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1 MEMBER ANDERSON: Right, right, right.

2 CDR. KING: Because some of the
3 hearings that would be public if under the CVRA
4 are not necessarily public hearings in the
5 military because there may be ones decided by the
6 convening authority --

7 MEMBER ANDERSON: Right.

8 CDR. KING: -- or a non-public
9 hearing.

10 MEMBER ANDERSON: So, we do need to go
11 through each one? That's fine. I just wanted to
12 clarify procedurally that it makes sense to go
13 through each one. Okay.

14 Meg?

15 MEMBER GARVIN: I think it would be,
16 from my perspective, you know, not knowing every
17 proceeding that could happen in the military, the
18 CVRA provision was intended to cover every public
19 proceeding. I will tell you that in the
20 amendment, proposed amendment to the CVRA,
21 "public" is likely going to come out of the CVRA
22 at some point because of the way hearings have

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1 started to be held outside of public to avoid
2 this provision.

3 But I guess the question would be,
4 what proceedings in a case would a victim not
5 have notice of, based on the way the NDAA is
6 drafted? That is my question.

7 MEMBER ANDERSON: That is a good way
8 of framing it.

9 MEMBER GARVIN: What don't they get?
10 Because I think that is our question: should
11 they, based on what we have heard from survivors
12 and from the people providing service to them,
13 would them having notice of that be beneficial to
14 their service and their recovery? And I think
15 that is the question before us.

16 So, based on this, what wouldn't they
17 get notice of?

18 MEMBER HOLTZMAN: This is Liz
19 Holtzman.

20 The point I was going to make, which
21 exactly fits into this, is that, as I understand
22 it, nobody would get notice of the -- I don't

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1 know if you would call it a proceeding, but we'll
2 just call it "proceeding" with a very broad
3 definition of the word -- before the convening
4 authority with regard to the decision whether to
5 prefer charges. No one gets a notice of that.
6 And so, they can't submit papers and ask to be
7 heard, or whatever. But that seems to me to be
8 something that should be allowed.

9 MEMBER JONES: I thought as being sort
10 of covered, and maybe it needs to be expanded and
11 made more specific. When you talk about the
12 reasonable right to confer with counsel
13 representing the government, and it refers to "in
14 any of the above-listed proceedings," that is
15 page 22. But, again, it is all A, B, and C, and
16 they are all public. And you're talking about
17 the deliberative process which results in a
18 decision by the convening authority.

19 COL HAM: From the CRS again, just to
20 provide you the information, the CRS says, the
21 right to be heard at proceedings "clearly does
22 not vest a victim with the right to participate

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1 in plea negotiations between the defendant and
2 the prosecutor which are neither public nor
3 proceedings".

4 MEMBER ANDERSON: That is a plea
5 negotiation. That's not process.

6 MEMBER MARQUARDT: That is not before
7 preferring charges.

8 MEMBER ANDERSON: Right.

9 COL HAM: You mean referring charge,
10 before the referring charge?

11 MEMBER MARQUARDT: Referring, yes.

12 MEMBER HOLTZMAN: Whatever you call
13 it.

14 (Laughter.)

15 COL HAM: The question to throw out
16 is, is that part of plea negotiations?

17 MEMBER HOLTZMAN: I don't think it is.

18 COL HAM: Because the convening
19 authority can reject it, counteroffer --

20 MEMBER HOLTZMAN: But, see, the victim
21 should have a right to appeal that decision.

22 MEMBER ANDERSON: What decision?

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1 MEMBER MARQUARDT: Whether or not they
2 are going to proceed with charges. I mean, if
3 they just completely dismiss it.

4 CDR. KING: Of course, where else does
5 a victim have a right to appeal --

6 MEMBER ANDERSON: The charging
7 discretion --

8 CDR. KING: Right.

9 MEMBER GARVIN: Well, actually, they
10 don't have a right to appeal it, but it depends,
11 in the civilian world under the CVRA, if charges
12 were brought and, then, dismissed, they actually
13 get to be heard and must be heard by the court
14 before dismissal of the charges.

15 MEMBER JONES: Right, and that is --

16 MEMBER GARVIN: But if this has never
17 been a right, then what they have is the right to
18 confer, because there is no "there" there.

19 MEMBER JONES: And that would be
20 conferring with the prosecutor.

21 MEMBER GARVIN: Right.

22 MEMBER JONES: Who would, then,

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1 together with -- well, the prosecutor would then
2 present his recommendations, and they would
3 ultimately get to the convening authority. But
4 the prosecutor's recommendations would have to
5 include the victims' sentiments on it,
6 presumably. I think that's what the reasonable
7 right to confer with counsel --

8 MEMBER GARVIN: But how would the
9 victim have any idea of who the prosecutor is?
10 Oh, that would be the staff advocate general?

11 MEMBER JONES: No, there would be
12 trial counsel. There would be trial counsel who
13 would have been, I think, working with the
14 investigators.

15 MEMBER HOLTZMAN: Wait. Why would
16 there be trial counsel if charges hadn't been
17 preferred?

18 CDR. KING: Ma'am, even though it is
19 not written in procedures, typically, when there
20 is a case, especially a serious case like a
21 sexual assault, the investigators work with the
22 prosecutors from the very beginning during the

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1 investigation. And then, the prosecutors work
2 with the Staff Judge Advocates, who advise the
3 Commander.

4 MEMBER HOLTZMAN: Okay.

5 CDR. KING: So, there's informal
6 processes where they work together. It used to
7 be in the old days a long time ago where the
8 prosecutors would receive reports that they had
9 never heard of. That's pretty much an unusual
10 event, especially in a sexual assault case. It
11 doesn't really happen anymore.

12 MEMBER HOLTZMAN: Okay. Well, I'm
13 talking about that situation with the Commander
14 and where the Commander makes the decision.
15 Right now, the Commander is making the
16 decision --

17 CDR. KING: Correct.

18 MEMBER HOLTZMAN: -- unless the
19 statute changes or something else happens. How
20 does the victim get an input into that decision?
21 My view is that the victim should have some
22 input, whether it is submitting papers or I don't

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1 know about a personal appearance. That might be
2 too much of an imposition in this system, but
3 some way to be heard at that stage.

4 CHAIRPERSON FERNANDEZ: Julie, what
5 were you saying?

6 MS. CARSON: It is in the current DoD
7 policy, 1030.02, but the instruction has
8 government trial counsel or their designees
9 "shall provide to victims and witnesses, if
10 applicable." And it has got "consultation
11 concerning a decision not to prefer against the
12 suspected offender, decision to pursue court-
13 martial charges". If preferred to court-martial,
14 a form they give them, notification of initial
15 appearance, consultation --

16 CHAIRPERSON FERNANDEZ: Where is your
17 document, so we can look at it?

18 MS. CARSON: It is the same document
19 that has got the --

20 MEMBER MARQUARDT: What page is it on?

21 MEMBER HOLTZMAN: What document? I
22 didn't hear.

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1 CDR. KING: She is reading from page
2 5 of our draft report.

3 MEMBER HOLTZMAN: Oh, page 5?

4 CDR. KING: But, ma'am, you're right,
5 that requires notification by the prosecutor to
6 the victim when a decision is made to charge or
7 not. I'm not sure that this specifies any formal
8 procedure for the prosecutor or the SJA to relay
9 the victim's wishes to the --

10 MEMBER ANDERSON: Consultation
11 concerning the decision to refer or not refer.

12 CDR. KING: Right, but it doesn't
13 say --

14 MEMBER ANDERSON: But it doesn't say
15 it has to be taken to the --

16 CDR. KING: Right. There is a
17 requirement to relay the convening authority's
18 decision to the victim, but --

19 MEMBER MARQUARDT: The victim has no
20 input.

21 CDR. KING: -- there is not a formal
22 procedure written in the policy. I believe it

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1 says the prosecutor or the SJA is required to
2 relay the victim's wishes to the convening
3 authority before a decision has been made.

4 MEMBER ANDERSON: And there is no
5 right of the accused to do that?

6 CDR. KING: Correct.

7 MEMBER ANDERSON: And I guess the
8 question I have, just to clarify -- and maybe the
9 question is directed at Meg; maybe it is directed
10 elsewhere -- is, is that different than in the
11 civilian world?

12 MEMBER MARQUARDT: Yes.

13 COL HAM: There is no right to appear
14 before a grand jury under the CVRA. Is that what
15 you're --

16 MEMBER ANDERSON: I guess the question
17 is, what's the analog? What is the --

18 MEMBER HOLTZMAN: The analog would be
19 that somebody could call the district attorney or
20 the U.S. Attorney, the Assistant U.S. Attorney,
21 and say, "I'd like to talk to you," or counsel
22 would, "about how you're handling the case," the

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1 arrest today, or even before.

2 MEMBER ANDERSON: Yes, but that's
3 different than having a right to do that and a
4 requirement that there's conference between the
5 two before proceeding. It seems to me, if it is
6 not -- I don't know. My presumption would be
7 that, if it is similar to what's happening in the
8 civilian world, my presumption is that it's
9 probably legitimate, unless somebody has a reason
10 why it needs to be different in the military.

11 MEMBER HOLTZMAN: You mean you think
12 it should be the same as it is in the civilian
13 world?

14 MEMBER ANDERSON: Unless there is a
15 reason why it should be enhanced rights in the
16 military context.

17 MEMBER HOLTZMAN: My reason for that
18 is that, given the whole hullabaloo about the
19 Commander's role, this would certainly help to
20 give victims, since a large part of that is
21 sending a signal, that their views will be taken
22 into account at this critical part of the

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1 process, which they're attacking altogether.
2 That's my view about it, but maybe --

3 MEMBER ANDERSON: Who's they attacking
4 what?

5 MEMBER HOLTZMAN: I'm sorry?

6 MEMBER ANDERSON: Who is they
7 attacking what? I'm just trying to --

8 MEMBER HOLTZMAN: "They," meaning the
9 victim advocacy organization.

10 CHAIRPERSON FERNANDEZ: Attacking the
11 role of the Commander, that if you had a moment
12 where --

13 MEMBER HOLTZMAN: No, they would
14 attack the Commander, they would attack the right
15 of the Commander to make decisions about
16 prosecution. They think that that is a very bad
17 idea, and they want to take it away.

18 My view is, one way of ameliorating or
19 addressing that concern, until or unless or if
20 ever the Commander's right is taken away, is to
21 allow the victim to have his or her views
22 transmitted to the prosecutor.

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1 MEMBER JONES: So, right now, if I've
2 got this right, the instruction, which still
3 stands -- it hasn't been repealed -- all it says
4 is, and tell me if I'm wrong, "consultation". In
5 other words, the trial counsel who is involved in
6 getting information for the Commander, who is
7 going to make the decision, has to provide the
8 victims consultation concerning the decision not
9 to prefer charges and the decision to pursue
10 court-martial charges.

11 So, it is not precisely what you're
12 talking about, Liz, and it might be something
13 that we would want to recommend, which goes
14 farther than the instruction, although actually
15 the military may be going a little bit farther
16 than the civilian goes already in the
17 instruction. So, I don't know. That could be a
18 recommendation.

19 I do think it is important that not
20 only are victims notified of the decisions and
21 consulted on going to talk to the convening
22 authority or his advisor, but also should be

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1 consulted in the sense of, "Well, what's your
2 feeling about this? What do you want?"

3 I think those conversations go on, and
4 I'm not sure consultation doesn't take that into
5 account. I would hope that that would mean that
6 that would be expressed to the convening
7 authority. But it is not that specific, I grant
8 you.

9 MEMBER GARVIN: I think something
10 specific would be beneficial, based on the
11 culture that we're seeing and why folks don't
12 think, victims as well as service providers don't
13 think that the system is responsive to them.
14 Because while it might be happening through
15 consultation, people aren't seemingly having
16 faith in that process.

17 And so, if we just define that
18 consultation includes explicitly that the
19 victim's views will be specifically presented --

20 MEMBER MARQUARDT: Before the decision
21 is made.

22 MEMBER GARVIN: -- before the

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1 decision, and my guess is that is happening.
2 But, again, there is a perception here that
3 matters, also. And if it just said that that's
4 included, not necessarily that they do it
5 themselves, if that's not appropriate, but that
6 it is explicitly part of the duty of someone to
7 present those, that seems to go pretty far, in my
8 mind.

9 MEMBER CASSARA: Yes, I can tell you
10 that it is happening in the real world.

11 MEMBER GARVIN: Yes.

12 MEMBER CASSARA: You know, I have two
13 cases right now where, after the Article 32
14 investigation, the command made the decision to
15 dismiss the charges. In both of those cases, the
16 prosecutors told me that they consulted with the
17 alleged victim. The alleged victim, obviously,
18 wasn't happy with the decision to dismiss the
19 charges, but, you know, their input was taken
20 into consideration and the prosecution made its
21 independent decision after receiving that input.

22 MEMBER GARVIN: And that would have

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1 been my guess. I mean, I think it is a rare
2 moment when that doesn't happen. But I think
3 having it be transparent that it is happening
4 would go a long way. And so, we are not putting
5 a new burden on anyone; they're doing it. But it
6 goes a long way to making sure victims understand
7 where their voices are heard and how they are
8 heard.

9 CHAIRPERSON FERNANDEZ: Clarification:
10 how is that --

11 MEMBER CASSARA: Under the SVC
12 program, I mean, is there anything within the SVC
13 mandate that allows, requires, anticipates them
14 going to the convening authority with the desires
15 of their client?

16 MEMBER GARVIN: Well, that was
17 actually going to be my next question on this,
18 too.

19 MEMBER CASSARA: Whoever is speaking
20 is, obviously, brilliant.

21 (Laughter.)

22 MEMBER GARVIN: This is Meg. I'll

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1 follow in your footsteps.

2 Yes, because I think that part one is
3 making sure their voices are heard and there's a
4 transparency about it. Part two is making sure
5 those voices aren't filtered, right? That is the
6 second part of empowerment for victims and, also,
7 making sure they buy into the system.

8 The easier way to do that is to have
9 this be an SVC charge that the SVC gets to
10 present directly, also, the victim's views. I
11 don't know that that is specifically in their
12 charge. Maybe one of the staff know that. I
13 know some of them have been trying to do it.

14 COL HAM: I would think they could try
15 it and defense attorneys can try to submit things
16 for the convening authority as well. It is the
17 extraordinarily-rare case where either a victim
18 or an accused will physically meet with a
19 convening authority, either before or after a
20 trial. I mean, extraordinarily rare.

21 MEMBER GARVIN: Do they get to submit
22 anything in writing?

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1 COL HAM: There is no right of an
2 accused to submit anything in writing before --

3 MEMBER GARVIN: Okay.

4 COL HAM: -- the referral decision.
5 However, he or she can, and the same would apply
6 to the victim, but there's no right anywhere
7 written down for either party. The only
8 required --

9 MEMBER CASSARA: But I can request,
10 meet with the convening authority prior to him or
11 her making a decision on the referral of charges.
12 And 99.9 percent of the time that request will be
13 denied, not because they are bad people, but
14 because they've got wars to fight.

15 CHAIRPERSON FERNANDEZ: How is this
16 different than what's in DoD 1030.02 on page 5,
17 what Julie had pointed out before? I mean, maybe
18 we need to make --

19 MEMBER HOLTZMAN: Where is it on page
20 5?

21 CHAIRPERSON FERNANDEZ: It starts
22 right at the top.

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1 MEMBER HOLTZMAN: Yes. Well, what
2 section are you pointing to?

3 CHAIRPERSON FERNANDEZ: Well, there is
4 a bullet that says, "Consultation concerning the
5 decision not to prefer charges against the
6 suspect or offender." And then, the second
7 bullet down, "The decision to pursue court-
8 martial charges against the suspected offender."
9 Doesn't that capture what we talked --

10 MEMBER HOLTZMAN: No, because it could
11 be after the fact. I don't know that that's
12 clear, and it is not clear who is consulting. It
13 is the trial counsel. That's different from the
14 convening authority.

15 MEMBER GARVIN: Yes, I think it is
16 making sure the victim's input regarding charges
17 is presented to the convening authority.

18 MEMBER HOLTZMAN: Right, the victim
19 had the opportunity to present the charges, and
20 that the convening authority considered them;
21 that's it.

22 MEMBER GARVIN: Yes. So, the question

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1 is, what's the device for doing that? If defense
2 can ask for it, but that's denied all the time,
3 talking to the convening authority, I mean, I
4 think in some ways the victim using the same
5 route makes sense, but I also think having some
6 obligation on trial counsel to affirmatively
7 present it, which it sounds like they're already
8 doing, but making it explicit could be useful.

9 MEMBER HOLTZMAN: Again, I mean, I
10 think that maybe one of the ways to deal with it
11 is to talk about clarify this provision. I mean,
12 my only point is that the victim should have the
13 right, and I guess I would use the word "right,"
14 to have his or her views about whether charges
15 should be preferred presented to the convening
16 authority, period.

17 MS. SAUNDERS: I think some of this
18 may be handled by service regulation, too, which
19 perhaps may not be the best way. Right now, I'm
20 looking at the Air Force instruction concerning
21 victim rights.

22 And one of the paragraphs in there

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1 says, "Under ordinary circumstances, consult with
2 a victim and obtain their views concerning
3 decision to prefer charges, dismissal, pretrial
4 agreements, plea negotiations," that kind of
5 thing.

6 MEMBER HOLTZMAN: Right, but who is
7 the person who is securing the views and are
8 those views getting to the convening authority?

9 MS. SAUNDERS: This would be under the
10 Staff Judge Advocate's office, who would, then,
11 convey that to the convening authority.

12 MEMBER MARQUARDT: Maybe that should
13 be incorporated.

14 MS. SAUNDERS: But I think you're
15 right. I think, right now, that may just be by
16 service regulation that that's being done. And I
17 don't know what the other services, other than
18 that, are doing with regard to that.

19 MEMBER HOLTZMAN: Well, I think the
20 thing is then -- I mean, my suggestion would be
21 to find out what the other services do, and I
22 would put it as a right and, basically, say we

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1 believe that this is -- you know, this seems to
2 be service policy, but it should be elevated to a
3 right; that's all. So, that it doesn't sound as
4 though we are completely making a revolutionary
5 change. It's just my point of view about it.

6 MEMBER MARQUARDT: I like that
7 statement.

8 (Laughter.)

9 MEMBER ANDERSON: Yes, I think it is
10 a good view.

11 MEMBER CASSARA: A good friend of mine
12 once said, "That's only my opinion, but I value
13 it very highly."

14 (Laughter.)

15 MEMBER ANDERSON: I guess I am just
16 wondering what the communication is to the
17 convening authority. It is clear that the victim
18 wants to proceed. She or he has made an
19 unrestricted report at this point in the process.
20 So, what additional information or what does that
21 right mean? Obviously, you know, maybe I'm
22 missing something. Maybe I'm missing something.

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1 What is communicated that changes this situation
2 that makes it a meaningful right?

3 MEMBER HOLTZMAN: Well, first of all,
4 the right to be heard is a meaningful right,
5 whether or not you say anything that is
6 intelligent.

7 (Laughter.)

8 You know, people like that right. You
9 know, it's my opinion, as they say in the third
10 grade. That's important. You raise your hand
11 and you get your voice heard.

12 (Laughter.)

13 But I think the other thing is, first
14 of all, you may have brought charges and, then,
15 you may have changed your mind. Okay? Or you
16 may have additional arguments that you want -- I
17 mean, just the fact that you prefer charges
18 doesn't mean, or that you reported it, doesn't
19 mean that the Commander understands the impact on
20 your or the seriousness of the charge, and so
21 forth and so on. You want to explain that to --

22 MEMBER ANDERSON: Yes, I guess I am

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1 just wondering if the record that the convening
2 authority is reviewing in order to make a
3 decision about whether to proceed includes that
4 information. If we are convinced that there may
5 be information the convening authority does not
6 have in front of her when she makes that
7 decision, then it would be important to be able
8 to give the alleged victim the opportunity to be
9 heard in that circumstance.

10 MEMBER CASSARA: Well, and I think
11 that is going to become even more relevant in the
12 year to come, when the new provisions kick in
13 that do not require the alleged victim to testify
14 at an Article 32 hearing. The convening
15 authority is going to have much more limited
16 information upon which to base his or her
17 decision.

18 MEMBER ANDERSON: Okay. Okay?

19 MEMBER CASSARA: Colonel Ham, would
20 you agree?

21 COL HAM: That is what the defense
22 counsel are saying, that --

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1 MEMBER CASSARA: Yes, I mean, I think
2 it may be one of the unintended consequences.

3 COL HAM: Right.

4 MEMBER CASSARA: On the flip side, you
5 know, I've got a couple of cases right now where
6 the alleged victims have decided not to prosecute
7 after charges were -- not to prosecute, but they
8 don't want the case to go forward. The
9 prosecution is still wanting to go forward. So,
10 this is one of those provisions where I think the
11 defense bar, I really don't have any issue with
12 letting the alleged victim, much as I can as a
13 defense counsel, submit something to the
14 convening authority, if he or she so desires or
15 if I so desire, as to why the case should or
16 should not go forward.

17 CHAIRPERSON FERNANDEZ: Bill, how many
18 cases do you have?

19 (Laughter.)

20 MEMBER CASSARA: I have a lot. You
21 know, within the last six months -- and I'm not
22 saying this is a good or a bad thing from the

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1 victim's standpoint -- but within the last six
2 months, the number of cases on my docket has
3 probably, of a sexual assault nature, has
4 probably tripled, to the point of where I am
5 turning cases away because I just can't do them
6 anymore.

7 You know, I'm not saying that is a
8 good or a bad thing from the victim's perspective
9 or from the soldier's perspective. I am not
10 making any commentary on it. That is just a
11 fact.

12 COL HAM: There is also the risk for
13 the victim -- again, I'm assuming the special
14 victim counsel will be writing the thing and be
15 very careful about this -- also the risk that if
16 the victim actually submits something, that it is
17 an inconsistent statement or it contains, you
18 know, some things harmful to the case, that
19 that's a choice that the victim and his or her
20 counsel will have to make.

21 CHAIRPERSON FERNANDEZ: Just to wrap
22 up this one, so are we in agreement that we

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1 should take what's in the Air Force directive
2 currently and translate into what should be --
3 it's an additional right? So, just take the
4 verbiage from the Air Force and, then, put it in
5 and our recommendation to make it a right?

6 MEMBER MARQUARDT: I like that.

7 MEMBER HOLTZMAN: The only thing is,
8 can we check what the other services have?

9 CHAIRPERSON FERNANDEZ: Sure.
10 Absolutely.

11 MEMBER HOLTZMAN: And if they have
12 different language, maybe just pick out the one
13 that we think is the --

14 COL HAM: And you are talking about
15 the right to be reasonably heard and the right to
16 reasonable, accurate, and timely notice of?

17 MEMBER MARQUARDT: No, the
18 consultation.

19 MS. SAUNDERS: The consultation, you
20 know, obtaining the views of the victim on the
21 decision to prefer.

22 MEMBER HOLTZMAN: Before the decision.

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1 MS. SAUNDERS: Right. The decision to
2 prefer, whether or not to prefer charges and,
3 also, on pretrial agreements and some other
4 things.

5 MEMBER CASSARA: I'm sorry, you're
6 breaking up again.

7 MS. SAUNDERS: Oh, sorry. The right
8 is to consult with the victim and obtain the
9 victim's views on both preferral of charges,
10 pretrial agreements, and some other things along
11 the way.

12 MEMBER CASSARA: Yes.

13 CDR. KING: And just for clarification
14 for writing this up, is that, are you talking
15 about a right just to relay, for someone to relay
16 information about what the victim wants or a
17 right for the victim to present information to
18 the convening authority themselves perhaps,
19 likely through counsel?

20 MEMBER MARQUARDT: It just says
21 consultation.

22 MS. SAUNDERS: The way it currently

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1 works is that, typically, the trial counsel would
2 be the one speaking with that victim, and it
3 would be relayed through the Staff Judge Advocate
4 to the convening authority.

5 CDR. KING: Well, and that's what I
6 was asking, because we were talking about victims
7 perhaps giving inconsistent statements if they
8 made their own statements. So, I wasn't clear.

9 CHAIRPERSON FERNANDEZ: No, no. I
10 think it is what you have just said.

11 MS. SAUNDERS: Right. Okay.

12 CHAIRPERSON FERNANDEZ: Anything else
13 on that section?

14 (No response.)

15 Okay. Let's go to the next one.

16 MEMBER JONES: Are we at the right not
17 to be excluded from any public hearing?

18 MEMBER CASSARA: Will somebody give me
19 a page number?

20 CHAIRPERSON FERNANDEZ: Twenty-one.

21 MEMBER CASSARA: I'm looking at the
22 hard copy.

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1 MEMBER JONES: Bottom of 21, the right
2 not to be excluded from any public hearing. I'm
3 reading now from the NDAA, right.

4 MEMBER CASSARA: Got it. Thank you.

5 MEMBER JONES: "Or proceeding
6 described above, unless the military judge or
7 investigating officer" -- there is a standard of
8 proof -- "determines the testimony by the victim
9 of an offense would be materially altered if the
10 victim heard other testimony at that hearing or
11 proceeding."

12 I guess the CVRA -- let me just take
13 a look at it -- is pretty much the same, I think.

14 MEMBER GARVIN: Yes, they are.

15 MEMBER JONES: Yes. And then, the
16 directive is I think the same as well.

17 MEMBER CASSARA: Hey, Meg?

18 MEMBER GARVIN: Yes?

19 MEMBER CASSARA: This is one of the
20 areas that my antennas went up a little bit. And
21 I'm just curious, from your experience on the
22 civilian side, how the issue plays out with the

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1 alleged victim, I mean, being in court the entire
2 time and hearing testimony of other witnesses.
3 Has that been a positive, negative, a wash? Or
4 what's been your experience? Or do they take
5 advantage of it? Or do the courts generally
6 exclude them, finding that there's clear and
7 convincing evidence?

8 MEMBER GARVIN: Courts don't exclude
9 them. When it has been actually presented and
10 litigated, no court has excluded.

11 MEMBER CASSARA: Okay.

12 MEMBER GARVIN: But what I will say
13 is, I guess to all of your other questions, it
14 has been a bit of a wash. A lot of victims, when
15 they are properly -- when they are consulted with
16 by their lawyer, they choose not to be in there
17 because they know what they are about to hear.
18 So, they make a choice not to be in there.

19 A lot of victims have been in there
20 from voir dire all the way through closing
21 arguments, even when they have been witnesses,
22 both direct and, then, rebuttal. And those have

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1 resulted in both convictions and acquittals. And
2 the convictions have been upheld through appeals
3 so far.

4 So, it has kind of been all over. It
5 hasn't resulted in -- there has been no finding
6 of error. There has been no reversible error.
7 But a lot of times victims are choosing not to
8 exercise it after being consulted with.

9 You know, I mean, when --

10 MEMBER CASSARA: Yes.

11 MEMBER GARVIN: -- you sit down and
12 talk to them about it --

13 MEMBER CASSARA: Do you have anything
14 from the defense bar, how they feel about it? I
15 mean, has it been beneficial for them? Has it
16 been detrimental? Or, again, is it just a wash?

17 MEMBER GARVIN: It's a wash. Some of
18 them will say that it has been a field day for
19 cross-examination --

20 MEMBER CASSARA: Sure.

21 MEMBER GARVIN: -- because it opens up
22 a whole new starting point for cross-examination.

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1 I have yet to have someone say it was
2 horrible in the defense bar, but they may also
3 not be saying that to my face, right?

4 MEMBER CASSARA: If it happens and I
5 find it to be horrible, I promise I'll tell you
6 to your face, though.

7 (Laughter.)

8 MEMBER GARVIN: I mean, the bottom
9 line is it is not, at least from what we have
10 been able to see across the country, it hasn't
11 altered much except when a victim exercises it,
12 cross-examination starts at a very different
13 point.

14 MEMBER CASSARA: You know, honestly,
15 one of the reasons why it causes some concern to
16 me is, having practiced in both the civilian
17 courts and military courts, I can tell you that
18 military courtrooms tend to be much smaller.

19 MEMBER GARVIN: Yes.

20 MEMBER CASSARA: I mean, I have been
21 in -- I don't know if Colonel Ham has ever
22 practiced at Fort Jackson, South Carolina, but

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1 the courtroom seats about 20 people. And the
2 presence of the victim would be much more
3 prominent in that case than in a trial in a
4 civilian courtroom, where there is 300 people, at
5 least theoretically, could be sitting in there.

6 And that is one of the reasons why it
7 caused me some concern, is that military courts
8 just tend to be, the courtrooms just tend to be
9 much smaller, and I think that the presence of
10 the alleged victim would be much more prominent
11 than it might be otherwise.

12 MEMBER ANDERSON: To what end, Bill?
13 You're saying that that would create error or
14 shading or bias in terms of witness testimony or
15 that that would change the decisionmaker's
16 decision or -- so, it is a small setting.

17 MEMBER CASSARA: And again, I think
18 this may turn out to be a wash, but I think that
19 both witnesses for and against, you know, defense
20 and prosecution witnesses, there is the risk that
21 their testimony may be tempered or altered in
22 some way because the alleged victim is sitting

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1 right there. I mean, I think that is just human
2 nature.

3 MEMBER JONES: Well, you know, we are
4 really just talking about a right not to be
5 excluded, which is --

6 MEMBER CASSARA: Yes, I'm not -- you
7 know, I don't want to get far off the field.

8 MEMBER JONES: Yes. It is really not
9 too different than --

10 MEMBER CASSARA: That's one of the
11 things. That's why I wanted to Meg's input --

12 MEMBER JONES: Right. Sure.

13 MEMBER CASSARA: -- on how it has
14 played out in the real world, or the other real
15 world.

16 (Laughter.)

17 MEMBER ANDERSON: Are we clear about
18 whether or not these are different? In other
19 words, if it is already granted, maybe we should
20 move on --

21 MEMBER GARVIN: They read pretty much
22 the same to me.

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1 MEMBER ANDERSON: Then, let's move on.

2 MEMBER JONES: Okay.

3 MEMBER CASSARA: Yes.

4 MEMBER JONES: The next one is the
5 right to be reasonably heard, at least under --
6 I'm reading the CVRA now -- "at any public
7 proceeding in the district court involving
8 release, plea, sentencing, or any parole
9 proceeding." And this is one provision that is
10 in -- reference to the plea proceeding is in the
11 CVRA, is not in the NDAA because the NDAA is
12 talking about a public hearing concerning the
13 continuation of confinement, prior to trial, a
14 sentencing hearing relating to the offense, or a
15 public proceeding of the Service Clemency and
16 Parole Board.

17 I think we started to talk about this
18 before. Because what is a plea proceeding in the
19 military?

20 MEMBER CASSARA: Yes, I think the
21 reason for the difference is because in a
22 civilian court everybody knows what the

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1 recommended plea agreement is, and the provision
2 allows the victim to say, "I think that that's
3 insufficient" or "I'm satisfied with that."

4 Whereas, in the military system,
5 whoever is doing the sentencing, whether it be
6 the judge or a panel, does not know the limits of
7 the plea bargain or the pretrial agreement until
8 at the very, very end. And I'm not saying it
9 would -- I'm just think it alters, that that
10 process would alter the involvement of the victim
11 at sentencing, which is why I think the language
12 states that it does.

13 Obviously, you don't want the victim
14 getting up and saying, "I know that there is a
15 plea bargain of five years in this case, and I
16 think that's ridiculous," because neither the
17 judge or the jury, if they're doing the
18 sentencing, knows that.

19 MEMBER JONES: I think that because of
20 the way plea bargaining is handled, you are
21 completely right. There is no real opportunity,
22 or maybe any reason -- there may be a reason, but

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1 there's no real opportunity for a victim to be
2 heard.

3 MEMBER CASSARA: Right, and "I think
4 that that input would come earlier when that
5 proposed plea bargain is going up to the
6 convening authority, and that convening authority
7 is determining whether to accept or reject that
8 plea bargain.

9 MEMBER JONES: So, you are saying that
10 could be part of what we are going to suggest to
11 be expanded consultation with the government and,
12 also, described as some mechanism to get the
13 victim's desires to the convening authority?
14 Thoughts?

15 MEMBER CASSARA: Yes, because, you
16 know, as you all know --

17 MEMBER JONES: And it would actually
18 not just be for the prosecution or a referral
19 decision, but it could also --

20 MEMBER CASSARA: Upon the acceptance
21 of a plea agreement.

22 MEMBER JONES: Right. It could also

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1 counsel with what he might want to do or she
2 might want to do with the plea.

3 MEMBER CASSARA: Right. And again, I
4 think that is something that is happening every
5 day in almost every case. And I just don't know
6 that it's codified.

7 MEMBER JONES: So, maybe that would be
8 something we would also include in the sense of
9 what a victim -- I mean, it is almost we want the
10 victim's attitudes and desires to get to the
11 convening authority. And we have talked about it
12 in the sense of through some consultation with
13 the government who is the person who knows what
14 is going on.

15 And we could also add that it would
16 not just be offered in order to affect the
17 charging decision, but also should be considered
18 in terms of any plea bargain.

19 MEMBER HOLTZMAN: I don't know why it
20 can't be phrased in terms of the right to be
21 heard by the convening authority --

22 MEMBER JONES: It can be.

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1 MEMBER HOLTZMAN: -- in terms of the
2 charges to be preferred or not preferred and any
3 plea agreement, in the nature of any plea
4 agreement. That's how I would like to see it.

5 MEMBER JONES: And that's simple.

6 MEMBER HOLTZMAN: Yes.

7 MEMBER CASSARA: Or just the
8 disposition of the case because that may also
9 include what we refer to as a Chapter 10 in the
10 Army, a Chapter 4 in the Air Force, which is in
11 lieu of court-martial.

12 MEMBER HOLTZMAN: Right. Right. Or
13 other disposition of the case.

14 MEMBER CASSARA: Some other
15 disposition.

16 MEMBER HOLTZMAN: Yes.

17 MEMBER JONES: Sounds good to me.

18 CHAIRPERSON FERNANDEZ: It seems like
19 the next one we have just expanded.

20 MEMBER JONES: Yes, this one was too
21 subtle. So, we have to make it more meaningful.
22 The reasonable right to confer with the counsel

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1 representing the government, do we want to talk
2 about that or have we pretty much covered it?

3 MEMBER HOLTZMAN: I think that that's
4 different because that's the counsel for the
5 government as opposed to the convening authority.

6 MEMBER JONES: Right. And I guess
7 you're right, because we want to make it specific
8 that these are the thoughts and desires, the
9 victim actually getting their message to the
10 convening authority --

11 MEMBER HOLTZMAN: Correct.

12 MEMBER JONES: -- not just a
13 consultation. It may happen through consultation
14 with the government --

15 MEMBER HOLTZMAN: Right.

16 MEMBER JONES: -- but that is a
17 mechanism.

18 MEMBER HOLTZMAN: Yes, right.

19 MEMBER JONES: Okay.

20 COL HAM: Would you like it drafted,
21 it sounds like what you're saying -- I guess I am
22 asking for your approval -- that because of the

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1 differences in how pleas work, we see a reason
2 why the CVRA right to be heard during a plea is
3 not applicable to the military? However, the
4 analogous point in time would be to be heard
5 before the convening authority decides the
6 disposition of the case, and you recommend that,
7 somehow --

8 MEMBER JONES: That's right.

9 MEMBER GARVIN: Yes. Yes.

10 MEMBER JONES: Perfect.

11 And are we going to recommend that
12 these be made clear for now in instructions and
13 recommend that it be made more clear in
14 legislation, future legislation?

15 MEMBER GARVIN: Yes.

16 MEMBER JONES: Okay. Next is --

17 COL HAM: Leaving to the convening
18 authority what right to be heard means.

19 MEMBER CASSARA: I'm sorry?

20 COL HAM: Leaving to the convening
21 authority what the right to be heard means.

22 MEMBER CASSARA: Oh, okay.

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1 COL HAM: In other words, in
2 writing --

3 MEMBER JONES: Sure. Yes. Yes.

4 COL HAM: -- through the attorney,
5 whatever.

6 MEMBER CASSARA: Yes, I think that is
7 fine. I think any special victims' counsel is
8 going to tell you they're going to want to do
9 that --

10 MEMBER GARVIN: Absolutely.

11 MEMBER CASSARA: Yes.

12 MEMBER JONES: Okay. So now, we have
13 codify in the NDAA the right to receive
14 restitution as provided in law. The CVRA says
15 the right to full and timely restitution, as
16 provided in law. And then, the instructions,
17 apparently, have already said the right to
18 receive available restitution.

19 I don't know much about the different
20 -- what the available restitution is. Isn't that
21 the area that may be left to the next Committee?

22 MEMBER CASSARA: That could take hours

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1 to explain.

2 MEMBER JONES: All right.

3 MEMBER CASSARA: It is really
4 convoluted.

5 MEMBER JONES: Shall we leave it to
6 the next panel?

7 (Laughter.)

8 MEMBER CASSARA: I can give you The
9 Reader's Digest condensed version, but even that
10 might take a while.

11 MEMBER JONES: There is a second panel
12 that starts after we are finished.

13 MEMBER CASSARA: Good for them.

14 MEMBER JONES: And one of its tasks is
15 to look at restitution.

16 MEMBER HOLTZMAN: Is there some reason
17 that we don't have the same language as the CVRA?
18 I mean, the only thing that is different on
19 restitution is "full and timely". Is there some
20 reason that that's not the same?

21 MEMBER JONES: I don't know, although
22 I happen to think the NDAA phrasing is better

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1 because I think "as provided in law" --

2 MEMBER ANDERSON: We haven't heard
3 much testimony on this, and there is a whole
4 other panel that is going to take this up. I'm
5 not sure that we should necessarily jump in and
6 tinker with the language.

7 MEMBER GARVIN: Yes, and on the
8 civilian side, the intricacies of "as provided in
9 law" and the other statutes that points to is
10 actually pretty complex. And I imagine layering
11 on top of that military intention and all that,
12 it is going to be a complex thing.

13 I do think figuring it out for the
14 next, you know, actually tackling it and figuring
15 out what it means would be pretty important, but
16 I don't even understand how it works in the
17 military under the directive right now. So, I
18 think it is a pretty big topic, I guess.

19 CHAIRPERSON FERNANDEZ: Why don't we
20 punt?

21 MEMBER JONES: You took the words
22 right out of my mouth.

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1 (Laughter.)

2 All right. The right -- this is NDAA
3 again -- to proceedings free from unreasonable
4 delay. And then, the CVRA has the same thing.
5 And then, apparently, there just are no
6 directives, no DoD directives on it.

7 But, apparently -- and I don't think
8 I heard this witness, if this was a witness --

9 MS. SAUNDERS: You weren't there that
10 day.

11 MEMBER JONES: I'm sorry then.

12 The DoD is working to include a
13 provision that mirrors the CVRA.

14 So, is there anything more to say
15 about this?

16 MEMBER MARQUARDT: What about the word
17 "proceedings"?

18 MEMBER JONES: Compared to?

19 MEMBER MARQUARDT: Well, to have --

20 MEMBER JONES: Investigations? Are
21 you thinking about that part of it?

22 MEMBER MARQUARDT: Well, yes, I'm

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1 thinking about the whole process from filing the
2 charge to the end. You know, everything should
3 be handled without unreasonable delay.

4 COL HAM: Similar to the Federal
5 Speedy Trial Act, there are numerous sources of
6 speedy trial rights for a military defendant,
7 including the analogy to the Federal Speedy Trial
8 Act, which requires a case to go to trial within
9 120 days of either preferral -- so, when the
10 charges are brought -- to arraignment, not the
11 taking of evidence but arraignment. And there
12 are not the numerous automatic exclusions of time
13 that are under the Federal Speedy Trial Act.
14 Most of the time a judge has to determine to
15 exclude evidence.

16 MEMBER MARQUARDT: Well, we are
17 looking this from the victim's rights. So, I
18 don't know how that impacts the Speedy Trial Act.

19 COL HAM: I guess I am only trying to
20 give information to help you consider that, that
21 there are not automatic exclusions of time like
22 there are in the Federal Speedy Trial Act. So,

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1 things move relatively quickly with regard for
2 the accused's right. The judge, of course, is
3 free to grant request for delay for good cause in
4 the military, and there is a lot of case law on
5 what good cause means and a number of factors
6 they are supposed to take into account, et
7 cetera.

8 MEMBER JONES: The speedy trial rights
9 for a defendant are very well -- you know, there
10 is a lot of case law.

11 MEMBER MARQUARDT: Right.

12 MEMBER JONES: You know that.

13 This is the right to proceedings free
14 from unreasonable delay for a victim. I don't
15 know what cases. Maybe you do, Meg. Has any
16 victim ever made an application under this right?

17 MEMBER GARVIN: Yes, and I think we
18 heard testimony from Russell Butler a little bit
19 about this. He handled one case in Utah. It has
20 been used in several other cases, but the Utah
21 habeas corpus case is the only published
22 decision, I think, on it.

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1 Essentially, when it is translated
2 into a civilian world, it does use the word
3 "proceedings" also in the CVRA, but the victims
4 have used it to move proceedings along,
5 basically, to get no further, for the prosecution
6 or the defense, no further continuances. And it
7 has been used in states that have the equivalent
8 statute and in the federal. It doesn't result in
9 a date certain of anything.

10 But victim's counsel have petitioned
11 courts to say, "Prosecution, usually, to be
12 honest, is dragging its feet. We want it to move
13 forward. And so, can you please no further
14 continuance or can you set a date, a calendar
15 date?", a calendar call, basically, like a status
16 conference in the civilian world. And that is
17 what it has resulted in. And then, at some
18 point, the court has said, "No further
19 continuances for anyone."

20 MEMBER HOLTZMAN: Can I just suggest,
21 since both these provisions are the same, the
22 NDAA and the CVRA, that we just move it along?

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1 MEMBER GARVIN: Yes, I think we can
2 resort to the handful of cases that have
3 interpreted it, just to give guidance. It's a
4 tool for victims to ask for things to move
5 forward. It certainly is never going to trump
6 trial prep for defense or the state or the trial
7 counsel. So, yes.

8 MEMBER JONES: Right. You did raise
9 the issue, though, of proceedings.

10 MEMBER MARQUARDT: Yes, and I thought
11 maybe, you know, have preferred charges proceed
12 from unreasonable delay. I mean, I like the
13 wording better, but as long as it is used --

14 MEMBER JONES: I think now that we
15 understand what it is used for, I think we are
16 good.

17 Okay. The right to be treated with
18 fairness and with respect to the dignity and
19 privacy of the victim. That is now codified
20 under NDAA '13. It's everywhere. Okay.

21 Any discussion?

22 (No response.)

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1 No?

2 All right. So now, we come to the
3 CVRA, and there is no similar provision, it
4 appears. "In any court proceeding involving an
5 offense against the crime victim, the court shall
6 ensure that the crime victim is afforded the
7 rights described above." So, this is our
8 enforcement proceeding, enforcement element, that
9 is in the CVRA.

10 "Before making a determination to
11 exclude the victim, the court shall make every
12 effort to permit the fullest attendance
13 possible."

14 I don't know. Let me see --

15 CHAIRPERSON FERNANDEZ: How is this
16 not being replicated in the provisions above?

17 MEMBER JONES: You know what? I'm
18 wrong. Yes, and it is not enforcement provision.

19 COL HAM: According to CRS, this puts
20 responsibility on the court.

21 MEMBER GARVIN: Yes, it is an
22 articulation of what actually should already be

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1 there for courts, which is courts have an
2 inherent duty to afford anyone their right who is
3 perform them, right? That it is a separate and
4 independent duty, which is why they connect sua
5 sponte on certain things.

6 That's what this provision does,
7 coupled with, if you are not going to afford them
8 a right, which is the right to be present, you
9 have to say so on the record and why. And this
10 was drafted this way, so that an appeal of a
11 decision to deny the right to be present could go
12 up on a record explaining what the court did.

13 So, it is two things. It is
14 articulating a court's independent obligation to
15 ensure the rights of person are afforded. And
16 two, when you are going to deny those rights, put
17 it on the record, so we have something to respond
18 to, rather than having it be in your brain,
19 basically.

20 CHAIRPERSON FERNANDEZ: That sounds
21 important to me.

22 MEMBER GARVIN: It has proven, from a

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1 victim's perspective in the civilian world, quite
2 a useful provision, in part, because courts have
3 had used it sua sponte to deny prosecution action
4 that they thought were putting victims at risk.
5 It hasn't, to the best of my knowledge, been used
6 in response to anything defensive has done. And
7 also, it has created records, so that the appeals
8 move more expeditiously, because you don't have
9 remands to the trial court for findings on the
10 record.

11 MEMBER HOLTZMAN: So, I would just
12 propose that we adopt the language, recommend
13 adopting the language that is in the CVRA.

14 CHAIRPERSON FERNANDEZ: I second it.

15 COL HAM: Although I would just raise
16 for you the issue that the NDAA gives rights
17 outside of court proceedings.

18 MEMBER GARVIN: Yes, I think it would
19 have to be finessed language, Liz, by maybe
20 someone who --

21 MEMBER HOLTZMAN: Understands it.

22 MEMBER GARVIN: Like if you can make

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1 recommendations, because it is really just court
2 proceedings. And so, the language can't be
3 identical, I don't think.

4 MEMBER HOLTZMAN: Right. Okay.

5 MEMBER JONES: All right. So, we are
6 for this, but we have to figure it out. Okay.

7 COL HAM: Would your recommendation
8 be, for lack of a better word -- I don't know if
9 you're making recommendations -- that DoD develop
10 a comparable right to propose for legislation,
11 something like that?

12 CHAIRPERSON FERNANDEZ: Yes.

13 MEMBER GARVIN: Yes, that is not a
14 right, though.

15 CHAIRPERSON FERNANDEZ: It's a --

16 MEMBER GARVIN: It is more a duty of
17 a court.

18 CHAIRPERSON FERNANDEZ: Yes, duty of
19 the court to be able to enforce a right.

20 MEMBER ANDERSON: So, we're back to
21 your enforcement.

22 MEMBER GARVIN: I mean, it is all

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1 phrasing. The term "enforcement" has been used
2 very oddly in all the victim's rights language.
3 The better language might be to accord the right
4 of the victim to assure they are accorded or
5 afforded, something like that, and denial of any
6 right be documented in the record, whatever the
7 record is of the military, you know. Basically,
8 it is the right you have something to appeal or
9 to challenge it or something.

10 MEMBER JONES: Right, and maybe there
11 is no similar provision for the same reason that
12 there is no enforcement or so-called enforcement
13 provision. It is a reason that you have to put
14 on the record for the very purpose of having a
15 record to appeal.

16 So, I don't know. Maybe if we keep
17 going, we will figure out that these should be
18 folded in together in some way.

19 MEMBER GARVIN: Yes. I am just going
20 to say one more thing.

21 MEMBER JONES: Sure, sure, sure, yes.

22 MEMBER GARVIN: I articulate a

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1 lawyer's reason for why that provision matters.
2 But, even if for some reason all this went down
3 the path of there never being appellate
4 enforcement, there is another reason for
5 articulating them on the record. And that is so
6 victims understand why their rights were denied.

7 MEMBER JONES: Yes.

8 MEMBER MARQUARDT: Right. It's good
9 for courts to have to do it, so they pay
10 attention also.

11 MEMBER GARVIN: Yes. We have seen
12 that, and there is one case right now where a
13 stay was granted in a military court on a
14 discovery issue and remanded to the trial court,
15 just to say on the record why they made the
16 decision they made. That just happened. I'm
17 sure you guys are aware of it.

18 You know, I mean, it may go the other
19 way, but the victim understanding the why, it
20 kind of matters. So, there's two reasons why
21 this provision is important. One is the long-
22 term appellate standing and enforceability

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1 moment, and the other is victim comprehension of
2 how their voice was heard, why the case went the
3 way it did, all of those things that they develop
4 a trust in the system.

5 MEMBER HOLTZMAN: Isn't it enough to
6 say to recommend to both Congress and DoD that a
7 provision comparable to the CVRA provision be
8 adopted for the military? We don't have to spell
9 out what we're trying to do here. They
10 understand it. Let them work out the language.

11 MEMBER GARVIN: That works for me.

12 MEMBER JONES: I like it. Next.

13 CHAIRPERSON FERNANDEZ: Okay. I guess
14 we can all read it, but, Meg, is there a reason
15 why the CVRA definition might be better than the
16 one in the NDAA or the one in the DoD?

17 MEMBER GARVIN: For the victim?

18 CHAIRPERSON FERNANDEZ: Yes. Are
19 there things that we need to adopt or change?

20 MEMBER GARVIN: I'm reading it.

21 (Pause.)

22 I actually think the NDAA might be a

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1 better definition. The NDAA definition is pulled
2 -- is it identical to the directives on the
3 right?

4 CHAIRPERSON FERNANDEZ: Yes, yes.

5 MEMBER GARVIN: Yes, which is pulled
6 out of the old victim's rights provisions pre-
7 CVRA.

8 I will have to think about it.
9 There's pros and cons both ways. I'm not
10 particularly worried about it.

11 MEMBER ANDERSON: The one in the
12 center imports the question of proximate cause.

13 MEMBER GARVIN: Yes, right, and that
14 can be useful and harmful to victims. I mean,
15 based on the child pornography case that was just
16 before the U.S. Supreme Court, it created some
17 interesting complications, actually.

18 CHAIRPERSON FERNANDEZ: Okay. Can I
19 say that we keep the definition that is in the
20 NDAA unless you see something in case law or that
21 would tell us to change it, and you can send that
22 to the staff, which, then, can convey it to us?

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1 MEMBER GARVIN: Yes. Certainly.

2 CHAIRPERSON FERNANDEZ: That sounds
3 good, right?

4 MEMBER JONES: Now we are at
5 enforcement, right? Are we done with definitions
6 then?

7 MEMBER ANDERSON: Yes. Right.

8 MEMBER JONES: Well, I mean, does
9 anybody disagree that there ought to be an
10 enforcement mechanism? We have given them
11 rights. So, there should be enforcement, right?

12 CHAIRPERSON FERNANDEZ: Wasn't that
13 the whole conversation we had when we had the
14 hearings, that a bunch of these rights didn't
15 have enforcement mechanisms?

16 MEMBER MARQUARDT: Or any recourse.

17 MEMBER GARVIN: I'm agreeing, yes, we
18 need to have enforcement, as I think you all
19 would predict.

20 (Laughter.)

21 I think in whatever recommendation we
22 write, however, we should be really clear in our

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1 language. I believe that there already is
2 enforcement because, by law, if you give a right,
3 there is one. It is just not explicit what it is
4 right now.

5 So, for instance, a victim in the
6 military already, which we saw in the Kastenberg
7 case, did seek a remedy, right? They had
8 standing. They went into the trial level. They
9 lost there. They went into the appellate level.
10 At the appellate level, you know, they had
11 standing and they were heard, and a remedy was
12 afforded, which was simply go back to the trial
13 court and you get to be heard.

14 But I think it is very important that
15 we don't say, "My God, there's no enforcement
16 right now in the current NDAA," because that
17 would, then, mean that we, as a Committee, have
18 said, until someone writes something explicit, no
19 one can do anything.

20 MEMBER ANDERSON: Right.

21 MEMBER GARVIN: But, in reality, there
22 is standing; there is enforcement. It is just

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1 not explicit. So, the lawyers out there are left
2 with traditional writs and a messy enforcement
3 process.

4 MEMBER ANDERSON: Right, and one
5 question I have, Meg, on that, on the enforcement
6 issue is whether or not a writ of mandamus, it
7 may be the only thing that is possible, but there
8 was certainly testimony that the writ of mandamus
9 was so limited that it was not applicable to
10 circumstances like the violation of the victim's
11 statutory rights.

12 I wonder if, in terms of supporting
13 the work that you're doing, and many others are
14 doing, in terms of trying to use traditional
15 opportunities or routes for enforcement, when
16 they are not explicitly identified, is that more
17 helpful or would it be more helpful for us to
18 make explicit the kinds of opportunities that
19 victims have to enforce these rights?

20 MEMBER GARVIN: Well, I think we heard
21 testimony that was clear that explicit is useful,
22 and that explicit that factors in the downfalls

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1 of the CVRA would also be useful. And the
2 downfalls of CVRA, from a victim's standpoint --
3 and, actually, I think from a system standpoint;
4 both the prosecution and defense I think would
5 concur in this -- the use of the word "mandamus"
6 is an odd term, and it hasn't played out very
7 effectively for appellate review.

8 MEMBER ANDERSON: So, in terms of
9 directing the staff in terms of the drafting
10 here, it seems to me that one thing we could do
11 is say, "Despite the fact that there is no
12 explicit enforcement provisions, attorneys are
13 currently litigating" -- just a factual statement
14 -- "attorneys are using traditional mechanisms of
15 enforcement to vindicate victim's rights. We
16 recommend that" -- I'm just throwing out
17 potential language -- "We recommend that either
18 the Department of Defense or Congress, or
19 whatever the mechanisms are that we're proceeding
20 to make recommendations to or for, we recommend
21 that an enforcement provision be made more
22 explicit by statute and include the following

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1 things." And then, something other than, I take
2 it, writ of mandamus specifically, is that right,
3 Meg?

4 MEMBER GARVIN: That would be my
5 recommendation.

6 MEMBER ANDERSON: Is that clear?

7 MEMBER GARVIN: Yes.

8 COL HAM: I am thinking through what
9 you're talking about. I mean, there are a couple
10 of ways to do an interlocutory appeal, right?

11 MEMBER ANDERSON: Right.

12 COL HAM: One is extraordinary writ
13 and one is a statutory basis. So, all accuseds
14 have to use extraordinary writs, and the
15 government has its limited interlocutory appeal
16 right, which is approximately the same in the
17 military as it is for the Assistant U.S. Attorney
18 or the U.S. Attorney's Office. So, you would be
19 looking at an additional statutory provision that
20 would apply. That is what I'm asking you. You
21 would allow for a statutory provision to --

22 MEMBER ANDERSON: Yes, they would

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1 allow for an interlocutory appeal, I guess.

2 MEMBER GARVIN: Yes.

3 MEMBER MARQUARDT: But it seems to me
4 that you would have to have an appeal right for
5 the denial of some victim's right. And so,
6 anyway --

7 MEMBER GARVIN: But, I mean, I think
8 the questions are what appellate devices do we
9 have? Is it an appeal right?

10 MEMBER ANDERSON: Yes, right.

11 MEMBER GARVIN: Is it an interlocutory
12 appeal right? Is it a writ?

13 And the CVRA is intended to create an
14 appeal right, but used the word "mandamus". And
15 that has caused huge problems. It is intended to
16 be, well, it was intended to create an
17 interlocutory appeal right that was reviewed
18 under the standard review of traditional appeals
19 and it used the word "mandamus".

20 MEMBER ANDERSON: Right. That's what
21 I was --

22 MEMBER GARVIN: It is among the worst

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1 drafting that could possibly have happened, and
2 I'm laughing because I was there. But it mixed
3 and matched all three things.

4 So, I think we need to be thinking
5 about the recommendation being the crafting of
6 the important piece here is interlocutory appeal,
7 because you want it to happen before, you know,
8 the horse is out of the barn, or whatever the
9 expression is, and it needs to be something that
10 is not so discretionary in review that it falls
11 under the category of extraordinary writ review,
12 because that is the problem with mandamus.

13 COL HAM: But you run into the issue
14 that came in the hearing, which is prejudiced.

15 MEMBER ANDERSON: And clarify for me,
16 Colonel Ham, is that an issue on whether we use
17 interlocutory? Actually, you're saying that
18 that's an issue if we suggest interlocutory
19 appeal?

20 COL HAM: Well, it would be to be
21 determined. Article 59a tracks the Rule of
22 Federal Procedure, that you have to show --

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1 actually, it's tougher -- material prejudice to a
2 substantial right before you are entitled to any
3 relief. There are a lot of questions. Would
4 that apply to this type of appeal? What would it
5 mean?

6 MEMBER ANDERSON: Do we have to go
7 there? I mean, it seems to me that the prejudice
8 question is always going to be an issue for
9 victim's rights, one that we probably shouldn't
10 surmount because we want finality and double-
11 jeopardy to attach when there is a conviction.

12 CHAIRPERSON FERNANDEZ: Can I be the
13 dummy in the room right now? Because I'm
14 starting to get confused with mandamuses and
15 interlocutory appeals and I'm trying to reach
16 back somewhere in my brain and remember what all
17 this is.

18 (Laughter.)

19 Take me through a victim, Meg, that
20 this issue is going to come up. What does this
21 look like?

22 MEMBER GARVIN: So, if we use the

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1 right to be present, right, let's say a judge
2 actually did decide that a victim's testimony
3 would be materially altered and, therefore, she
4 is going to be kept out of the courtroom.

5 CHAIRPERSON FERNANDEZ: Right.

6 MEMBER GARVIN: She would file, under
7 the CVRA, she would argued to the trial court and
8 said, "I have this right. Don't keep me out."
9 The trial court would have said, "You're out."

10 She would, then, take a writ of
11 mandamus under the CVRA and file it with the
12 court of appeals. The court of appeals would
13 have 72 hours in which to determine her writ.
14 And it is a mandatory review. They have to take
15 the writ. They have 72 hours to decide it, and
16 then, they issue the decision back to the trial
17 court. So, her writ runs against the trial court
18 saying, "Trial Court, you violated my right."
19 And then, it goes back to the trial court
20 afterwards.

21 CHAIRPERSON FERNANDEZ: Okay.

22 MEMBER GARVIN: It would all depend on

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1 what she put in the writ. You know, the ones
2 that we have done on the right to be present have
3 been the trial court didn't make the necessary
4 findings that her testimony would be materially
5 altered; the trial court didn't make sufficient
6 record, or an out-and-out trial court erred.

7 And then, what the issue is right now
8 is some courts, two circuits are saying you just
9 review that like traditional appeal, meaning the
10 court reaches the merit. The rest of the
11 circuits are saying you only get writ relief if
12 it is a clear and indisputable error, in which
13 case they are not reaching the merits of the
14 decision. And so, they are saying it is not a
15 clear and indisputable application of federal
16 law. So, we're leaving it back to the trial
17 court, and we're not granting your relief.

18 MEMBER ANDERSON: And it is not clear
19 and indisputable because of the facts related to
20 the individual case or because the statute does
21 not grant it as a clear and indisputable right?

22 MEMBER GARVIN: More so that it is not

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1 -- the law isn't settled. So, there is no clear
2 and indisputable application of law because there
3 is no law for the trial court to apply.

4 MEMBER ANDERSON: And that's because
5 it hasn't percolated sufficiently through the
6 courts?

7 MEMBER GARVIN: Yes, which is exactly
8 why the CVRA was supposed to create mandatory
9 reviews, that a body of law would be created
10 expeditiously, so that there would be law for
11 trial courts to apply. But we are in a really
12 circular argument at the appellate level right
13 now.

14 CHAIRPERSON FERNANDEZ: Meg, what is
15 our solution?

16 MEMBER GARVIN: Well, I think Colonel
17 Ham has raised a point that has to be factored in
18 our recommendations, which is, whatever we
19 recommend, we can't have it be wholesale against
20 the rest of the appellate practice or
21 interlocutory practice of the military.

22 I think what we need to recommend is

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1 that, as the Dean said, while enforcement isn't
2 explicit, practitioners are using traditional
3 mechanisms now. We encourage A, B, or C, whoever
4 it is, to consider specifying an appropriate
5 appellate device -- and I'm not saying "appeal"
6 -- appellate device to ensure expedited review,
7 expedited mandatory review of victim's claims in
8 accord with all other participants' rights.

9 MEMBER ANDERSON: It sounds good.

10 CHAIRPERSON FERNANDEZ: So, there
11 would be a variety of devices? That's what we're
12 saying? And so, you don't --

13 MEMBER GARVIN: There potentially
14 could be. Again, I don't know -- Colonel Ham and
15 others there know the current landscape of how
16 appeals happen or interlocutory appeals happen.
17 It can't be back to the trial counsel or to the
18 government to do the appeal. But I think it has
19 to fit in the devices that are already authorized
20 by law. We're just creating a parallel one for
21 the victim.

22 MEMBER CASSARA: Hey, Colonel Ham,

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1 that raises a question. Again, I don't want to
2 get too far afield, but I think that it is
3 helpful to this part of the discussion.

4 You know, under the current system,
5 the government has an appellate division; the
6 defense counsel have an appellate division. Now
7 that we have SVCs as third parties to the
8 litigation, who asserts their rights on appeal?

9 COL HAM: All I can tell you was what
10 it was in LRM, which was --

11 MEMBER CASSARA: That was GAD, wasn't
12 it?

13 COL HAM: No, no, oh, no.

14 MEMBER CASSARA: No?

15 COL HAM: The Judge Advocate General
16 of the Air Force designated the Air Force JAG
17 School as the Special Victim Appellate Division.

18 (Laughter.)

19 MEMBER CASSARA: Okay.

20 COL HAM: Yes, it raises all kinds of
21 issues under -- I don't want to take inside --
22 under Article 70; there is no mechanism to

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1 appoint an attorney.

2 MEMBER CASSARA: Right.

3 COL HAM: There is no appellate's
4 statute. There was no appellate section under
5 the statute.

6 CHAIRPERSON FERNANDEZ: So, there is
7 no vehicle that we're talking about? The vehicle
8 doesn't exist?

9 COL HAM: There was no structure.

10 CHAIRPERSON FERNANDEZ: There is no
11 structure.

12 COL HAM: No, there's no such
13 structure.

14 CHAIRPERSON FERNANDEZ: So, we are
15 providing a right where there is no structure?

16 COL HAM: But, on the other hand, many
17 times, as Mr. Cassara knows, I mean, it is the
18 trial-level attorney, in this instance the SVC,
19 that files the writ or appeal, or whatever, and
20 the government steps in at certain times, and the
21 defense only steps in at certain times. So, a
22 lot of times, it is the trial-level attorney or

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1 the analogous special victim counsel who is doing
2 it all the way through.

3 CHAIRPERSON FERNANDEZ: Yes.

4 MEMBER CASSARA: Okay. Because, you
5 know, I mean, in the few cases where I have filed
6 writs, mostly in Air Force cases, I will tell you
7 that 72 hours is a pipedream.

8 MEMBER GARVIN: The first one that
9 went up under the CVRA, the Ninth Circuit sat on
10 for nine months, even though the law said 72
11 hours.

12 MEMBER HOLTZMAN: I think that we
13 should specify the timeframe for that.

14 MEMBER CASSARA: Yes.

15 CHAIRPERSON FERNANDEZ: Well, it was
16 specified, and it seems to have been ignored.

17 MEMBER GARVIN: Well, it was ignored.
18 It is no longer ignored, but nobody in the
19 community that litigates these things on the
20 civilian side would agree/argue for -- would put
21 forward the 72-hour requirement. Again, it
22 hasn't been good because the decisions that issue

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1 from the courts aren't as thoughtful as one might
2 hope, nor are they as explained as one might
3 hope.

4 MEMBER CASSARA: With yes or no, it is
5 probably not good judicial law.

6 MEMBER GARVIN: Exactly. You know, so
7 nobody would argue for it. I will tell you the
8 reason for it, though, is still valid, which is
9 the idea was to make sure victim's rights
10 litigation did not slow down the rest of the
11 case, that it was a fast-side collateral moment
12 that didn't have significant ramifications on the
13 timing for defense or the prosecution. That was
14 why it was made to be so expedited, was that the
15 issue could be resolved and people could move on.

16 MEMBER HOLTZMAN: Yes, well, maybe
17 listing that as part in the recommendation to the
18 Defense Department and to Congress, that they
19 should take into account that the purpose, I
20 mean, that the review should be expedited in
21 order not to slow up the proceedings, to the
22 detriment of the defendant, but also to ensure

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1 that the victim, the victim's rights were
2 properly taken into account.

3 MEMBER CASSARA: And for the benefit
4 of Commanders who want these cases resolved.

5 MEMBER HOLTZMAN: Yes, right.

6 MEMBER GARVIN: Absolutely.

7 CHAIRPERSON FERNANDEZ: Okay. Just so
8 that we can kind of take into account everything
9 that we have discussed, the first thing that we
10 talked about was that whatever we write here
11 shouldn't be limiting to other types of
12 enforcement. Am I getting that right?

13 MEMBER GARVIN: Yes.

14 CHAIRPERSON FERNANDEZ: Okay. So, we
15 need to clarify that this is not limiting
16 enforcement language. It is --

17 MEMBER GARVIN: That silence on the
18 explicit enforcement provision right now doesn't
19 mean it is not enforceable.

20 CHAIRPERSON FERNANDEZ: Okay.

21 MEMBER ANDERSON: I would just suggest
22 that sounds a little defensive. Rather, we

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1 should just say they are proceeding to pursue
2 these rights through normal channels of
3 enforcement. We want to make clear that or we
4 recommend that this enforcement be made explicit
5 by statute.

6 MEMBER GARVIN: Yes, I like that.

7 MEMBER MARQUARDT: And be done
8 expeditiously.

9 CDR. KING: I am just trying to make
10 sure we write down. It might be a little while
11 until we get that. So, I'm not sure we are
12 writing down or getting the exact words every
13 time.

14 CHAIRPERSON FERNANDEZ: The second
15 thing that we covered was the devices for appeal.
16 Am I getting this right or am I just making this
17 stuff up?

18 You had recommended some language
19 before, Meg.

20 MEMBER ANDERSON: It would be an
21 interlocutory appeal.

22 MEMBER GARVIN: Yes, that's correct.

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1 MS. CARSON: You wanted to say --
2 excuse me; this is Julie. I just want to be sure
3 I get it down correctly.

4 Meg, earlier you said, "Recommend
5 appropriate appellate device to" something.
6 That's what your recommended language was.

7 MEMBER GARVIN: Oh, I'm not sure I was
8 being all that articulate, anyhow.

9 MS. CARSON: Okay, we got it.

10 MEMBER GARVIN: Expedited
11 interlocutory appeal, I think, or expedited
12 interlocutory review.

13 MEMBER ANDERSON: Yes, that would be
14 good.

15 CHAIRPERSON FERNANDEZ: And then, the
16 third issue was limiting the time. It said 72
17 hours here. Is that --

18 MEMBER GARVIN: I think if we just
19 wrap that into the recommendation we just had,
20 which is expedited, then we can explain why
21 expedited. It is in the best interest of the
22 victims, the Commanders, and the system in

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1 general.

2 MEMBER HOLTZMAN: Well, and the
3 defendants.

4 MEMBER GARVIN: And the defendant,
5 right, and the trial counsel.

6 MEMBER HOLTZMAN: Right.

7 MEMBER GARVIN: I mean, it is in the
8 best interest of everybody.

9 COL HAM: Although there would be no
10 automatic stay. There is no guarantee that
11 proceedings are stayed while this appeal is going
12 on.

13 MEMBER GARVIN: So, we should probably
14 factor that into the recommendation, that that be
15 considered, whether a stay is necessary. In the
16 CVRA, you can ask for a stay.

17 MEMBER HOLTZMAN: So, then, we should
18 also be able to ask for a stay here, too.

19 MEMBER GARVIN: You know, I don't know
20 that we can craft all the language, though,
21 because that, of course, then, implicates who
22 does the state count against or --

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1 MEMBER HOLTZMAN: Oh, no, no. Right,
2 we shouldn't do any of that stuff.

3 MEMBER GARVIN: Yes.

4 MEMBER HOLTZMAN: We should just put
5 the general principles.

6 MEMBER GARVIN: Yes.

7 CHAIRPERSON FERNANDEZ: Are we done
8 with this one?

9 MEMBER ANDERSON: I think so.

10 MEMBER MARQUARDT: For now.

11 (Laughter.)

12 MEMBER ANDERSON: So, let me
13 understand this provision. This provision is
14 designed to make explicit the mechanisms by which
15 folks within the Department of Justice will
16 understand and be competent on the rights that
17 have been granted. Or is it an ombuds-person?

18 COL HAM: It is an ombudsman.

19 MEMBER ANDERSON: Okay, okay. But,
20 then, there is further enforcement, right? Yes.

21 CDR. KING: Is this a separate -- I
22 think this is after the fact, to take some sort

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1 of action as far as either retraining or
2 punishing, you know, doing something to the
3 people who violated the rights, not --

4 MEMBER ANDERSON: Independent of what
5 happens immediately?

6 CDR. KING: Right. Exactly.

7 CHAIRPERSON FERNANDEZ: Yes, it is the
8 compliance process when you get all the actors to
9 comply, but it has nothing to do with the
10 procedure itself.

11 MEMBER ANDERSON: How important is it,
12 Meg?

13 MEMBER GARVIN: I have yet to see it
14 work. You guys might have had better experience
15 with an ombudsman office. I don't know. We
16 haven't seen it result in a lot.

17 I think it is a good idea. What it
18 was intended to do was set up a structure to
19 allow you to complain about the conduct of
20 government actors, particularly a U.S. Attorney
21 or the FBI or whatever state actor, who was
22 violating your rights, and to give you a method

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1 to complain about that behavior that was not to
2 them, right, a point person to complain to in
3 order to try to get that redressed. I'm not sure
4 I've seen it work, though.

5 CHAIRPERSON FERNANDEZ: I mean, this
6 might be one of those appearance things more than
7 actual execution. It just gives a further
8 appearance of transparency and a check-and-
9 balance.

10 MEMBER MARQUARDT: I am surprised at
11 the very end of this that they refer to the
12 Attorney General or his designee. I mean,
13 gender-neutral language would be preferable.

14 (Laughter.)

15 CHAIRPERSON FERNANDEZ: I like the
16 idea of it. Does anybody not like the idea of
17 it?

18 MEMBER MARQUARDT: I think the
19 appearance issue is really important, whether it
20 works or not.

21 MEMBER HOLTZMAN: Maybe the language
22 of this could be changed in some way, because it

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1 wasn't clear to me what this is about. But maybe
2 we can just say a provision, again, what I had
3 suggested earlier, a provision comparable to this
4 provision that would create an ombudsman-type
5 mechanism to handle complaints about failure of
6 personnel in the military system to grant the
7 rights, to enforce the rights that are granted
8 under the law, victim's rights granted.

9 MEMBER JONES: So, maybe we just make
10 a recommendation that the services look at this
11 as opposed -- I don't know what we would propose
12 for actual legislation. So, I think we are
13 talking about, right, a proposal to maybe give
14 the military a chance, either service-by-service
15 or more broadly the Department of Defense to
16 figure out? I mean, this is a whole structure
17 here.

18 MEMBER HOLTZMAN: Yes. Sure, that is
19 fine with me. That's fine.

20 I thought, though, Barbara, that the
21 other proposals we were making were legislative
22 because --

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1 MEMBER JONES: You know, I am not
2 saying those were not.

3 MEMBER HOLTZMAN: Oh, okay.

4 MEMBER JONES: But, on this one --

5 MEMBER HOLTZMAN: No, that's fine.

6 MEMBER JONES: -- yes, they could
7 propose, I mean, if they want to propose
8 legislation. It is just that it does seem to
9 require some sort of structure here.

10 MEMBER HOLTZMAN: Yes, that's fine.

11 MEMBER MARQUARDT: I would think the
12 Department of Defense would be the place to do it
13 because you would want to have --

14 MS. SAUNDERS: There is an IG office,
15 whether that would be --

16 MEMBER MARQUARDT: Yes.

17 CDR. KING: Well, each service has
18 their own IG also.

19 MS. SAUNDERS: Already.

20 CDR. KING: Yes.

21 MS. SAUNDERS: Or would it be DoD IG?

22 CDR. KING: Right. I mean, you could

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1 specify or you could --

2 MEMBER JONES: I don't know what the
3 DoD would think would be the most efficient way
4 and the best way to do this. That's all I'm
5 saying. So, I think it is hard for us to be any
6 more specific than to recommend they look at it
7 and come up with something.

8 CHAIRPERSON FERNANDEZ: Yes, I think
9 that this gets to the heart on some level as
10 having people --

11 MEMBER CASSARA: Mai?

12 CHAIRPERSON FERNANDEZ: Oh, sorry, I'm
13 mumbling. I'm mumbling, Bill.

14 (Laughter.)

15 MEMBER CASSARA: Oh, I'm sorry.

16 CHAIRPERSON FERNANDEZ: It wasn't
17 anything. It wasn't a huge point of brilliance.

18 MEMBER CASSARA: It wasn't one of your
19 more brilliant moments?

20 (Laughter.)

21 CHAIRPERSON FERNANDEZ: No, not at
22 all.

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1 I think it is important to have in
2 there.

3 MEMBER ANDERSON: What is the "it" in
4 your sentence?

5 MEMBER JONES: Oh, you wanted
6 legislation. Is that right? You're talking
7 about --

8 CHAIRPERSON FERNANDEZ: I think it is
9 important to have some sort of --

10 MEMBER JONES: Okay.

11 CHAIRPERSON FERNANDEZ: Because I
12 think it gets to the point that you have recourse
13 if your rights are violated, and I think that
14 drives at the heart of what we are trying to do
15 and the transparency we are trying to create.

16 MEMBER MARQUARDT: Well, on the
17 criminal side on regular cases, you have the
18 right to say that your counsel was ineffective.
19 And I think you ought to have similar right in
20 the military.

21 COL HAM: Your special victim counsel
22 was ineffective or your --

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1 MEMBER JONES: Or defense counsel?

2 MEMBER MARQUARDT: Well, if anybody
3 violated the rights --

4 CHAIRPERSON FERNANDEZ: Yes, yes, it
5 is not just your counsel here.

6 MEMBER MARQUARDT: Yes.

7 CHAIRPERSON FERNANDEZ: It seems to be
8 everybody involved.

9 MEMBER MARQUARDT: Right.

10 CDR. KING: But this doesn't affect
11 your case, the actual criminal case itself. This
12 only affects the future of the person who
13 violated the rights.

14 CHAIRPERSON FERNANDEZ: Yes.

15 CDR. KING: It's a separate --

16 MEMBER JONES: It is like a standards
17 of conduct, yes.

18 CDR. KING: Right. Exactly.

19 MEMBER MARQUARDT: Yes.

20 CHAIRPERSON FERNANDEZ: We also heard
21 testimony that going through the IG's office is
22 really difficult when you don't get what you

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1 want. So, this is creating another vehicle.
2 Whether it works perfectly or not, I think the
3 existence of it is important.

4 Do you disagree?

5 CDR. KING: So, are you thinking a
6 separate office other than the IGs?

7 COL HAM: What would your proposal be,
8 to legislate directing DoD to come up with
9 something or would your proposal be more
10 specific?

11 CHAIRPERSON FERNANDEZ: I think for
12 DoD to come up with something. I don't need to
13 come up with the language.

14 MEMBER HOLTZMAN: Right. Congress or
15 the DoD --

16 CHAIRPERSON FERNANDEZ: Right.

17 MEMBER HOLTZMAN: -- I think either
18 one of them could come up with a mechanism --

19 CHAIRPERSON FERNANDEZ: Yes, either
20 one.

21 MEMBER HOLTZMAN: -- for an ombudsman
22 to address failures to adhere, to respect the

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1 rights of victims, as spelled out in the statute.

2 CHAIRPERSON FERNANDEZ: In the CVR,
3 yes. Okay.

4 MEMBER HOLTZMAN: Whatever the
5 military equivalent is.

6 MEMBER CASSARA: And part of that is
7 going to be, how do we make that information
8 known to victims, that they have that right?

9 CHAIRPERSON FERNANDEZ: All of this is
10 going to have to be known, to be made known to
11 victims.

12 MEMBER CASSARA: Well, I am speaking
13 specifically in that area because, if one of your
14 complaints/concerns is that your SVC is not
15 properly advocating your position, you know, they
16 need to know. I mean, who are they going to
17 complain to, their SVC?

18 COL HAM: Well, wouldn't it be in the
19 forms, in the pamphlets that are handed out, that
20 these are your rights? It would be another thing
21 to add to that pamphlet.

22 MEMBER CASSARA: Yes, that's all I'm

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1 saying, is that we need to make sure that that is
2 included.

3 MEMBER JONES: I don't know that it
4 contemplates -- are we saying make a complaint
5 against your special victims counsel?

6 CHAIRPERSON FERNANDEZ: I think you
7 could.

8 MEMBER JONES: Okay.

9 COL HAM: It might be referred over to
10 the Standards Conduct Office.

11 CHAIRPERSON FERNANDEZ: Right.

12 COL HAM: If it is against the counsel
13 for his or her performance, as an attorney, it
14 would probably be referred over to professional
15 investigation.

16 MEMBER JONES: I guess SVC counsel, if
17 not all, are mostly military. "Require a course
18 of training for employees in offices of the DOJ
19 that failed to comply." So, I don't know. We
20 don't need to get into weeds on that. It may not
21 matter.

22 CHAIRPERSON FERNANDEZ: I mean,

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1 doesn't this get to the heart of, if you think
2 your Commander is biased against you, you have a
3 place to complain and say, "He didn't look at any
4 of my rights."?

5 CDR. KING: Against your Commander,
6 you already have an ability to file a complaint
7 against your Commander.

8 MS. CARSON: It is a statutory right
9 under Article 130 --

10 MEMBER HOLTZMAN: Isn't this ombudsman
11 for the system, more or less, the military
12 justice system part of it, as opposed to outside?
13 I mean outside the military justice system. I
14 mean, this is parts of how your rights are
15 respected in the court hearings. Are you allowed
16 to make a statement about it at sentencing? Are
17 you allowed to be in the courtroom? I mean,
18 that's what I thought it's about. Now maybe I'm
19 wrong. Maybe I misunderstood the point of the
20 statute.

21 And, you know, if your views are not
22 transmitted, for example, to the Commander, I

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1 mean, those would be things that you could
2 complain about that. But, other than that, I
3 think it is restricted to the judicial, to the
4 military justice system

5 MEMBER JONES: I think it is, and I
6 also think it is mostly pointing to your trial
7 counsel and his or her success or failure at
8 fulfilling their obligations. I mean, if a judge
9 decides he is not going to let you in the
10 courtroom, and he states his reason on the
11 record, and there's an appeal, I wouldn't see
12 that going to --

13 MEMBER HOLTZMAN: Right, you're right.

14 MEMBER JONES: So, I am just saying
15 this is narrow for the DOJ because they have all
16 these compliance obligations within this
17 ombudsman office.

18 MEMBER HOLTZMAN: Oh, okay.

19 MEMBER JONES: I don't disagree that
20 it would be good for victims to know they can
21 make complaints, but I think in the military
22 system it is really meant for trial counsel, I

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1 think.

2 But, yes, we ought to recommend that
3 there be some similar structure when there is
4 failure to comply. I don't know. Right now, if
5 trial counsel is woefully deficient in terms of
6 doing the right thing by the victim, and he has
7 or she has the obligation, there's probably
8 nothing codified about that, right? And that's
9 what this might do?

10 COL HAM: It would seem it would go
11 into the judge's bench book, the script.

12 MEMBER JONES: Oh, I'm sure it would
13 go there, yes.

14 COL HAM: And it would be very clear
15 as they're going through whatever the proceeding
16 is whether their rights were complied with or
17 not.

18 CDR. KING: Yes, and if there was a
19 misrepresentation there, that would be obvious --

20 COL HAM: Right.

21 CDR. KING: -- at that point, that
22 that would be something.

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1 MEMBER JONES: All right. And then,
2 it could be remedied by the command because he
3 wasn't being a good trial counsel or it could
4 also be remedied by a complaint to whatever
5 structure this is that we are talking about.

6 CHAIRPERSON FERNANDEZ: Okay. We are
7 on our last one, folks. This seems to be the
8 anti-victim provision.

9 (Laughter.)

10 MEMBER ANDERSON: I was wondering,
11 when I read this, whether it was an attempt to
12 restate the obvious import of finality and
13 double-jeopardy or was it an attempt to restrict
14 victims more seriously than that in the sense of
15 when they can report and pursue interlocutory
16 appeal. I am not clear on this language.

17 Meg?

18 MEMBER GARVIN: It is the former. I
19 mean, the first sentence is this great re-
20 articulation of double-jeopardy, right? You are
21 not going to be able to get a new trial for a
22 violation of --

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1 MEMBER ANDERSON: Right.

2 MEMBER GARVIN: -- the victim's right.

3 The second sentence was aimed, or I
4 guess clause is aimed at increasing finality in
5 those situations where jeopardy may not have
6 attached because you don't have a legitimate
7 expectation of finality if a right has been
8 violated, but to cabin that. So, if you are
9 going to do something with the plea or the
10 sentence, there are some jurisdictional hurdles
11 you have to have jumped through, which is you
12 have to have participated; you have to file your
13 writ within 14 days. So, in those moments where
14 perhaps the most is at stake because you're
15 furthest along, the CVRA puts in place some
16 additional steps to make sure that finality can
17 attach.

18 MEMBER ANDERSON: And do you have any
19 problem with those, Meg, because they seem to be
20 -- I mean, I'm not even sure that we need to
21 state a reassertion of the import of double-
22 jeopardy. And so, I guess the question is only,

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1 I mean, in my mind, the question is only the
2 jurisdiction hurdle of 14 days, underscoring the
3 importance anyway.

4 MEMBER GARVIN: I would say in the
5 civilian world that has been a problem because
6 victims aren't getting counsel within 14 days
7 sometimes.

8 MEMBER ANDERSON: But here --

9 MEMBER GARVIN: And that's challenged.
10 That won't be challenged in the military.
11 They're going to have SVCs. So, I'm not sure
12 this is a necessary provision, but others may
13 disagree.

14 And then, of course, the last sentence
15 is about there's no civil cause of damage, right,
16 which is you can't sue someone for violation of a
17 victim's right.

18 MEMBER ANDERSON: Right.

19 MEMBER GARVIN: So, I don't know that
20 the middle sentence is necessary, but if it is,
21 it is relatively de minimis limitation on
22 victims. It is new facts. Basically, it says

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1 new facts, though, you're right.

2 MEMBER JONES: Well, if we agree with
3 what it says, it might be helpful to have it
4 clarified for the military justice system as
5 well.

6 MEMBER ANDERSON: I don't see a
7 downside if victims already have special victim
8 counsel.

9 MEMBER GARVIN: It is very protective
10 of defendant's -- in my opinion, it ensures the
11 defendants get to have some finality and there
12 are no rights that have future implication. I
13 mean, a compromise at the moment to make sure
14 that defendant's rights were protected also; I
15 have no problem with it.

16 MEMBER ANDERSON: I think we should
17 include it. Defendant's rights should be
18 guaranteed.

19 MEMBER JONES: I agree.

20 CHAIRPERSON FERNANDEZ: It is in.

21 Bathroom break, folks?

22 MEMBER HOLTZMAN: Are we all done?

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1 (Laughter.)

2 CHAIRPERSON FERNANDEZ: We are done
3 with this part of it, Liz.

4 MEMBER HOLTZMAN: How much longer are
5 we going to go?

6 CDR. KING: The maximum time we have
7 the phone, ma'am, is four o'clock because the
8 school has the phone line reserved after that. I
9 don't know if you want to go that long, but
10 that's the maximum time we have the phone line.

11 CHAIRPERSON FERNANDEZ: Well, maybe
12 before the bathroom break, is there something
13 else that we could tackle in an hour and a
14 quarter?

15 MEMBER ANDERSON: I understand, as a
16 procedural matter, that the staff is asking us to
17 make progress, so that they can continue to draft
18 until we meet again. And we've provided them
19 with a lot of progress to make, a lot of
20 direction here.

21 I'm thinking, for the issue of the
22 concerns that I raised that are sort of, now we

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1 have reoriented, if they have reorganized it to
2 where those are -- I think it would be helpful
3 for staff to identify where in the record, to
4 maybe draft some of that up and identify where in
5 the record, because there are a lot of disparate
6 places where those issues come up. Some of these
7 issues are very straightforward, were they are in
8 the record, but some of these are more
9 widespread. So, that would be a request. If
10 there is time, I think that would helpful to us
11 in our deliberations next time around.

12 MEMBER JONES: Is there another
13 section, though, where there may be questions
14 that we could start talking about --

15 MEMBER ANDERSON: Exactly.

16 MEMBER JONES: -- to help give them
17 direction, even this afternoon?

18 MEMBER ANDERSON: Let's look at the
19 outline.

20 MEMBER JONES: Yes.

21 MEMBER ANDERSON: So, we went through
22 victim's rights. We did some with sexual assault

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1 reporting, a little bit just in terms of
2 structure, because we are going to move that to
3 the first part.

4 I guess the question is whether we
5 dive into victim services.

6 CHAIRPERSON FERNANDEZ: This may not
7 be helpful.

8 MS. SAUNDERS: We received a lot of
9 information on it. Certainly, there's a lot --

10 CHAIRPERSON FERNANDEZ: On what?

11 MS. SAUNDERS: On victim services.

12 CHAIRPERSON FERNANDEZ: Yes.

13 MS. SAUNDERS: There's a lot of
14 information.

15 CHAIRPERSON FERNANDEZ: If there are
16 things that, if we go down -- let's say we take
17 victim services and we go down the outline. We
18 don't have all of the hearing stuff in front of
19 us, but there are going to be things that we
20 remember that are important to each one of us,
21 and to at least flag that to the staff to be
22 something to be on the lookout. So that, when

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1 you guys take a plunge into the masses that say,
2 well, I know Michelle is going to really want to
3 see this.

4 CDR. KING: Right. Also, if you could
5 think as you talk about it, if there's stuff that
6 you don't think we have yet that you would want
7 us to get --

8 CHAIRPERSON FERNANDEZ: Right.

9 CDR. KING: -- that would be really
10 helpful. Because, like we talked about, we have
11 to start getting the rest. Anything else you
12 want to gather up, we have to hurry up and do
13 that since you're running out of time.

14 MEMBER ANDERSON: The volume of
15 information and materials that you all have
16 provided is enormous.

17 CDR. KING: I know, but I am worried
18 at the last minute you will be drafting an issue
19 and you'll say, "But we don't know about this and
20 we never heard about what these people do" or "We
21 don't feel like we have enough information," and
22 it will be too late to get it. And so, that's

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1 the part I'm worried about, and then, we will
2 feel like we didn't do our job to get you what
3 you want.

4 CHAIRPERSON FERNANDEZ: I think we
5 went through one look at the outline. Let's take
6 it chunk-by-chunk and see if we can issue-spot.
7 Let's just be more fellows for a while or law
8 students, I should say, and see if there are
9 things that we remember that we really want to
10 include or things that we feel that we need --

11 MEMBER ANDERSON: So, the only thing
12 on victim's rights that we haven't deliberated on
13 today is this last D, which is additional rights
14 for military members; should there be additional
15 rights that are not included in the NDAA? And I
16 don't know that anything springs to my mind or
17 the sort of procedural question of, is there
18 other information that we would need to answer
19 that? I feel like I don't know.

20 MEMBER JONES: And we are letting
21 the --

22 MEMBER ANDERSON: Yes.

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1 MEMBER GARVIN: I think there's one
2 that was presented to us in testimony. Well, I
3 guess it didn't count as testimony, but at
4 Lackland, and it is summarized in the Lackland
5 notes, which says the SVC had indicated that it
6 would be useful to their practice to have some
7 rights of discovery, whether it is called
8 discovery or not called discovery, but some right
9 to access information that trial counsel has, in
10 order to know how to exercise and assert victim's
11 rights.

12 And I think somewhere along the way
13 that was mentioned this morning, I think, too.
14 But I think talking about that as a right might
15 be a useful conversation, especially since we did
16 hear from SVCs on it.

17 MEMBER ANDERSON: Meg, can you remind
18 us, Meg? I was there, but I don't recall the
19 specifics. I do recall this generally. Was this
20 discovery or information about prior sexual
21 history issues, rape shield law? Was this
22 generally about other matters related to what the

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1 defense or the prosecution had in its possession?
2 Was it discovery vis-a-vis the prosecution or
3 vis-the-vis the defense, or both? I cannot
4 remember what information we got about that.

5 MEMBER GARVIN: Yes. If I am
6 remembering correctly -- and, first of all, the
7 notetakers, you guys were fantastic -- the notes
8 reveal that it was mostly about what those SVCs
9 could currently litigate on, which was pre-NDAA.
10 So, it was 412 issues and 513 issues, the rape
11 shield.

12 MEMBER ANDERSON: The rape shield.

13 MEMBER GARVIN: And what one of the
14 SVCs indicated was -- and it was in the
15 Kastenberg case. The original pleadings in
16 Kastenberg were, "Could I get copies of all the
17 papers that are at issue in these rape shield
18 proceedings?" And he was denied that.

19 So, it ranges from that to the case
20 that I mentioned earlier that just went up on
21 appeal, which is they just want access to those
22 parts of the record for the current files of

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1 trial counsel that implicate their victim's
2 rights.

3 So, what that may mean, I can tell you
4 we have had SVCs not related to this
5 Subcommittee, but I have had seen it, where they
6 aren't even getting copies of their own victim's
7 statements that we are giving to law enforcement.

8 COL HAM: I can read you from the SRS.

9 MEMBER GARVIN: That would be great.

10 COL HAM: It is about the right to
11 confer. It says, "The right to confer does not
12 extend to a right to access the prosecution's
13 investigative files nor to the Probation
14 Service's pre-sentencing report in a federal
15 court." And it cites the Ninth Circuit, the
16 Fourth Circuit, and the Sixth Circuit, and a
17 couple of district courts on that issue.

18 MEMBER GARVIN: Can you say that
19 again, Colonel Ham? I'm sorry.

20 COL HAM: Yes. It's from the
21 Congressional Research Service Summary and Legal
22 Analysis of the Crime Victims' Rights Act, which

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1 is April 24th, 2012.

2 It addresses it under the right to
3 confer with an attorney for the government, this
4 issue. It says, "The right to confer, however,
5 does not extend to a right to the access to the
6 prosecution's investigative files nor to the
7 Probation Service's pre-sentencing report," and
8 cites a case from the Ninth Circuit, a case from
9 the Fourth Circuit --

10 MEMBER GARVIN: Yes.

11 COL HAM: -- which is the Moussaoui
12 case, a big case, and a case from the Sixth
13 Circuit, and, actually, an Eastern District of
14 New York case and a Western District of North
15 Carolina case.

16 MEMBER GARVIN: Yes, and that is an
17 accurate and very thorough summary of the case
18 law out there. It has been litigated on four
19 specific issues.

20 One, does the victim get a copy of the
21 entire pre-sentence report? That is how the
22 litigation went up. It was not litigated,

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1 though, does the victim get access to portions of
2 the pre-sentence report. That litigation came
3 down that the victim does not get the entire pre-
4 sentence report in two circuits.

5 It was also litigated, do they get
6 access to the entire file of the prosecution, and
7 that came back no.

8 And then, there is the District of
9 Utah, which I am not sure whether that is showing
10 in there, which it went up in the Tenth Circuit,
11 which is, do they get access to certain pieces of
12 evidence? And that came back "No, but...," and
13 there is interesting dicta in there that is being
14 further litigated.

15 The litigation so far I don't believe
16 has resolved the issue because it has been
17 litigated as an all-or-nothing as opposed to,
18 does the victim get access to those pieces of the
19 investigative file that are relevant to him or
20 her exercising their right? And that hasn't been
21 litigated.

22 And that is what the SVCs, I believe,

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1 presented to us at Lackland. I may be
2 misconstruing or applying my own knowledge to
3 what they have said. And if so, everyone please
4 correct me.

5 CDR. KING: Meg, my recollection is
6 that the attorneys said that many times they are
7 getting discovery from the government only
8 because they're friends.

9 MEMBER GARVIN: Thank you for that.
10 That was absolutely stated, and they found it
11 useful when they got it. But when they aren't
12 friends, they aren't getting it.

13 CDR. KING: Right.

14 MEMBER ANDERSON: Well, is there a
15 limited universe that we could articulate that we
16 wanted to make available to the victim as a
17 right? In other words, okay, you're friends with
18 the prosecution. You may or may not get any
19 number of things. But is there a limited
20 universe of things that we think are so important
21 for the effectiveness of the special victim's
22 counsel to defend the victim at various stages of

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1 the process, that we want to make those available
2 as a right?

3 Because I don't think we want to say
4 all the prosecution files or all the -- you know,
5 that's just --

6 MEMBER JONES: No, that is why those
7 cases came back.

8 MEMBER ANDERSON: Yes, that is why
9 those cases came back the way they did. Yes.

10 MEMBER JONES: Those are no-brainers.

11 But, on the other side of it, it is so
12 case-specific and there is so much to talk about
13 in terms of, well, just what are you asking for,
14 what are the considerations?

15 MEMBER ANDERSON: Right.

16 MEMBER JONES: I think it would be
17 very difficult. I mean, even for a victim
18 witness to ask for a statement they may have
19 previously made to the prosecutor, some
20 prosecutors don't want their witnesses to re-read
21 their prior statements. I happen to think that
22 is not good trial practice. So, I don't know.

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1 If that went up, maybe for certain reasons with
2 more background, a judge would decide, no, you
3 have to give that over.

4 But I think there are so many
5 different specific circumstances, not just what
6 it is asking for, but in terms of the case,
7 prosecutorial strategy, what have you, I think it
8 would be a big adventure for us to try to craft
9 something.

10 MEMBER ANDERSON: Right.

11 MEMBER JONES: So, I mean, this may be
12 something that we have to let case law proceed
13 with.

14 I don't know, Meg, what do you think?

15 MEMBER HOLTZMAN: Or recommend that
16 this is an area for further study by the Defense
17 Department to see how the laws are working out.

18 MEMBER GARVIN: I would like that
19 recommendation at the very least because, if you
20 are getting nothing -- and I think it was sent to
21 us, like the link to the blogs discussing this
22 issue. I believe that was circulated.

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1 MEMBER ANDERSON: It was, yes.

2 MEMBER GARVIN: Yes. And if you read
3 through that, it is a very thoughtful discussion
4 on there on all sides of this issue, which I
5 think there are multiple sides, not two sides.
6 But if you get nothing in the file, the victim's
7 counsel is going in dark, you know, just blind,
8 making arguments that may actually make them
9 sound ridiculous, right? You are making
10 arguments based on not knowing what everyone else
11 in the room knows. And therefore, for the
12 victim's rights to be meaningful heard or to
13 participate is really diminished because you
14 don't know what the landscape is.

15 On the other side, to get everything
16 is really problematic because you have
17 defendant's right. You have the fairness of the
18 system, all of those kinds of things that might
19 be implicated. But I think it has to be tackled
20 because to make the rights meaningful, the
21 victim's counsel has to be well-informed. So,
22 there is some middle ground, and I think we need

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1 to make a recommendation that DoD figure out what
2 the middle ground is.

3 And it may be that the recommendation
4 is discovery -- and I don't like the word
5 "discovery" because discovery just means parties.

6 MEMBER JONES: Yes, I don't like the
7 discovery, either.

8 MEMBER GARVIN: But access to
9 information is not prohibited, but it is left to
10 the discretion of, you know, based on these
11 criteria. It might be something, but right now
12 this ad-hoc approach to it where some victims'
13 counsel are getting all of the information, some
14 are getting none, is I think really problematic.

15 MEMBER MARQUARDT: I like your
16 recommendation because every case is so
17 different, that you can't know the specifics of
18 what would be reasonable to get.

19 MEMBER JONES: So, you like the
20 discretion?

21 MEMBER MARQUARDT: Yes.

22 MEMBER ANDERSON: But, Meg, you're not

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1 proposing that we make that as a recommendation?

2 You're proposing that we task the DoD with --

3 MEMBER GARVIN: Yes, yes.

4 MEMBER ANDERSON: -- with analyzing
5 this question. Because we see important values
6 on both sides for the efficacy and truth-seeking
7 process of the proceedings, and we task them with
8 taking that into account and making changes as
9 appropriate.

10 MEMBER GARVIN: Yes.

11 COL HAM: That is sort of your
12 recommendation?

13 MEMBER ANDERSON: As a draft.

14 (Laughter.)

15 COL HAM: Okay. I mean, you said you
16 weren't making a recommendation, but it sounds
17 like a recommendation.

18 MEMBER ANDERSON: Well, that is
19 interesting. I mean, I think we are tasking them
20 with looking into this question because we see
21 value on both sides.

22 CHAIRPERSON FERNANDEZ: A study is

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1 what you're doing.

2 COL HAM: Okay.

3 CHAIRPERSON FERNANDEZ: To study the
4 issue and to recommend what would be appropriate.

5 COL HAM: Yes.

6 CHAIRPERSON FERNANDEZ: Is that what
7 we're getting at, sort of the congressional punt,
8 isn't it, and a study?

9 MEMBER MARQUARDT: A DoD punt.

10 CHAIRPERSON FERNANDEZ: Well, right,
11 we get the DoD to punt. We're punting to DoD to
12 punt. Sorry.

13 How about a quick bathroom break,
14 folks? And then, we can come back and look at
15 victim services, unless we think we need to --
16 just one clarification. Do we need to spend more
17 time on additional rights that don't exist?

18 MEMBER HOLTZMAN: Oh, yes, I was going
19 to suggest that -- Meg and I discuss at the end
20 of the hearing that we had. Because the two
21 witnesses who testified, in general, were upset
22 that there were concerns about the Crime Victims'

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1 Rights Act. And we didn't get specifics.

2 I think that we ought to have a better
3 sense, if it is at all possible, from them of any
4 specifics, other problems with that Act because
5 we need to know if there is something else that
6 should be -- I mean, if something else should be
7 added or subtracted from what we're doing,
8 because we are basically operating off of that
9 Act. And if there are problems, we should know
10 about it. That's it.

11 CHAIRPERSON FERNANDEZ: Is that some
12 additional, without having additional testimony,
13 could we get in writing from witnesses --

14 MEMBER HOLTZMAN: Sure. Right.

15 CHAIRPERSON FERNANDEZ: -- sort of
16 additional problems? And I would ask that, when
17 you are asking these witnesses, you would include
18 Meg as one of the people who you would ask their
19 opinion of.

20 MEMBER HOLTZMAN: Well, Meg, are there
21 such issues that we need to know about?

22 Is she still there?

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1 MEMBER GARVIN: I am still here. I'm
2 thinking.

3 MEMBER HOLTZMAN: So, we exhausted the
4 subject, and that's great.

5 MEMBER GARVIN: No, I think we
6 probably do. Just off the top of my head right
7 now, I can't think of them.

8 MEMBER ANDERSON: Meg is a leading
9 national authority. If off the top of her head
10 she doesn't have something here, maybe we should
11 -- I just keep thinking this is a first draft.

12 MEMBER GARVIN: Yes.

13 MEMBER ANDERSON: And it is our goal,
14 I think, today to make as much headway as
15 possible to allow the staff to do its
16 extraordinary work, with the proviso that we need
17 to figure out if there are other materials we
18 want collected or other testimony, God forbid,
19 that we want to hear at this juncture.

20 So, right. No, I'm with you. So,
21 that we can make progress. But, then, once we
22 have a draft, then we look at it, and all of us

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1 have another opportunity to weigh-in on
2 additional rights we may want to --

3 CDR. KING: We might want to take a
4 break, but I do have one thing I would like to
5 bring up.

6 The sentencing procedure in military
7 cases, typically, at least according to the
8 formal procedure, there's not a place where
9 victims just get up and say what they want to
10 say. There's not a pre-sentence report where
11 they tell the officer what they want to say. And
12 there's not just a place where they normally
13 stand up and tell the judge what happened to
14 them.

15 It is a formal sentencing hearing that
16 is more like a contested hearing. And typically,
17 unless there is an agreement between the defense
18 and prosecution to allow the victim to either
19 give a statement, you know, give a written
20 statement or something, the victim testifies
21 under oath.

22 And generally, there is not cross-

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1 examination, but there certainly is the
2 opportunity for that. And I assume it makes some
3 victims nervous.

4 Bill, you can maybe chime-in on this.
5 And so, I don't know if that is something you
6 think is an issue or anybody thinks is an issue
7 that you would like to look at to change the
8 scope of victim impact statements at sentencing
9 in the military.

10 MEMBER GARVIN: Yes.

11 CHAIRPERSON FERNANDEZ: Okay. Yes.

12 MEMBER GARVIN: I guess I was not
13 completely aware of that. I mean, my two cents
14 is the victim -- I mean, this is one of the
15 oldest rights in the civilian world. Restitution
16 and victim impact statements are two of the
17 oldest rights, and there's actually quite a bit
18 of literature on the importance of impact
19 statements to survivors. So, I would really
20 encourage that be considered as an additional
21 right, and that it be an allocution right, like
22 it is in the federal system, as opposed to an

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1 evidentiary moment.

2 CDR. KING: Maybe do you want to take
3 a break and think about it?

4 CHAIRPERSON FERNANDEZ: I like the way
5 Meg put it, an allocution rather than
6 evidentiary. So, you can't be crossed on it.

7 MEMBER CASSARA: Yes, and I can tell
8 you from my perspective it is a rare, rare, rare
9 event when I would cross-examine a victim after a
10 conviction.

11 COL HAM: And against the additional
12 consideration -- again, throwing out there that
13 he does have the right to testify, present a
14 statement not under oath in sentencing.

15 MEMBER GARVIN: Right.

16 COL HAM: However, then there is an
17 instruction that it is not evidence.

18 MEMBER GARVIN: And that is the exact
19 statement that a civilian --

20 COL HAM: That's right.

21 MEMBER GARVIN: So, if the victim is
22 put on by the prosecution or the defense is

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1 aggravating or mitigating, cross-examination
2 attaches in the civilian.

3 If they allocute, they are allocuting
4 and there's an instruction if it is jury
5 sentencing. So, it basically is parallel to the
6 defendant's allocution right. And defendant, of
7 course, has an opportunity to rebut.

8 CDR. KING: Right, and that is the
9 same. In the military the government has the
10 right to rebut statements of fact --

11 MEMBER GARVIN: Yes.

12 CDR. KING: -- made by the defendant
13 in their --

14 MEMBER CASSARA: But the one
15 difference is we don't get two to three months
16 between sentencing --

17 CDR. KING: Right.

18 MEMBER CASSARA: -- conviction and
19 sentencing.

20 CDR. KING: Right. We go right into
21 it immediately after --

22 MEMBER CASSARA: Sometimes it is

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1 really pretty meaningless because --

2 CDR. KING: Right.

3 MEMBER CASSARA: -- we don't know what
4 the person is going to say until they say it.
5 And the chances that either the prosecution or
6 the defense has anything to rebut that with is
7 pretty minimal.

8 CHAIRPERSON FERNANDEZ: But if it is
9 not evidentiary, does it matter?

10 MEMBER CASSARA: No, I just want to
11 make sure that everybody was clear that that's
12 how it works. We go straight from findings into
13 sentencing.

14 CHAIRPERSON FERNANDEZ: Right.

15 MEMBER GARVIN: Which is what happens
16 in the state systems, many state systems, not
17 federal, but state.

18 CHAIRPERSON FERNANDEZ: Right.

19 A 10-minute break?

20 MEMBER HOLTZMAN: All right. I may
21 not be here when you all come back.

22 CHAIRPERSON FERNANDEZ: Liz?

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1 MEMBER JONES: That sounds awful
2 final, Liz.

3 (Laughter.)

4 (Whereupon, the foregoing matter went
5 off the record at 2:42 p.m. and went back on the
6 record at 3:00 p.m.)

7 CHAIRPERSON FERNANDEZ: Everybody on?

8 MEMBER CASSARA: I'm here.

9 CHAIRPERSON FERNANDEZ: Meg?

10 MEMBER GARVIN: Yes, I'm here.

11 CHAIRPERSON FERNANDEZ: Okay. Victim,
12 and I'm looking at the wrong thing here. Okay.

13 MEMBER JONES: I am sorry, I don't
14 have mine in front of me.

15 CHAIRPERSON FERNANDEZ: Here.

16 Okay. Ways to attack this. So, why
17 don't we go down and, then, see if there are
18 things that come to mind that we need to be
19 highlighting or that we feel that we don't have
20 enough information on?

21 So, why don't we start with the
22 military system's role in investigation,

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1 prosecution, and adjudication?

2 MEMBER GARVIN: I am sorry, Mai, this
3 is Meg. Are we just walking through the outline
4 then?

5 CHAIRPERSON FERNANDEZ: Yes, yes.

6 MEMBER GARVIN: Okay. All right.
7 Thank you.

8 MEMBER JONES: So, we are starting on
9 B where the victim advocates start and their
10 role in --

11 CDR. KING: No. 3(b). Isn't that
12 where you are?

13 MEMBER JONES: So, are we going to go
14 through and pick out what we know are the things
15 that the military provides to protect victims? I
16 am just going back to the terms of reference. Or
17 to support and protect, right? And I gather, is
18 this from the statute? I should know. From 2007
19 to the present and current status?

20 CHAIRPERSON FERNANDEZ: I think that
21 is just enumerating the different programs --

22 MEMBER JONES: Right, right.

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1 CHAIRPERSON FERNANDEZ: -- that have
2 been created since 2007. So, I think that is
3 pretty straightforward, right?

4 CDR. KING: Right. We are still
5 trying to get that. We have requested the
6 services provide a list. We have a lot of it,
7 but we just didn't want to --

8 MEMBER JONES: But, then, what do we
9 propose to say? For instance, do we have enough
10 information on victim's advocates and SARCs, for
11 instance, to say something like "It seems like a
12 great program, but there are problems with" this
13 or that? I mean, I think that is what we are
14 supposed to be doing, right?

15 MEMBER MARQUARDT: Right. Well, for
16 the SARCs, does all the information that they
17 have become confidential or is it discoverable?

18 COL HAM: They have a privilege.

19 MEMBER JONES: And the victim's
20 advocate as well?

21 COL HAM: Uh-hum. Because it is
22 called the victim advocacy victim privilege.

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1 CDR. KING: It applies to SARCs.
2 SARCs are who you can report restricted reports
3 to.

4 COL HAM: For purposes of privilege.

5 CDR. KING: Right.

6 COL HAM: I'm talking about an
7 evidentiary privilege.

8 MEMBER JONES: You know, like an
9 attorney/client.

10 MEMBER MARQUARDT: Right.

11 MEMBER JONES: I think that is only
12 victim advocate, right?

13 COL HAM: I think it is only victim
14 advocates as well.

15 CHAIRPERSON FERNANDEZ: Don't usually
16 the SARCs supervise the victim advocates?

17 COL HAM: Right. Yes.

18 CHAIRPERSON FERNANDEZ: So, how could
19 it not apply to them for the SARC?

20 MS. SAUNDERS: I'm almost sure it
21 does, but --

22 MEMBER JONES: It is logical.

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1 COL HAM: Well, we need to figure that
2 out.

3 CHAIRPERSON FERNANDEZ: So, when we
4 are saying it's privileged, it means it is
5 still --

6 MEMBER MARQUARDT: It is not
7 discoverable.

8 COL HAM: There is a Brady exception,
9 but these individuals are not attorneys. I don't
10 know that they receive any instruction on what
11 Brady would require them to reveal or that they
12 would recognize a blatant Brady violation if it
13 stood up on its hind legs and spit at them.

14 MEMBER CASSARA: That's okay, Colonel
15 Ham.

16 (Laughter.)

17 Including most trial counsel.

18 (Laughter.)

19 CHAIRPERSON FERNANDEZ: So, then, how
20 does that work?

21 COL HAM: Mr. Cassara, how is that
22 working in practice?

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1 CHAIRPERSON FERNANDEZ: Are SARCs and
2 victim advocates just handing over their notes?

3 MEMBER CASSARA: No. But what I
4 think, in reality, anything, for the most part,
5 except for anything that is actually told to them
6 by the alleged victim, anything that they have is
7 going to be stuff, you know, medical records,
8 mental health records, et cetera, are going to
9 fall under the 502 privilege anyway.

10 But, in terms of direct communications
11 between a SARC and a complaining witness or
12 victim, I have not run across it yet, where they
13 have turned over Brady information, maybe because
14 (A) they don't have it or (B) they don't know
15 what it is.

16 MEMBER GARVIN: And the SARCs are
17 governed by Brady?

18 CDR. KING: The SARCs are victim
19 advocates. They are qualified as victim
20 advocates under the instructions.

21 MEMBER GARVIN: Right. I mean, but
22 they are part of the prosecution team?

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1 MEMBER CASSARA: Right now they work
2 for the prosecution.

3 MEMBER GARVIN: Okay.

4 CHAIRPERSON FERNANDEZ: Wait. Sherry
5 is nodding no.

6 CDR. KING: No.

7 MEMBER CASSARA: Who is nodding no?

8 CDR. KING: Me. Sherry. SARCs don't
9 work for the victim advocates. SARCs work for
10 the SAPR program.

11 MEMBER CASSARA: Well, you know --

12 CDR. KING: They work for the
13 Commander. They don't work for the prosecution.
14 They are not a Victim-Witness Liaison or a victim
15 advocate.

16 MEMBER CASSARA: Right. You're right.
17 I'm mistaking terms.

18 CDR. KING: Okay.

19 MEMBER CASSARA: My bad.

20 CHAIRPERSON FERNANDEZ: So, then, that
21 does not need to be given over to defense?

22 MEMBER GARVIN: Right.

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1 MEMBER CASSARA: Well, I don't know.
2 I mean, I would beg to differ in the sense that
3 the Brady requirement is that information in the
4 hands of the government. The Commander is as
5 much the government as the prosecutor is.

6 COL HAM: There is a specific
7 exception in the rule. The rule is Military Rule
8 of Evidence 514; 514(d) are all the exceptions.
9 There is no privilege when the victim is dead,
10 when federal law, state law, or service
11 regulations impose a duty to report the
12 information contained in a communication; if it
13 clearly contemplates future commission of a fraud
14 or crime, et cetera; when necessary to ensure the
15 safety and security of military personnel,
16 military dependents, military property,
17 classified information, or the accomplishment of
18 a military mission; when necessary to ensure the
19 safety of any other person, including the victim;
20 when a victim advocate believes a victim's mental
21 or emotional condition makes the victim a danger
22 or when a mission or disclosure of a

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1 communication is constitutionally required.

2 MEMBER GARVIN: But that doesn't
3 answer whether Brady attaches to them. Right.
4 He is raising the question of whether Brady
5 attaches.

6 COL HAM: They have an independent
7 duty, it seems.

8 MEMBER GARVIN: Right, but Brady
9 doesn't create an obligation, other than on the
10 prosecution team, and I would beg to differ that
11 it is the whole government. At least in the
12 civilian world, that language which it attaches
13 to lots of privileges also is a recognition of
14 fair trial rights and due process rights, not a
15 Brady obligation, because the Supreme Court said
16 it didn't create a general discovery right; Brady
17 didn't.

18 So, I guess our recommendation should
19 be clarification of to whom Brady attaches in the
20 military.

21 COL HAM: Yes.

22 MEMBER CASSARA: I think that is going

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1 to be an issue, frankly, that is going to be
2 resolved through appellate litigation.

3 MEMBER GARVIN: I would agree. I
4 mean, because I think, yes, I mean I think, even
5 if we wrote a statute, then it is going to be a
6 constitutional question.

7 MEMBER CASSARA: Obviously, I am going
8 to argue that, due to the unique nature of the
9 military --

10 CHAIRPERSON FERNANDEZ: Yes, it sounds
11 like you two are litigating it right now.

12 (Laughter.)

13 MEMBER CASSARA: I think we just need
14 to recognize that that's probably an issue that
15 is going to be resolved through appellate
16 litigation.

17 CHAIRPERSON FERNANDEZ: Okay.

18 MEMBER JONES: But just to take us
19 back a minute, do we want to say something
20 generally about the SARC system, the victim
21 advocate system, that it does support, that it
22 needs more or it doesn't; it's not the right way

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1 to go? I mean, I think that's what we are
2 supposed to be doing, assessing each of the
3 programs that are relatively new.

4 CHAIRPERSON FERNANDEZ: Let's take it
5 step-by-step investigation.

6 MEMBER JONES: Okay.

7 MEMBER MARQUARDT: They don't
8 participate in the investigation, do they?

9 CHAIRPERSON FERNANDEZ: My
10 recollection is that a SARC can be with you while
11 the investigator is present.

12 CDR. KING: A SARC or victim advocate.

13 CHAIRPERSON FERNANDEZ: Right.

14 I don't know; I feel like No. 1 is
15 like, what's their role in each one of those?
16 And I think it would be good to specify what
17 their role is. I think that that's when you can
18 bring up the Brady question in there, that that
19 is an issue that has been unresolved.

20 MEMBER JONES: Yes, and I guess,
21 generally, it helps us describe how the SARC
22 assists a victim through each of those phases --

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1 CHAIRPERSON FERNANDEZ: Yes. Exactly.

2 MEMBER JONES: -- if they do.

3 CDR. KING: I'm not sure we have a lot
4 of testimony about especially the prosecution and
5 adjudication as far as SARCs and victim
6 advocates. When we were in Texas at one of the
7 places, I think I asked them how much training
8 they had, or somebody did, on what the military
9 justice system is, and most of them said a
10 PowerPoint presentation and they knew very little
11 to nothing about it.

12 MEMBER JONES: Right, but what are
13 they saying they think their job is?

14 CDR. KING: Right.

15 MEMBER JONES: And what are they
16 saying they are doing now? I think I heard some
17 of that. What are they there for?

18 CDR. KING: Yes. Right. Mostly, I
19 think what they have said is that they are not
20 involved in that part so much --

21 MEMBER JONES: I see.

22 CDR. KING: -- except to provide

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1 support during interviews. Or they are not
2 involved in the process like a traditional victim
3 advocate from a prosecutor's office who advises
4 on the prosecution and the role like that. If
5 they are involved, I think what I recall them
6 saying is more as a support person to like go
7 with, you know, be there, go with, and arrange
8 other services and things like that.

9 MEMBER JONES: Right.

10 CHAIRPERSON FERNANDEZ: So, it seems
11 almost like we could say what their role is
12 supposed to be, but that one of the deficiencies
13 is that they don't have sufficient training in
14 the criminal justice system.

15 MEMBER MARQUARDT: Well, it seems to
16 me that there is some duplication.

17 MS. CARSON: I can read from the
18 policy what a SARC responsibility is

19 CHAIRPERSON FERNANDEZ: Pardon me?

20 MS. CARSON: I can read from the
21 policy.

22 "The SARC shall serve as the single

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1 point of contact for coordinating care to ensure
2 that sexual assault victims receive appropriate
3 and responsive care. All SARCs shall be
4 authorized to perform victim advocate duties in
5 accordance with service regulations and will be
6 acting in performance of those duties. All SARCs
7 have direct unimpeded contact and access to the
8 installation Commander for the purpose of this
9 instruction and reference."

10 CHAIRPERSON FERNANDEZ: Well, a few of
11 the things that we heard at Hood was, on the
12 investigation side, if you call the medical exam
13 an investigation, that they didn't have the
14 resources to bring people to get the medical
15 exams. They had to bring them in their own cars,
16 that it was a 45-minute drive. So, it impedes an
17 investigation when you've got to get through all
18 those kinds of hurdles.

19 MEMBER JONES: Yes. And to take it
20 back a step, so it sounds to me like the
21 description of the SARC is the person who
22 facilitates for the victim getting all of the

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1 available --

2 MS. CARSON: Their care, right.

3 MEMBER JONES: -- care, whether it is
4 medical services, emotional, what have you. And
5 that is a deficiency, at least at Hood or a
6 complaint that was made.

7 CHAIRPERSON FERNANDEZ: Right. The
8 other complaint that was made is you've got this
9 role as being a SARC, but it is an adjunct to
10 whatever else you are doing. And so, somebody
11 says --

12 COL HAM: SARC or a victim advocate?

13 MEMBER JONES: And what is the
14 difference?

15 COL HAM: Think of it like the chain
16 of command. The SARC is at the top, and the
17 victim advocates are down.

18 CHAIRPERSON FERNANDEZ: It was the
19 SARCs because we had the SARCs come in and talk
20 to us, and they said --

21 COL HAM: They were mixed in with the
22 victim advocates.

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1 MS. SAUNDERS: We had victim
2 advocates, but they were sort of interchangeable
3 there.

4 COL HAM: Maybe they were
5 interchangeable.

6 MS. SAUNDERS: The people that seemed
7 to work primarily in the volunteer role were the
8 victim advocates; whereas, the SARCs seemed to be
9 the full-time -- and that may be an
10 overexaggeration, but they seemed to be more a
11 full-time, paid position.

12 MS. GORDON: We have been advised on
13 a lot of these things. So, we can collect this
14 information and can get a very clear picture of
15 what their responsibilities are.

16 MEMBER MARQUARDT: But it seems to be
17 that they don't have a real role in the
18 investigation, prosecution, and adjudication.
19 They are there as a personal person for these
20 victims.

21 COL HAM: Support.

22 MEMBER MARQUARDT: Yes.

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1 CHAIRPERSON FERNANDEZ: Yes, but part
2 of the investigation is actually getting them to
3 medical exams. All of that will be
4 investigation. I mean, that's evidentiary at
5 some point.

6 MEMBER JONES: But we can say that, to
7 the extent --

8 MEMBER MARQUARDT: But they assist the
9 victim. Instead of having a role in the
10 investigation, they assist the victim.

11 MEMBER JONES: Right, right.

12 CDR. KING: Well, they are supposed
13 to. At least at Fort Hood they kind of had a
14 role just because there wasn't enough support
15 provided for someone else to get them there.

16 COL HAM: Now again, the NDAA requires
17 -- I'm trying to find it -- the same at every --

18 MEMBER MARQUARDT: Installation?

19 COL HAM: -- place where there is a
20 24/7 emergency room. And I guess there is
21 subject to interpretation what that means. If
22 they have one and it is not operating 24/7, I

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1 don't know if there is some --

2 MEMBER JONES: I think this
3 information is correct. The reason they didn't
4 have SANE nurses at Hood was because you needed
5 to do so many SANES to stay certified, and they
6 didn't have enough volume of SANE exams.

7 But, anyway, that is just --

8 CHAIRPERSON FERNANDEZ: How you could
9 not have enough when you have got jurisdiction
10 over 300,000 people seems --

11 COL HAM: Texas required a certain
12 number to remain certified as a SANE under Texas
13 State law.

14 CHAIRPERSON FERNANDEZ: No, no, no, I
15 get that, but it just seems odd that at Hood,
16 with 300,000 people, you wouldn't have enough.

17 MS. GORDON: It is usually delayed
18 outcry, I think. I remember they were discussing
19 that most of their victims are coming two weeks
20 or later.

21 CHAIRPERSON FERNANDEZ: Late outcries.
22 Oh, so you can't -- there is no exam?

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1 MS. GORDON: Right, right.

2 CDR. KING: Plus, if you remember the
3 numbers they gave us from Fort Hood, the actual
4 sexual assault reports were only in the hundreds
5 total. So, if you take that into consideration,
6 you know, the late outcry, the cases that it
7 might not apply to --

8 MEMBER JONES: Or just people who
9 didn't want the exam.

10 CDR. KING: Right. Exactly. And so,
11 there might not be as -- I don't know the numbers
12 exactly that they require, but I think that is a
13 pretty common requirement now.

14 MEMBER MARQUARDT: Well, where does
15 the SANE nurse fit in with this SARC?

16 MEMBER JONES: I think it is just in
17 the sense that there are a lot of services that
18 the SARC has to make sure that they can get, and
19 that's one of them, if the victim wants it. So,
20 it is kind of like I guess the SARC does
21 coordinate everything with the Commander and
22 facilitates the provision of all these services.

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1 And then, the victim's advocate I
2 guess I see it, I think I heard, is more like
3 they are one-on-one with a victim. The SARC may
4 do that function, too -- I don't know -- in
5 different place where they are shorthanded, or
6 whatever. But a victim's advocate would be a
7 person supporting the victim.

8 And now that there's victim counsel,
9 I don't know whether the victim advocate ever
10 made an effort to -- and you will have to tell me
11 -- it was part of their role to try to explain
12 the system as it went along, the military justice
13 system. If it was, I guess to some extent they
14 have been supplanted now by the victim's counsel.

15 MS. CARSON: In policy, it is the
16 Victim-Witness Liaison who has the responsibility
17 for -- it is a whole different line of, it is a
18 whole different program, and they have the
19 responsibility on the criminal trial part versus
20 the care part, which is where the SARCs --

21 COL HAM: Right. And the rationale
22 for that may be because there's a Victim-Witness

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1 Liaison for every case, and there are only victim
2 advocates and SARCs and SVCs for this very
3 limited category.

4 MEMBER MARQUARDT: Maybe they should
5 be separated, then.

6 MEMBER JONES: We did describe who is
7 doing what.

8 MEMBER MARQUARDT: Right. Instead of
9 just military system.

10 MS. CARSON: The Victim-Witness
11 Liaison is much older. So, there are things
12 there --

13 COL HAM: The program, you mean.

14 MS. CARSON: The program, I mean the
15 program is much older than the SARCs.

16 (Laughter.)

17 COL HAM: And the Victim-Witness
18 Liaison generally works with the prosecution in
19 the prosecution office; whereas, the victim
20 advocates are down in the unit. They are mixed
21 with active-duty.

22 So, I am throwing out a potential

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1 rationale for you to consider that there may have
2 been a policy decision that a little knowledge is
3 dangerous on putting on the victim advocate,
4 having to explain a very complicated system.
5 That may have been a deliberate choice; I don't
6 know.

7 MS. SAUNDERS: When there was already
8 a person available to --

9 COL HAM: When there is another person
10 available whose job that is.

11 MEMBER MARQUARDT: Well, I think it is
12 confusing the way it is in the outline.

13 CDR. KING: I think maybe it is
14 confusing in the outline, but that is because
15 there are so many services, they are confusing.
16 And that is one of the things you may want to
17 look at, especially as we write them out for you,
18 is, do we need all these services and could they
19 combine some of them and not have so many? Or
20 should they designate their duties differently?

21 CHAIRPERSON FERNANDEZ: Well, I am
22 just wondering -- and maybe you guys can all

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1 answer this for is -- is, if it is confusing for
2 us, is it confusing to everybody else who is
3 having to use these services?

4 COL HAM: It is a similar setup to
5 other programs in the military. For example, the
6 Equal Opportunity Program, there is like a unit
7 rep. Then, there is a higher-level EO person.
8 So, it is a similar command setup that a soldier
9 would be used to. Whether or not they are
10 familiar with it, that is to determine if we
11 throw that out.

12 CHAIRPERSON FERNANDEZ: Is it easy
13 access maybe? It there confusion, so much so
14 that there would be a problem with accessing, and
15 then, that would impede investigation,
16 adjudication, prosecution?

17 MS. GORDON: I personally think it is
18 the opposite of that. I think that there are so
19 many avenues, that they know that if -- you know,
20 the Unit Victim Advocate, for instance, is
21 somebody that is in your own unit, and you
22 probably know them from work; you know them from

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1 everything that your unit does.

2 If you are not comfortable going to
3 that person and you know where your installation
4 SARC's office is, then you can go directly to
5 that person. Or you know where your legal
6 assistant's office is or your chaplain.

7 And so, there are so many different
8 places they can go. What tends to happen, I
9 think, is that the victim will find someone to go
10 to, and they may not establish a good rapport
11 with the first person they see. But, when these
12 other people are brought into the system, they
13 eventually find someone, and that person sort of
14 takes the lead in walking them through the
15 process, whether they are someone that sits
16 through the trial with them. You know, I have
17 seen Unit Victim Advocates do that. I have seen
18 chaplains do that. It just sort of depends on
19 who is the best person to provide that support,
20 based on personal preference really.

21 MEMBER MARQUARDT: It sounds like
22 there is a duplication of services.

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1 MS. GORDON: That's accurate.

2 MEMBER MARQUARDT: I mean, if you can
3 go here and there --

4 MS. SAUNDERS: Well, especially with
5 Special Victim Counsel, now the Victim-Witness
6 Liaison, you know, whose role up to that point
7 had been to explain the military process to
8 them --

9 MEMBER MARQUARDT: Exactly.

10 MS. SAUNDERS: At least in terms of
11 sexual assault offenses, that person may not play
12 as much of a role, now that we have Special
13 Victim Counsel.

14 COL HAM: But not everyone gets a
15 Special Victim Counsel.

16 MS. SAUNDERS: Right.

17 COL HAM: Because they have to be
18 requested.

19 MS. SAUNDERS: Right.

20 COL HAM: A victim can go through the
21 whole process and not request a counsel.

22 MS. SAUNDERS: Exactly.

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1 CHAIRPERSON FERNANDEZ: I think that
2 is the best way to do it because you always want
3 to find the person who connects best with the
4 victim. At the same time, you don't want the
5 duplication of services because that costs way
6 too much and it is totally inefficient. So, how
7 do you get both? How do you get efficiency and
8 the right access?

9 MS. CARSON: You have more highly-
10 qualified, professionalized advocates.

11 CHAIRPERSON FERNANDEZ: Is that it?

12 CDR. KING: Well, you may be asking
13 the wrong people because we might have their own
14 opinions.

15 MS. SAUNDERS: Well, some of it, too,
16 is you need to have the Victim-Witness Liaison.
17 You can't get rid of that person because these
18 victim advocates and Special Victim Counsel are
19 only for sexual assault offenses; whereas, the
20 Victim-Witness Liaison is for any victim of any
21 crime. You're the victim of dorm theft. That
22 person is there to assist you.

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1 COL HAM: To be even more specific, it
2 is not every sexual assault victim. It is a
3 military sexual assault victim --

4 MS. SAUNDERS: Right. Exactly.

5 COL HAM: -- of a dependent. It is a
6 very limited class, which may account for most
7 victims.

8 MS. SAUNDERS: So, to say that, well,
9 we have Special Victim Counsel now; now we can
10 get rid of this other Victim-Witness Liaison, you
11 really can't because they're --

12 MEMBER JONES: Well, we wouldn't ever
13 recommend to get rid of them because they are not
14 just there to serve --

15 MS. SAUNDERS: Right. Exactly.

16 MEMBER MARQUARDT: But we are only
17 dealing with sexual assaults.

18 MEMBER JONES: That's right.

19 MS. SAUNDERS: Exactly.

20 MEMBER JONES: So, we might want to
21 take a look at whether there is duplication once
22 the Victim's Counsel Program kicks in, although

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1 probably the Victim-Witness Liaison has most work
2 with the prosecutor. Because, usually, what they
3 do, too, is alert everybody to dates and times
4 and what is happening. They are sort of an
5 adjunct there for an organization, and that's
6 fine, if that is the role. That is the role I'm
7 used to for them.

8 CDR. KING: You can't really have the
9 Special Victim's Counsel being responsible for
10 that because --

11 MEMBER JONES: No, you can't.

12 CDR. KING: -- if the victim has a
13 different view of the prosecution than the
14 prosecution does, they are not necessarily going
15 to be working closely to understand the motion
16 hearings that may be coming up or the various
17 times that they need to interview, or whatever
18 happens in the case.

19 MEMBER JONES: No, someone would have
20 to tell the counsel --

21 CDR. KING: Right.

22 MEMBER JONES: -- as well, that's

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1 right.

2 CDR. KING: Right. Right. They
3 wouldn't be the one to explain it to the victim
4 necessarily from the prosecution point of view.

5 MS. GORDON: So, I think what will
6 help is that, if we can get, from our
7 perspective, lay out sort of a chart of the
8 qualifications of each of these positions,
9 because I think that will illustrate to you a
10 significant difference. SARCS tend to be a
11 little more qualified, a little more experienced.
12 We have some social workers and things like that
13 in the SARC position. Unit Victim Advocates are
14 just those who have volunteered to go through
15 training. And so, there is a different
16 qualification.

17 The problem is it is a three-
18 dimensional issue. You have the depth of
19 knowledge being one of them. And then, you have
20 the accessibility being another issue.

21 And so, do we want to, just because we
22 have provided these other opportunities outside

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1 the unit, remove someone from that day-to-day
2 interaction where, if I am having a rough day, I
3 can turn and go to this person, knowing that they
4 are a victim advocate, and they may live in the
5 same barracks as I do. They will be at the first
6 morning formation with me. And so, a lot of
7 times, that victim advocate is that initial
8 outcry witness because they are the first
9 responder.

10 And so, do we want to remove that ease
11 of access by providing only more qualified
12 people? And so, I think if we lay out those
13 qualifications and the accessibility, would that
14 assist you, I think, in making that
15 determination?

16 MEMBER CASSARA: I can't hear whoever
17 is speaking.

18 MS. GORDON: I'm sorry.

19 Mr. Cassara, this is Joanne Gordon.

20 I was just talking about the two or
21 three different issues we have. You know, the
22 different people involved have a different depth

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1 of knowledge, but also a different accessibility.
2 And they are sort of inverse. You know, the
3 greater your depth of knowledge, I think the
4 lower accessibility a victim on a day-to-day
5 basis has to you, whether they have to seek out
6 and request a Special Victim's Counsel versus a
7 Unit Victim Advocate who is depth of knowledge
8 may not be very thorough, but they are easily
9 accessible.

10 And so, there is sort of a balancing
11 act I think that has been attempted here. If we
12 can illustrate that in some sort of chart, it may
13 assist in making recommendations on how to shape
14 some of these positions a little bit better or
15 eliminate some of them.

16 MEMBER CASSARA: I think that is a
17 wonderful point. Because I will tell you, as one
18 who deals with this all the time, I'm not sure
19 even I understand the difference between the SARC
20 and the VA.

21 MS. GORDON: Right, right.

22 CDR. KING: I am not sure they did in

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1 Texas because they didn't understand at least who
2 was supposed to supervise who, it seemed like.
3 So, I'm not sure they all understand it exactly.

4 I think, you know, if we may be so
5 bold, then maybe we need to make a recommendation
6 as to whether both of those positions are really
7 necessary.

8 MEMBER MARQUARDT: That's what I said.

9 MEMBER CASSARA: I think the one
10 thing, while I wasn't at any of the meetings in
11 Texas, the one thing that I have gotten from all
12 of you that were is telling the story over and
13 over again is not therapeutic for most people.
14 And I'm not sure -- maybe we don't need a SARC
15 and a VA; maybe just one of those. I don't know.

16 CDR. KING: It might help to lay out
17 their duties, and I'm not sure that they all
18 require telling the story necessarily. But
19 laying out their duties at least might help try
20 to at least figure out a little bit more who is
21 who, instead of having all these names --

22 MEMBER CASSARA: Sure. And the other

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1 part of the equation is not every base is Fort
2 Hood --

3 CDR. KING: Right.

4 MEMBER CASSARA: -- where there are
5 300,000 people.

6 CDR. KING: Right.

7 MEMBER CASSARA: I mean, there is a
8 Marine Corps Depot in Albany, Georgia, that has
9 about 212 troops and about 1,000 civilians.

10 CDR. KING: Right.

11 MEMBER CASSARA: So, the necessity or
12 the ability to have both of those positions is
13 going to be, obviously, significantly different
14 on one base than the other.

15 CDR. KING: And that is some of the
16 difficulty with just going to one or two
17 facilities, where you get a view of the service
18 from the Army at a large base compared to the
19 Marine Corps at a very small one, or something
20 like that.

21 MEMBER CASSARA: Right. Or the Navy
22 on a ship.

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1 CDR. KING: Exactly.

2 MS. SAUNDERS: Mr. Cassara, have you
3 seen this issue? You know, each of the services
4 provides additional guidance on these roles. And
5 so, they are going to vary slightly by service
6 regulation. And maybe that is an issue to take
7 up, too, whether or not all of those "eaches and
8 owns" should be standardized by DoD and how much
9 they should be variant at the service level.

10 MEMBER CASSARA: Yes, and I guess
11 because I don't get that deep into the woods with
12 either one of those, I haven't really had that
13 much familiarity with them, but I don't know;
14 that is an interesting theoretical question,
15 whether there is enough of a difference in the
16 climates of the different services where we want
17 to leave that up to the command or whether,
18 because the underlying problem is universal,
19 whether we want to make a universal response to
20 it. I think that's something that either we or
21 somebody else probably needs to address.

22 CHAIRPERSON FERNANDEZ: I think that

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1 your chart is good, but --

2 MEMBER CASSARA: Did my statement make
3 any sense? I'm not hearing everybody.

4 CHAIRPERSON FERNANDEZ: Yes. Yes.

5 MEMBER CASSARA: Okay.

6 CHAIRPERSON FERNANDEZ: But I think
7 the chart would be good, but, also, I think that
8 when we start talking about cost of resources, we
9 have to say, look, if there is stuff that is
10 really duplicative here -- we don't want to stop
11 the access. The way you put it was really nice.
12 It was, you know, you need the broad access as
13 well as the depth.

14 Where there is overlap where there
15 doesn't need to be, that could be something we
16 could cut out. But that has got to be an
17 analysis that doesn't stop easy access. So,
18 somewhere when we talk about cost and resources,
19 that needs to come out.

20 You know, the full-time/part-time was
21 what I said before, was what we heard at Hood,
22 was that when this is just sort of an adjunct

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1 job, it can be very difficult to try to do. At
2 the same time, you only have "X" amount of
3 resources.

4 The other thing that we heard was when
5 we had the civilian folks, when we were in
6 Austin, testifying, and I asked the question,
7 "Would you want somebody in one of these jobs
8 that hasn't volunteered for it?", they all said
9 no.

10 You have that balance. You only have
11 so many people. You have to fill these slots.
12 There is going to be some point where people
13 aren't going to volunteer and you still are going
14 to have fill the slots.

15 But the problem is if you are getting
16 the wrong kind of person in a very sensitive job.
17 You wouldn't want a gossip hound to be in a high-
18 security spot, you know. It is just sort of --
19 or a predator. So, how is it that you really
20 properly screen for these jobs? So, even if you
21 have to put somebody in there, you don't get the
22 wrong person in there?

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1 COL HAM: Well, you could get the same
2 issue with a volunteer, though. Somebody could
3 be volunteering and have access --

4 CHAIRPERSON FERNANDEZ: Agreed.
5 Agreed. And you might get the predator much more
6 agreeing to volunteer.

7 COL HAM: Right.

8 So, again, just for your
9 consideration, I think you also heard there's a
10 whole lot of duties in the military that we don't
11 think we want to do. Initially, I had a boss who
12 used to say, "I know what job you want next
13 before you want it."

14 (Laughter.)

15 CHAIRPERSON FERNANDEZ: Sure.

16 COL HAM: And he was always right.

17 So, there is a lot of that for your
18 consideration, but that is the only thing --

19 CHAIRPERSON FERNANDEZ: And we heard
20 that.

21 COL HAM: Right.

22 CHAIRPERSON FERNANDEZ: We heard that,

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1 and it is just that we also heard the exact
2 opposite.

3 Because I was kind of going, okay, if
4 you get stuck in this job and you realize you're
5 actually pretty good at it, you might realize
6 that you have a talent that you didn't realize
7 you had.

8 But when the civilian counterpart was
9 asked, they said, "No, that would be a really bad
10 situation." So, I don't think we can ignore that
11 testimony, either.

12 MEMBER JONES: Do we know right now
13 whether there are enough services in the area of
14 victim's advocates and SARCs? I mean, are we
15 scrambling to full positions because we have --

16 CHAIRPERSON FERNANDEZ: Yes.

17 MEMBER JONES: Yes? Because it was
18 more reporting this and we have more volume.

19 MS. CARSON: The interesting thing,
20 the statistic I remember off the top of my head
21 is the Army, that they tell you they have 10,000
22 trained victim advocates.

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1 MEMBER JONES: Right.

2 MS. CARSON: But when you see their
3 slots for victim advocates, the full-time ones
4 that are required now by the SECDEF, they're not
5 all full and they're not all certified.

6 MEMBER JONES: Right. I don't know,
7 were there resources --

8 MS. CARSON: So, I don't know where
9 all these other people are.

10 MEMBER JONES: -- allocated in the
11 NDAA for these? Was there any money allocated?
12 I don't know how the bill works or how the
13 authorization works.

14 MS. CARSON: I don't know if that is
15 O&M or DoD SAPR money. I don't know the answer
16 to that.

17 MEMBER JONES: Yes.

18 CDR. KING: I know they were all
19 required to hire so many people, and I think
20 different services did it a little bit different.
21 I know we have a lot of information on that that
22 we haven't put together. I don't know if it will

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1 be enough for you to make any recommendations,
2 but --

3 MEMBER JONES: Well, no, but, I mean,
4 maybe the only recommendation we could ever make
5 is that, generally speaking, it is a terrific
6 idea for a victim, and we know this from the
7 civilian world, to have an advocate.

8 CDR. KING: Right.

9 MEMBER JONES: And so, as these
10 programs get older and proceed, we should be
11 assessing whether we are providing enough
12 services and whether we have enough advocates and
13 making sure that the resources are available. I
14 mean just something like that. I agree with you,
15 resources plays into everything.

16 MEMBER MARQUARDT: But some of these
17 programs are so new that we really can't assess
18 them.

19 MEMBER JONES: Right. Exactly.
20 That's right, we can't. So, I think we have to
21 say, especially like Victim's Counsel, for
22 instance --

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1 MEMBER MARQUARDT: Right.

2 MEMBER JONES: -- this looks like, if
3 you are prepared to make this kind of finding --
4 I don't know -- I have heard a lot about Victim's
5 Counsel; I think we all have. This seems like a
6 terrific program for these reasons.

7 MEMBER MARQUARDT: It's essential.

8 MEMBER JONES: Or essential, whatever.

9 So, in your report on victim services,
10 obviously, that would be a highlighted service,
11 it seems to me, to talk about, where we would
12 describe exactly the pilot started in the Air
13 Force, give the history, and then, whatever
14 results that we think we can accurately put in
15 there from the testimony you have heard about
16 reporting or whatever other results we think we
17 have.

18 I mean, I think we have to sort of lay
19 out for each of these what are they and, then,
20 the issues we have with them. And I think we
21 have sort of identified them with is SARC and
22 victim's advocate, and, you know, Victim's

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1 Counsel. There were a lot of tests on Victim's
2 Counsel.

3 COL HAM: The NDAA sets forth by
4 statute the duties of the Special Victim Counsel.

5 MEMBER JONES: Uh-hum.

6 COL HAM: You may want to -- I don't
7 know -- assess whether you believe those are
8 sufficient as compared to what you know they are
9 already doing.

10 MEMBER JONES: And I actually had read
11 that portion of the NDAA. So, I think we ought
12 to look at it.

13 COL HAM: Or is there some kind of
14 disconnect?

15 MEMBER MARQUARDT: I think that is
16 something we need to look at for the next
17 meeting.

18 COL HAM: It is a long list, two-and-
19 a-half, three-and-a-half-page list of duties that
20 Congress gave the Counsel, which may or may not
21 comport with how they are operating in practice.
22 You may have some thoughts or recommendations on

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1 the way the different services are staffing those
2 things. You have heard different models for how
3 they are staffed and set up, the stovepipe or
4 part of an office in existence already.

5 So, you may see an emerging best
6 practice amongst the services or not.

7 MEMBER JONES: This is good because it
8 lists a lot of the issues we are sort of talking
9 about already.

10 COL HAM: Right.

11 MEMBER JONES: That's 1043 -- 1716.

12 CHAIRPERSON FERNANDEZ: Under
13 education and training, the SARCs themselves said
14 they didn't have sufficient training to be doing
15 what they were doing.

16 MEMBER CASSARA: Ladies, you could
17 give a guy a complex because I really can't hear
18 anything.

19 (Laughter.)

20 CHAIRPERSON FERNANDEZ: Sorry. What
21 I was saying, when we went to Fort Hood, the
22 SARCs were saying that they did not have enough

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1 training to do what they were doing.

2 COL HAM: The SARCs or the victim
3 advocates?

4 CHAIRPERSON FERNANDEZ: Both. The
5 whole room said it.

6 COL HAM: The victim advocates get the
7 80 hours of training.

8 CHAIRPERSON FERNANDEZ: So, do SARCs.

9 MS. CARSON: And the SARCs get the 80
10 hours. And you heard some civilian comparison
11 with the victim advocates. I'm trying to think.
12 Is the training comparable to what a civilian
13 gets, the Victim-Witness Liaison and the victim
14 advocates?

15 CDR. KING: I think one of the
16 problems is that they talked about, too, was that
17 they get this 80 hours of training, of whatever
18 it is, but, then, they don't have any victims to
19 deal with. So, they don't actually put it into
20 practice. So, then, they don't feel very
21 qualified because they don't actually talk to
22 victims.

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1 And so, a lot of what the civilians
2 are doing where they feel more confident is
3 because they have victims all day long all the
4 time. And so, they do a lot of on-the-job
5 training and practice because they have
6 supervisors who deal with victims and they have
7 people they deal with all the time and victims
8 they deal with all the time.

9 And in the military, that was one of
10 the things they were saying, is, "We went to
11 training, but, then, we come back and we don't
12 have victims." So, they don't feel competent to
13 deal with victims and their issues because they
14 don't.

15 And if you go to training and, then,
16 you don't use it, you kind of don't feel so good
17 about it compared to if you go and do something
18 every day, you get better and better at it.

19 MEMBER MARQUARDT: It is like working
20 on the computer.

21 (Laughter.)

22 CDR. KING: Exactly.

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1 MEMBER MARQUARDT: You all get the
2 lessons and, then, you don't practice.

3 CDR. KING: I know it.

4 MS. CARSON: One of them said that the
5 trainers sometimes have never had a victim.

6 MEMBER MARQUARDT: Right.

7 CDR. KING: Well, that is a problem
8 when we just don't -- it seems weird that we
9 don't have enough victims to go around to give
10 them enough experience. But that was one of the
11 things that was expressed, I think, by a lot of
12 them, and that when you talk to civilian victim
13 advocates, they don't have that problem.

14 CHAIRPERSON FERNANDEZ: Does anybody
15 want to check on making sure Michelle is okay?
16 Oh, is she on the phone? Okay. Okay. I was
17 just wondering if something happened to her.

18 CDR. KING: So, is that something us
19 to at least look at what we have and consider if
20 we --

21 CHAIRPERSON FERNANDEZ: Yes.

22 CDR. KING: I don't know what kind of

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1 other information we could get. I know we have
2 gotten a lot of testimony about what kind of
3 training they get. I don't know if we have
4 gotten a lot of information.

5 MEMBER JONES: One thing, and you may
6 know this already, is we ought to check and see
7 what the Comparative Systems --

8 CDR. KING: Right.

9 MEMBER JONES: -- Subcommittee has
10 because --

11 CDR. KING: Right.

12 MEMBER JONES: -- they would be
13 comparing --

14 CDR. KING: Right.

15 MEMBER JONES: -- these services
16 between the civilian and military. And that's
17 fine.

18 MS. SAUNDERS: Actually, this
19 Subcommittee would be doing that. I don't think
20 they're doing that. For victim services, they
21 are comparing civilian, but most of the
22 comparisons are being done by the other

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1 Subcommittee, but this one is comparing the
2 victim services.

3 MEMBER JONES: Oh, okay. Great. So,
4 I take it all back.

5 CDR. KING: They may have talked to
6 some of the same people, though. But I know we
7 have gotten a lot of testimony about their
8 training programs and what their responsibilities
9 are that we could lay out. I don't know if we
10 have gotten a lot of on-the-ground talking to
11 them about actually in a non-attribution setting
12 where they feel free to say how confident they
13 feel about their duties or not.

14 We were just talking about that. In
15 Texas, some of them said that they hadn't
16 actually dealt with victims or they didn't feel
17 their training was very sufficient for dealing
18 with victims.

19 CHAIRPERSON FERNANDEZ: Do we have any
20 idea about how many SARCs or victim advocates we
21 need per capita?

22 MS. CARSON: Well, you can look at the

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1 number of cases.

2 CDR. KING: You mean if there is like
3 a national standard or something?

4 CHAIRPERSON FERNANDEZ: Well, yes. I
5 mean, how do we know that Hood has enough? I
6 mean, how do we come up with the numbers that we
7 need to fill? I mean, how do we know what each
8 base needs? How do we come up with that number?

9 MS. CARSON: Well, yes, the
10 requirement is one SARC and one victim advocate
11 at every grade level that is full-time and every
12 grade level troop, and there are more downstream
13 who are the collateral-duty ones. But if you
14 wanted to look at where the sexual assaults are
15 happening and how many reports there are --

16 CHAIRPERSON FERNANDEZ: No. No, just
17 sort of --

18 MS. CARSON: You have an idea of where
19 the need is.

20 CDR. KING: There is a standard.
21 There is a standard. That standard is because of
22 who they have. But I don't know if that is based

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1 on a study of how many people they have, you
2 know, how many people a victim advocate can
3 handle or --

4 MEMBER JONES: No, it is just to cover
5 everybody.

6 CDR. KING: Well, I don't know. I'm
7 not sure if they have some scientific way of
8 knowing that.

9 MEMBER JONES: You know, one of the
10 things that came up, at least in some of the
11 testimony I heard, was the notion of trying to
12 compile a victims -- sort of at some point at the
13 right time from the victim as well, a
14 satisfaction survey. And you guys probably heard
15 about that, too.

16 That might be something. It sort of
17 fits into assessing, I suppose, the
18 accountability of everybody in terms of the whole
19 command. But, certainly, if it comes to
20 fruition, it will give us a better idea of
21 whether these services are fulfilling the needs
22 of victims. And if they are not, what the

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1 problems might be.

2 It is just a little piece that might
3 fit into this Subcommittee's thinking, because
4 part of our problem is most of these are pretty
5 new. Like Victim's Counsel is very new. It
6 seems like a great idea.

7 CHAIRPERSON FERNANDEZ: An overall
8 assessment of the program I think is something
9 that is needed. Effectiveness, whether there is
10 enough client/SARC/victim advocate ratio. I
11 mean, I think, again, it is, are these things
12 that we have put in place being evaluated on an
13 ongoing basis to know if they are working or not?
14 And whether too many resources are being put into
15 it or too little resources, but I think it is an
16 ongoing assessment that we need to be asking for.

17 MEMBER ANDERSON: One of the questions
18 I had -- and I do apologize if you were able to
19 cover this before I could come back, return to
20 the meeting here -- one of the questions I am
21 wondering is, is the value of victim advocates
22 when you have SARCs -- did you all talk about

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1 that?

2 MEMBER MARQUARDT: A little bit.

3 CHAIRPERSON FERNANDEZ: A little bit.

4 MEMBER ANDERSON: Oh, okay. Just
5 because it seemed that the victim advocate may be
6 singular who we talked to at Lackland, may be
7 plural, thought that their own rules had changed
8 radically, given the introduction of the SARCs.
9 And it wasn't clear that at least one of them had
10 much of any role left. And because the SARCs
11 were functioning at a much higher level, because
12 they were attorneys, in terms of the help that
13 they could afford, they couldn't, it wasn't --

14 MS. SAUNDERS: I think you may be
15 talking about the Special Victim Counsel. There
16 was a Victim-Witness Liaison who had mentioned,
17 "Well, there is a Special Victim Counsel" --

18 MEMBER ANDERSON: Yes, I think that's
19 it, yes.

20 MS. SAUNDERS: They don't do anything
21 with sexual assault.

22 MEMBER ANDERSON: Yes. I apologize.

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1 MS. SAUNDERS: Yes, I know.

2 CHAIRPERSON FERNANDEZ: No, no, no.
3 We were talking about --

4 MS. SAUNDERS: The confusion of all
5 those.

6 CHAIRPERSON FERNANDEZ: -- the
7 confusion of who all the actors are.

8 MEMBER ANDERSON: Yes. Right.

9 MS. SAUNDERS: But I do remember that
10 person saying that.

11 MEMBER ANDERSON: Okay, okay. So, I
12 remembered that correctly. So, the victim
13 advocate is different than the Victim Advocate
14 Counsel?

15 CDR. KING: Yes.

16 MS. SAUNDERS: That is the Special
17 Victim Counsel is the attorney position and the
18 new creation. And then, we have SARCs and victim
19 advocates who are not attorneys.

20 MEMBER ANDERSON: And they are the
21 ones who I thought didn't feel like they had the
22 same role now that --

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1 MS. SAUNDERS: And here is where the
2 confusion comes in even more. There's another
3 position. We call this the Victim-Witness
4 Liaison who typically works out of the
5 prosecutor's office, who typically has that role
6 of explaining to victims how the military justice
7 process works.

8 MEMBER ANDERSON: And that is the role
9 that evaporated, right?

10 MEMBER MARQUARDT: No, no.

11 MEMBER ANDERSON: Sorry.

12 MS. SAUNDERS: Well, what he said --
13 and I do recall this -- he said, in terms of
14 sexual assault cases, because, of course, they
15 advise victims of all crimes, not just sexual
16 assault, but he did say, in terms of sexual
17 assault cases, since the Special Victim Counsel,
18 he did not feel that he played as much of a role
19 in advising on those cases.

20 CDR. KING: But that is not an obvious
21 answer that they are going away. Because,
22 remember, at -- was it Fort Hood? Where was it

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1 that Colonel Mulligan came, Fort Hood? Where he
2 talked about the new program with 23 victim
3 advocates that worked with the prosecutors.

4 And I was wondering if that is
5 something we want to get some information on, if
6 that is a new program, and why they are
7 developing that or expanding the --

8 MEMBER JONES: The task of the victim
9 advocate to a Special Victim Prosecutor.

10 CDR. KING: Right, to a Special Victim
11 Prosecutor, and if you want to look at that a
12 little bit, it wouldn't take very long. But it
13 seems like, if they are hiring 23 new or
14 developing 23 new positions to work as special
15 victim teams --

16 MEMBER ANDERSON: Do you think that
17 this is a function of the various services
18 implementing these things differently and that
19 there isn't a coherent directive to all of the
20 different services about how to implement these
21 advocacy positions for victims?

22 MEMBER JONES: I think they are pretty

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1 uniform. I mean, maybe the numbers are
2 different, but --

3 CDR. KING: I think the actual roles
4 they play and the importance they play in each
5 particular place or each service might be
6 different.

7 MEMBER JONES: In reality.

8 CDR. KING: In reality.

9 MEMBER JONES: But the roles I think
10 are pretty uniform, aren't they?

11 CDR. KING: Right.

12 MEMBER JONES: I mean as policy.

13 CDR. KING: Because DoD policy
14 everybody has to follow. And then, they
15 implement it --

16 MEMBER JONES: Right.

17 CDR. KING: -- and maybe some are
18 slightly different, but --

19 MEMBER JONES: Let me ask you this:
20 there are Special Victim's Prosecution Units now,
21 right? Isn't that something that is service
22 wide? I mean, DoD-wide, that new special --

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1 MS. SAUNDERS: Special victim
2 capability of the Department.

3 CDR. KING: The Army has Special
4 Victim Prosecutors that are Special Victim Units.
5 The Navy does not have Special Victim Prosecutors
6 per se. We have a track for prosecutors that are
7 experienced to try the sex cases and other
8 serious cases. But they have a special victim
9 capability where they have paralegals who are
10 supposed to be specially trained to work with the
11 prosecutors on such cases.

12 MEMBER ANDERSON: But that is just
13 about training folks who are prosecutors. That
14 is not about having individual -- you know, we
15 have other layers. You know, there are -- now I
16 am all confused on the acronyms, but there are
17 sexual assault attorneys for the victim.

18 CDR. KING: Uh-hum.

19 MEMBER ANDERSON: Those are SARCs?

20 CDR. KING: No.

21 MEMBER ANDERSON: Okay. SARCs, right.
22 And those are totally different than the

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1 prosecution?

2 CDR. KING: Correct. Yes.

3 MEMBER ANDERSON: Right. And so, we
4 have specialized the training of prosecutors. We
5 have now counsel for the victim service-wide,
6 right?

7 MS. SAUNDERS: Right.

8 MEMBER ANDERSON: Right, right. And
9 then, we have people to whom you report; those
10 are the SARCs?

11 MS. SAUNDERS: Yes.

12 CDR. KING: Right.

13 MEMBER ANDERSON: Ah, and then, there
14 is a liaison.

15 MS. SAUNDERS: A Victim-Witness
16 Liaison.

17 MEMBER ANDERSON: Which is the person
18 that is across crimes --

19 MS. SAUNDERS: Yes.

20 MEMBER ANDERSON: -- whose role in
21 sexual assault crimes has receded because of the
22 implementation of these other people with

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1 expertise. Is that right?

2 MS. GORDON: Although they may still
3 coordinate other witnesses and provide
4 information to other witness in sexual assault
5 cases, just not direct victim contact in sexual
6 assault cases.

7 MEMBER ANDERSON: Okay.

8 MEMBER MARQUARDT: You know, what we
9 have here is a tremendous problem that we are
10 throwing everything we can think of at. I think
11 our job should be to really look at this and see
12 where there is duplication, because it really
13 sounds like a huge problem to me.

14 CHAIRPERSON FERNANDEZ: The problem is
15 that we don't have the capacity on this panel to
16 make that assessment. I mean, that is my take on
17 it. I mean, we know the testimony we got at
18 Lackland. We know the testimony we got at Hood.
19 But it is going to vary. I mean, there are going
20 to be SARCs somewhere that are going to say, "I
21 got plenty of training."

22 But somebody out there has got to be

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1 setting a standard and saying, "You know what?"
2 How long has this SARC and the victim advocate
3 positions in sexual assault cases been --

4 COL HAM: About 2004.

5 MS. SAUNDERS: 2005?

6 COL HAM: Say 2004.

7 MEMBER ANDERSON: But the Special
8 Counsel for the victim --

9 MEMBER MARQUARDT: That's new.

10 MEMBER ANDERSON: -- that's new. And
11 it appears to be, in my assessment, the most
12 effective.

13 CHAIRPERSON FERNANDEZ: Not
14 necessarily, no.

15 MEMBER ANDERSON: Okay.

16 CHAIRPERSON FERNANDEZ: No.

17 MEMBER ANDERSON: That is one thing to
18 tease out --

19 CHAIRPERSON FERNANDEZ: Yes.

20 MEMBER ANDERSON: -- how we
21 interpreted the information we were given.

22 CDR. KING: They might like them, but

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1 that doesn't necessarily mean they are the most
2 effective.

3 You know, go ahead.

4 CHAIRPERSON FERNANDEZ: Right now, the
5 SARC program is ripe for evaluation. It has been
6 active for almost ten years, nine years, and you
7 could do a thorough evaluation. I think that our
8 report could say this is the testimony that we
9 heard. You know, we heard that many of them
10 didn't think they had appropriate training, that
11 they thought that it was too difficult to do as
12 an addition to their regular job. However, a
13 thorough evaluation of what is needed and how to
14 standardize is what we need.

15 COL HAM: I have to figure out if we
16 asked for them and got them. And so, I can't
17 remember off the top of my head. They do do SARC
18 surveys. I believe, are they annually?

19 MS. CARSON: I think, and it is the
20 same --

21 COL HAM: And it is a wide assessment
22 of the things that you are asking about, surveys

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1 of SARCs.

2 CHAIRPERSON FERNANDEZ: And does it
3 evaluate the program?

4 MS. CARSON: Well, I think there is
5 probably more that you could evaluate. But, I
6 mean, it is the only --

7 COL HAM: Is it called the Quick
8 Compass?

9 MS. CARSON: The Quick Compass,
10 uh-hum.

11 COL HAM: They do these Quick Compass
12 surveys of SARCs, yes, and they ask them all the
13 kinds of things that you are discussing.

14 MEMBER JONES: Is that part of SAPRO
15 of SAPR?

16 COL HAM: Well, it is run by the
17 Defense Manpower Data Center, the same
18 organization that does the WGRA.

19 MEMBER JONES: I see.

20 COL HAM: But it is for the DoD SAPRO
21 program, right? Yes.

22 CHAIRPERSON FERNANDEZ: I think only

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1 if you looked at the information like that in the
2 aggregate --

3 COL HAM: Yes, the Annual Report
4 comments on those.

5 MS. GORDON: Comments on that, right.
6 So, DoD SAPRO is required annually to send a
7 report to Congress. We have the last few years
8 of those annual reports, I think actually going
9 back about five years. And that report not only
10 discusses victim statistics and victimology, but
11 discusses SARC programs and victim advocates, and
12 even to the extent of whether or not all those
13 billets are filled, and the decrement annually,
14 and that sort of thing.

15 MEMBER ANDERSON: And those are
16 fairly-substantial reports.

17 MS. GORDON: They are very
18 substantial.

19 MEMBER ANDERSON: That is my
20 recollection. They are bigger every year.

21 (Laughter.)

22 MS. GORDON: There is a great deal of

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1 narrative in them, but if you can kind of weed
2 through and pull out the statistical data, it is
3 fairly interesting.

4 CHAIRPERSON FERNANDEZ: Does it give
5 us a good snapshot of what needs to be done or
6 not needs to be done in the SARC program?

7 MS. GORDON: I think it gives you a
8 good trend analysis. I don't know if it gives
9 you a good snapshot of what needs to be done. I
10 think it gives you what has happened.

11 CHAIRPERSON FERNANDEZ: I think it
12 would be really good to analyze that stuff and
13 see, even if we could get the trend analysis, I
14 think it would be really important.

15 MEMBER ANDERSON: I agree it is
16 helpful in terms of our assessment of the SARCs.
17 I guess I wonder about the comparative value
18 analysis of the different players at this
19 juncture. I'm not sure that we have information
20 sufficient to do that, in part, because the new
21 counsel for the victim, him or herself, that is
22 such a new program and actually not fully filled,

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1 as far as I can tell.

2 On the other hand, we have a lot of
3 information about the value of that. So, I think
4 my impulse would be, if we had perfect
5 information, we would say this is relatively more
6 important, and given fiscal constraints that we
7 know ebb and flow in the military sector, like
8 all sectors of the economy, we would recommend
9 that the following be prioritized. That would be
10 an ideal report.

11 But I don't think that we have a
12 sufficient amount of information to make relative
13 assessments as between the value of a SARC
14 program versus the value -- I'm just throwing out
15 what maybe obvious to people, but I think --

16 MEMBER JONES: But I also think that
17 this will all be easier to -- I think this is all
18 stuff that will go into this report that will be
19 great. And what will emerge is a picture that
20 SARC and victims' advocates are all about a
21 variety of services, and the Victim's Counsel is
22 a whole different service entirely.

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1 MEMBER ANDERSON: Entirely. That's
2 right. Right.

3 MEMBER JONES: It has no ability to
4 touch into the command to make the medical and
5 the other services happen. So, you need both.

6 Now there could be criticisms of SARC
7 and victim's advocates and that program, but they
8 are not interchangeable.

9 MEMBER ANDERSON: That is helpful.
10 They don't overlap --

11 MEMBER JONES: No.

12 MEMBER ANDERSON: -- on a Venn
13 diagram?

14 MEMBER JONES: No, I don't see them
15 that way.

16 MEMBER ANDERSON: No, that is helpful.
17 That is helpful to understand, to think about.

18 CDR. KING: Just a reminder, we lose
19 the phone in five minutes or less.

20 MEMBER JONES: Let's go around the
21 table, 10 seconds, any comments from anybody?

22 CHAIRPERSON FERNANDEZ: I think Meg

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1 has been trying to say something for a while.

2 MEMBER GARVIN: No, no, no, no, no.
3 I'm good. It got covered.

4 COL HAM: Does the Subcommittee want
5 to, I guess, address the umbrella question, for
6 lack of a better word? Are there any programs
7 that you would think would be helpful that the
8 military doesn't already have that you heard from
9 civilian presenters exist in civilian areas that
10 the military does not have? Are you satisfied
11 that the military has similar programs to
12 civilian life plus or similar programs minus?
13 So, the big umbrella questions.

14 CHAIRPERSON FERNANDEZ: I think that
15 something that would be good to have, and I know
16 that it happens in a lot of jurisdictions, but
17 there are the official MOUs between the rape
18 crisis centers and any base and the local and the
19 base. Because when there is that cross-
20 pollination, one can find out about the other.
21 If there is a new model program -- there are in
22 some places, but is that --

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1 MS. CARSON: They are supposed to be
2 everywhere. That has been an RFI. So, they have
3 provided all -- we asked them to provide all the
4 MOUs that exist. So, we have a collection of
5 them.

6 MEMBER JONES: We should comment on
7 this because I think that is a great --

8 CHAIRPERSON FERNANDEZ: It is. And
9 are they used for families in uniform?

10 MS. GORDON: DoD does not set a
11 standard for the MOU. So, they allow that to be
12 governed both based on the installation and the
13 local jurisdiction. They are usually pushed by
14 that local jurisdiction because they are the ones
15 that are far more limited in the scope of what
16 they can agree to with the federal government
17 than the federal government is. I mean, we could
18 standardize it, but, then, Arizona and Alaska are
19 going to vary greatly on what they are going to
20 agree to with the federal government. And so,
21 that is why we have --

22 CHAIRPERSON FERNANDEZ: But do we have

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1 a sample one at least out there?

2 MS. GORDON: We have a number of
3 examples that have been provided. And there is
4 in the Manual for Courts-Martial an agreement
5 between, for instance, the Department of Justice
6 and the Department of Defense. And so, kind of
7 how those things are crafted, there is an example
8 out there, and it has been used as a base --

9 CHAIRPERSON FERNANDEZ: Are they
10 usually with the prosecutor's offices or are they
11 with community-based organizations, too?

12 MS. GORDON: I've seen them
13 personally -- I have seen them mostly with
14 prosecutor's offices, with medical services, so
15 local hospitals when it comes to SANEs. It just
16 sort of depends on the jurisdiction.

17 CHAIRPERSON FERNANDEZ: That is what
18 I have heard also. And I think there may need to
19 be a push with the counseling programs because
20 that is where there may be more -- I mean, I
21 think it is all three that need to be -- it is
22 crime, medical, counseling.

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1 MEMBER ANDERSON: The other thing that
2 I was thinking in terms of what is different --
3 and this may be covered by the Comparative
4 Systems Subcommittee -- but the question of
5 collateral misconduct in the military is
6 obviously very different than in the civilian
7 world. And uniformly, I think, maybe almost
8 uniformly, uniformly in the civilian world there
9 is a relinquishment of an opportunity to
10 prosecute the victim for any number of crimes
11 that may have occurred during the time of the
12 sexual assault. And that is not the same in the
13 military. I think it would be good for us to
14 think about that issue. I am not sure exactly
15 where it fits.

16 COL HAM: It is on there somewhere,
17 yes.

18 MEMBER ANDERSON: I remember. But I
19 do think that, if we were going to recommend from
20 the perspective of victims that it would enhance
21 reporting or enhance confidence in the system,
22 then we should think about that on this Task

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1 Force. Because you were thinking, you know, what
2 is the difference? And that is one that kind of
3 jumps out at you in terms of the difference
4 between civilian jurisdictions and the military
5 jurisdictions.

6 COL HAM: And that has come up in
7 every Subcommittee.

8 MEMBER ANDERSON: I'm sure; it's a big
9 one.

10 COL HAM: It touches every role.

11 MEMBER ANDERSON: It does.

12 COL HAM: It depends on how they
13 handle it.

14 MEMBER ANDERSON: Yes.

15 COL HAM: The Comparative Systems, the
16 comparison you are talking about, and yours on
17 support and protecting the victim.

18 One item of information I don't know
19 if we have -- I mean, you have heard alcohol is a
20 factor in a number of incidents, and you have
21 heard, I think anecdotally, that underage
22 drinking is the prototypical collateral

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1 misconduct, but I don't know that there is any
2 actual data.

3 MEMBER ANDERSON: That is interesting.

4 COL HAM: I don't know.

5 MS. CARSON: The FY13 NDAA required
6 it. So, there should be --

7 MEMBER ANDERSON: Required what?

8 MS. CARSON: Required statistics on
9 the number of alcohol-related sexual assaults.

10 MEMBER ANDERSON: That is a slightly
11 different question. I think it is important and
12 interesting to know that alcohol is associated
13 with sexual assaults, but that is absolutely true
14 in the civilian world. It is no different in any
15 jurisdiction.

16 What is interesting to me is -- and I
17 wonder if we have information about -- what are
18 the collateral charges? Is it fraternization?
19 Is it underage drinking? Is it drugs? What is
20 it?

21 That would be interesting to know
22 because, then, we would know a little bit more

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1 about what is at stake, or adultery or any number
2 of other things.

3 COL HAM: That goes in the reporting.

4 MEMBER ANDERSON: Right. Because if
5 what is at stake are very serious infractions
6 versus fraternization and alcohol, I think we
7 have got different values to weigh in terms of
8 military combat readiness and discipline and
9 order.

10 CDR. KING: Do we still have anybody
11 on the phone?

12 MEMBER CASSARA: I am here.

13 CDR. KING: Okay. Good. I just
14 wanted to make sure. I wasn't sure how they cut
15 you off. Okay.

16 MEMBER CASSARA: Hey, folks, why don't
17 we next -- you know, I was supposed to be up
18 there today and tomorrow. Obviously, that ain't
19 happening. When are we next all together?

20 CDR. KING: February 13th.

21 MEMBER CASSARA: Oh, yes, the day
22 before Valentine's Day. I'll have to explain

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1 that to my bride. Okay. We're good. I'll be
2 there.

3 MEMBER MARQUARDT: Will we be meeting
4 at your offices?

5 CDR. KING: Yes. Yes, at our offices
6 or on the phone, Bill.

7 MEMBER CASSARA: No, I'll be there.
8 And the one after that is, I think, 7 March, am I
9 correct, or 13 March? 13 March.

10 COL HAM: And in between that, you
11 have a couple of your Subcommittee members going
12 to Joint Base Lewis McChord and Bremerton and
13 Dolphin's Place, the civilian multidisciplinary
14 center. You have some folks going to the
15 Philadelphia multidisciplinary center, I believe.

16 MEMBER CASSARA: Yes, I am still going
17 to take a look at those. I have a trial that
18 week in front of -- Patty, you'll get a kick out
19 of this -- in front of Judge Edie Moran. But I'm
20 going to, hopefully, make at least, I'm trying to
21 see if I can make at least one of those.

22 COL HAM: We wanted to provide a

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1 number of opportunities, if anyone wanted to take
2 advantage of them.

3 MEMBER CASSARA: Sure.

4 COL HAM: I think Commander King
5 informed that we need at least two Subcommittee
6 members to attend each of those. I know
7 Comparative Systems is doing them, too. I know
8 we have them for Comparative Systems. I'm not
9 sure where we --

10 CDR. KING: We do for the Washington
11 trip right now. So far, we have two people.

12 MEMBER ANDERSON: We have one and a
13 half who is almost committed.

14 (Laughter.)

15 It is a lot of travel.

16 We had better close, so that we don't
17 keep the phone line.

18 Okay. Thank you.

19 MR. SPRANCE: Meeting closed.

20 (Whereupon, at 4:03 p.m., the meeting
21 was adjourned.)

22

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