

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT  
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

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DELIBERATION SESSION

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TUESDAY  
MARCH 11, 2014

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The Panel convened in the  
Teleconference Room of Suite 150 in 875 North  
Randolph Street, Arlington, Virginia at 12:00  
p.m, Elizabeth Hillman, Chair, presiding.

PRESENT

- Elizabeth Hillman, Chair
- Harvey Bryant \*
- BG (Ret.) John Cooke
- BG (Ret.) Malinda Dunn
- Rhonnie Jaus
- Colonel (Ret.) Larry Morris
- Colonel (Ret.) Dawn Scholz
- Russell Strand

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ALSO PRESENT

Maria Fried, Designated Federal  
Official  
Janice Chayt  
Dillon Fishman  
Colonel Patricia Ham  
Lieutenant Colonel Kelly McGovern  
Terri Saunders

\* Present via telephone

A-G-E-N-D-A

Report from Quantico	4
Report by Member Strand	47

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

12:31 p.m.

DFO FRIED: All right, good afternoon. This subcommittee meeting of the Comparative Systems Subcommittee is now open.

CHAIR HILLMAN: Okay. Thanks to everybody for coming. We're a little behind schedule which is really surprising for this panel. We're never behind schedule. And I'll start with the report from Quantico that's on the schedule here.

So, last week the subcommittee staff set up a great visit to Quantico that I was fortunate enough to go on with General Dunn, Lieutenant Colonel McGovern, with Dillon Fishman and Shannon Green, our legislative analysts.

And we didn't tour in the same way we had at some other installations in part because of the weather. There was still a lot of ice on the ground. But because that was

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after the big storm earlier in the week we were able to make the visit.

And our staff set up a great program which was similar to what we'd done at the other site visits. We wanted to go to Quantico because we'd not visited a Marine Corps installation yet and we knew that the Marine Corps has featured as prominently as any other service in some of the publicity that's out there, but also that the -- and that is the stories that have influenced the legislative reform efforts.

But also because the Marine Corps is a distinctive service that has a different demographic profile and a different force structure that raises different questions for our study of response to sexual assault.

So we started with command briefs as we had at most of the installations and then we went through roundtables with the different groups that we wanted to focus on in the

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process, defense counsel, prosecutors, and both civilian prosecutors and military prosecutors, law enforcement personnel from the base and then the Sexual Assault Response Team members. So more of a victims services focus at the end.

And I'll run some highlights. If General Dunn has anything to add you should interrupt throughout or anybody else. Kelly, if there's things you want to add too.

So, the command brief focused on how Quantico fits into the Marine Corps which is pretty centrally. Marine Corps Base Quantico is the Crossroads of the Corps. It's a central training facility as well as the personnel functions of the Marine Corps run through there. It also has a huge weapons systems development role. It has a Fiscal Year '14 budget of \$1.65 billion they told us and about 25,000 military and civilian personnel stationed there.

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They have many different resident units there. It was the commander of the installation who spoke to us about the overall atmosphere. And he talked about how the emphasis on sexual assault had changed the tenor of Marine Corps operations.

And specifically he talked about what the Commandant of the Marine Corps has called the reawakening of the Corps which is a focus on the values that would prevent sexual assault rather than allow it to continue.

One thing that came up right at the beginning was the different demographics of the Marine Corps which is 94-plus percent male. So there aren't very many women in the Corps. And the feel of meetings is quite different and they referred to us as ladies all the time. This is an example of how the Marine Corps just doesn't feel like the rest of the world in many respects and that was true here.

They talked about addressing from a

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command standpoint some of the culture change issues that we've talked about, particularly with respect to alcohol. They're trying to de-glamorize the use of alcohol across the Corps.

And they're making some physical changes in that they moved the liquor aisles from the front of the post exchange to the back. So there's different steps they're trying to take across the board.

They talked a lot about the training that they're doing throughout the Corps all the way down to the lance corporal level on leadership and initiative. Trying to again inculcate the values that they think will prevent sexual assault rather than allow it to continue.

So that's all I think I'll say about the command brief. Did you want to add anything on the command brief?

BG DUNN: No.

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CHAIR HILLMAN: All right, so then defense counsel. This was a panel that I took tons of notes on. The defense counsel felt strongly that cases are going forward that should not be because of the relatively low grade of the offense, and that the very wide definition of sexual assault in Article 120 and the definition of sexual assault that triggers the investment of investigative resources and triggers aggressive prosecution is just so big that their clients are coming to trial.

And they're winning, that is the defense counsel are successful and they're actually getting more cases.

One of the issues with the prosecutors especially was talking about the lack of trial experience which they've seen decline as the military tries fewer cases. Defense counsel right now seemed to be getting plenty of experience because they're taking so many cases to trial. It's a very different

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atmosphere right now than what it has been in the past.

But the cases are what they described as having marginal evidence and trials that have devastating consequences for the individuals who are accused even though they're winning acquittals at the end of the day.

They talked about the changes in the Article 32 process, that that will force a move towards more depositions. So the discovery process will happen outside of the Article 32 in what will not be necessarily a better or a faster or a cheaper process.

In general they said more cases are going forward. They do worry about the lack of experience across the Corps but right there they seem to have reasonably experienced supervision and actually lead defense counsel in these cases.

They like the military justice

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track, the sort of military litigation, the litigation track in the Corps. They talked about concerns about promotion and success in the Marine Corps for persons on that litigation track.

They echoed the same demands of defense counsel everywhere that I've been anyway where they want a subpoena power. They want to have the ability to get experts. They want more training and they want not to go through trial counsel.

They specifically mentioned they wanted training on the sexual offender registries because they realize those are the consequences that are really meaningful to their clients and they actually don't always understand enough about all the different state sex offender registries that are out there.

They did use a phrase that I quoted, "blindly fumbling through without supervision" is how they felt some of the time on this.

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But in general their concerns on how the process is going echoed what had been raised elsewhere.

They had some strong feelings about the way that the training on sexual assault education is affecting the pool of the potential panel members and that it's harder to seat an impartial panel now because of the emphasis on drinking and alcohol being -- making consent impossible. And also the emphasis on manifestation of verbal consent.

And they talked specifically, and I'll just mention one of these cases that I mentioned earlier today. They talked specifically about the very minor offenses that are going forward. A hand on the shoulder or a touch of the hair is going forward as a sexual assault even when the person who was the target of that attention, while it wasn't welcome, that person did not consider it an assault. But it was reported by a third party and then

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it triggered the sexual assault investigation process which was frustrating the defense counsel.

They talked some about collateral misconduct. That did come up elsewhere too. And that's all I have to say about defense counsel.

BG DUNN: I would add that in unison they said investigators when you ask them what's one thing if you could have, what would it be.

And I guess you're going to talk about the prosecutors separately.

CHAIR HILLMAN: Yes.

BG DUNN: Okay.

CHAIR HILLMAN: Right now. So the prosecutors. They talked about the biggest impact on them not being the changes that have come through the DoD on sexual assault so much as the reorganization of the JAG structure of the Corps and that they're still working that

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out. Because they've separated Legal Services from -- that is, advice to the commanding officer from the prosecution, the whole criminal justice process, which is distinctive. And the new litigation track.

So the judge advocates are reckoning with this, with what this is going to mean and it's still working out.

They talked about the challenges of getting enough experience and that it had been difficult. The relatively few contested trials that prosecutors had been through. But that -- and that they needed more training.

They mentioned too that it's hard to focus on training for prosecutors because they're so busy with other things and that makes it difficult which is a common complaint too. Even with the change in the Marine Corps with legal services apart from the legal advice to command, there's still -- legal services for the prosecutor is more than simply serving as

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a prosecutor and that was challenging for them.

They seemed positive about their relationship with the victim's legal counsel which is VLCO. That's what they call the Special Victim's Counsel in the Marine Corps.

The civilian prosecutor who was there talked about a case that he'd been very unhappy about that had not been sent to trial despite a fact pattern that he very much felt should have been sent to trial because he thought the convening authority, right, in that case. Was this a military or civilian case?

LTCOL McGOVERN: This was a civilian case.

BG DUNN: He was an AUSA.

CHAIR HILLMAN: Right.

BG DUNN: U.S. Attorney's Office.

CHAIR HILLMAN: So, he was talking about outside of the military, although --

LTCOL McGOVERN: It was a military victim on Quantico with a civilian perpetrator

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so he had exclusive jurisdiction. He was very upset.

CHAIR HILLMAN: This was frustration with the jurisdiction. And this actually, this raises some questions about the jurisdictional pieces that are in the bill that passed the Senate yesterday about the victim's preference for which jurisdiction to pursue.

But here, this is a case where the AUSA had exclusive jurisdiction to go forward and then they didn't go forward and he felt they should have.

Mostly he brought that up to talk about the importance of the right mind-set for the prosecutorial authority. Because he thought that they made a bad calculus in that case.

BG DUNN: And his specific point was for Congress to direct that cases be tried in the U.S. Attorney's Office versus by military courts martial for events that occur

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on exclusive federal jurisdiction installations. It's not a solution because he had this case that he wanted to proceed with and it was stopped at upper levels in the U.S. Attorney's Office.

LTCOL McGOVERN: He said that he wrote an extensive prosecution memo. The police officer was in uniform wearing his weapon. They had been dating and --

MEMBER BRYANT: Could you speak up, please? That's -- it's a case but I'm interested in why. Was that -- I assume that's the Eastern District of Virginia out of the Alexandria office.

LTCOL McGOVERN: Yes, sir, and that is correct. And his opinion was they had a very strong case, a sodomy case. She did not want to participate in that and had expressed that previously and on this occasion he didn't give her the choice. That was at 1 a.m. She reported it by 7 a.m. the next day. So they

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really thought they had a good case going forward.

His point was he emphasized the standard that they require to go forward was really a guaranteed win was pretty much his impression of DOJ's requirement for that case.

And he attributed that because the federal prosecutors don't try a lot of sexual assault cases. They do a lot of fraud cases. So, when these messy cases come in they, in his opinion, resist them or do not want to go forward because there is not as high a likelihood of success.

MEMBER BRYANT: When we're saying he are we talking about the AUSA was there?

LTCOL McGOVERN: Yes, sir.

MEMBER BRYANT: Or a military prosecutor was complaining.

LTCOL McGOVERN: No, this was the AUSA.

MR. FISHMAN: Yes, as background.

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Sorry, we didn't lay this out very well. But the gentleman's name, you probably know --

LTCOL McGOVERN: No, it's non-attribution.

MR. FISHMAN: Okay. Well, it's someone with a lot of experience, 25 years in DOJ. So this is not a brand new AUSA. This is someone who I happen to know from personal experience teaches at the NAC. Very experienced AUSA.

MEMBER BRYANT: Who was frustrated that his office didn't go forward? Or he's the one who -- that's what I'm unclear on.

MR. FISHMAN: He was frustrated at the upper management and frustrated would be an understatement. He was livid.

CHAIR HILLMAN: The former. I mean, this was a long explication of a particular case.

MEMBER BRYANT: Okay.

CHAIR HILLMAN: To me the upshot of

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it was civilians get it wrong sometimes too.

MEMBER BRYANT: The real question about that and there is no question about the fact that across the nation AUSAs are prosecuting relatively few violent crimes of any kind.

So, I mean, as an AUSA I prosecuted a robbery and malicious wounding. We had a couple of murders that were associated with gang cases. In 14 years I don't remember a single rape case we ever did.

Not that we turned them down, they just weren't brought to us because we wouldn't have had jurisdiction. It had to be committed on federal property where there was a military base and all sorts of things like that.

But anyway, I read what was said which I've seen many, many times before of course. The standards for prosecution for DOJ and sometimes those are tinkered with a little bit at the actual district level by the U.S.

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Attorney himself.

But if you read the words of that nobody is constantly looking for a slam dunk. The U.S. Attorney's Offices lose cases just like anybody else although they don't lose nearly as many as other people. But there's a lot of reasons for that.

And I won't go on and on, but I just wanted to get the background on that. Thank you very much.

CHAIR HILLMAN: So, speaking of that standard for prosecution, the AUSA felt like a reasonable probability of conviction was the standard.

And the military prosecutors circled around that some and talked without a lot of real clarity in some ways about the standard. But their role is different because of the convening authority and the process anyway. But they did talk about that standard to prosecute.

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MEMBER BRYANT: That's in their manual. And I -- some of you and others have heard me speak. I really believe in that and I think that's the ethical thing to do.

There ought to be a reasonable probability of a conviction before you invoke this massive criminal justice system to take somebody's liberty away. Rather than just throwing it up there and see what happens. But anyway, that's an argument for another day. I'm sorry.

CHAIR HILLMAN: So, Dillon has raised for us to talk about later whether we want to make a recommendation about the standard for prosecution for -- in the military. But I think we should defer that till we get the report from the prosecution folks.

So, the other points that the -- I'll try to wrap this up quickly. The other points that the prosecution made were that

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nullification is a reality in cases that they're taking to trial, that they have the expertise to bring very complex and difficult cases to trial. And they often lose them because of nullification.

And they described cases of Ambien and alcohol and forensic evidence about the behavior of the victim and all sorts of things.

They said at one point that to get a conviction you need a likable victim and an unlikable perpetrator and that's how you're going to get a conviction in the non-stranger assaults that they're prosecuting among peer group, peer-age offender and victim groups.

So, they talked about considering a case successful regardless of whether they won or lost if it was tried well.

They did say that the victims legal counsel is a great addition to the team but it does make it different, their development of rapport with the victims.

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And they said that they thought that backlash could dissipate with training and that that would continue.

They talked some about the generation gaps in the military with respect to the members they're impaneling. They said they really want younger members who understand -- who have embraced this new paradigm of bringing everyone to account for sexual assault rather than more senior members who don't have the same training and have a different understanding going forward.

So, additions on the prosecution front? Okay.

So, then the next group was law enforcement. Here we had CID and the Family and Sexual Violence folks represented. A couple of special agents.

And the first chief warrant officer who talked to us said the changes in Article 120 had made his job a living hell, that the mandate

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to investigate every sexual assault regardless of severity had diverted resources into meaningless work that diverted them from the real law enforcement they'd like to engage in.

And said the reporting requirements have increased their -- that is, the mandatory investigation requirements for every report have maybe doubled their case loads and limited their ability to do things. This is when they described the hair-touching incident.

They talked about --

MEMBER BRYANT: He's doing these investigations primarily on Quantico, is that where he was stationed?

CHAIR HILLMAN: Yes. And basically they said NCIS is swamped because of all the cases that are going there, that they should be returned. They shouldn't all go to NCIS. And that they need more discretion within Article 120 investigations.

They said that the age-specific

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sort of demographics of what's happening is very consistent. The cases they're seeing go forward, alcohol.

They recommended law enforcement education, bystander intervention, things like that that would help as well.

But their main point really was very strongly that the lack of discretion created by the rules now around investigation is hindering their ability to do the most important work they have. They were very frustrated.

MEMBER BRYANT: Well, is the makeup at Quantico 94 percent male also? In other words, are these male-on-male cases that they're seeing? Or are the 6 percent --

CHAIR HILLMAN: They're not male-on-male cases. I think they've had very -- they haven't had a big increase there. They weren't ready to talk about that at all actually to us, although maybe -- I don't think anybody there mentioned one of those cases to us. They

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were non-stranger, you know, social event, alcohol-involved offenses.

MEMBER STRAND: This is a big culture change for NCIS and OSI when they changed the requirements. CID has --

BG DUNN: Army CID.

MEMBER STRAND: Army CID has for decades investigated all these types of crimes. So this was new for NCIS and OSI. And so it's a huge culture change for them, huge additional resource requirements. So we got recommendations on the investigations piece to address that.

CHAIR HILLMAN: Okay. And then the last group were the Sexual Assault Response Team members, a chaplain, a victims legal counsel, a staff judge advocate, the base chief of staff there, the SANE and the SART.

And they talked about the integration of these different groups and how they're working together.

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They talked about how -- why reporting doesn't happen essentially. They talked about career concerns, specifically derailing reporting for female Marines in particular. There are concerns about that. They talked about men a little bit, but not much there, again.

And they raised some issues about co-location of services. You know, having a one-stop shop sort of model for what should happen for victims services. And that focusing on the victim, maybe use some different models.

I was impressed by the depth of experience that they had. The civilians who work on this and have done it for a long time on military posts really do have a deep understanding of the military.

They're very much a part of the military team which tends to transition around them but the core coordinators stay. And that

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seems an effective model for a place like Quantico.

LTCOL McGOVERN: I think at Quantico the move in the Marine Corps is to have the special victim counsel co-located with the victim advocate. And that portion of the process will be one-stop. The investigator, the prosecutor are at separate locations.

CHAIR HILLMAN: That's all I have from Quantico.

MEMBER BRYANT: May I ask a question, please, then? In terms of Quantico how many convening authorities are on Quantico? Did you have that? Or is the base commander a convening authority? And what rank is he? If he's like most Naval installations he's an O6 or?

BG DUNN: The guy at Quantico is an O6. He has some tenant units because they've got all that, you know, combat development. And they've got the school there. But he's the

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GCMCA.

MEMBER BRYANT: He is the convening authority for the entire -- everybody who's there then?

BG DUNN: He's the convening authority for Quantico, correct. And for, you know, Marine Corps barracks downtown, for the whole D.C. area.

MEMBER BRYANT: Okay. I don't know if this is the appropriate time or not, but I have a request for information and I would like to see if we can find out the number of convening authority provisions that there are in each service.

For instance, when we were in Norfolk we found out it's Admiral Dixon who's basically the convening authority for close to one-third of the entire Navy. And so --

COL HAM: Mr. Bryant, this is Colonel Ham. That information is in a chart in the interim assessment on the role of the

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commander. That came out of the Role of the Commander Subcommittee.

MEMBER BRYANT: Is it? Okay.

COL HAM: There's a little chart in that interim assessment. And you are correct, the Navy is much different than the other services. So I would refer you to that chart or I can resend it to you. There are very, very few.

MEMBER BRYANT: Well, I'll find it.

COL HAM: Yes. There are very, very few in all the services but the Navy and the Navy -- whether or not the person is acting as a convening authority if they're by statute entitled to that convening authority they count them in their numbers. So you're correct, it is much higher in the Navy. But if you don't have a copy of that interim assessment I can resend it to you.

MEMBER BRYANT: I'll look for it, but if you could resend it for me I'd obviously

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appreciate that you're allowing me to be lazy.

COL MORRIS: Can I ask a question? You mentioned the devastating consequences to accused who wind up acquitted. Anything notable other than --

BG DUNN: Just going through the process which can be really lengthy from investigation to, you know, through the 32 and 32 officer recommending not to go forward. And then the commander telling you to go forward and then the case being tried.

COL MORRIS: Anything even particular enough about post-acquittal consequences in terms of reintegrating meaningfully into military duties?

BG DUNN: Well, I think -- they didn't address that specifically. They did talk about the branding. You know, once you've been accused and been through that lengthy process that at least as far as your immediate surroundings your name is relatively well known

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at that point.

CHAIR HILLMAN: I agree with what General Dunn said. I thought that they saw this as a pause that takes someone out of the mix for such a long period of time that it's difficult for them to recover afterwards. But because they don't continue to represent the person afterwards they're not the best place to get that full assessment.

And they were very much focused on the cases they have now. I mean, they have -- they're active. Their case load is reasonably high given the number of prosecutions that are going forward it seemed like.

BG DUNN: And both the prosecutors and the defense talked about the huge increase in the number of acquittals. And that if you look at just the sexual assault cases that go forward the vast majority of which are peer, alcohol-facilitated, acquaintance and no other witnesses. The acquittal rate for those is in

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the 90, up in the 90 percents and above.

COL MORRIS: Did you get a sense at all for the lower-level -- you know how the Marines have had anyway a greater -- they've tried more cases proportionately than the other services because, for example, they would take one-time drug use that the Army would give NJP. Marines would have -- so their special court stats were way different from everybody else.

Are there equivalent low-level sexual offenses that the other services might dispose of through NJP that we get a sense that they are trying at maybe special courts?

LTCOL McGOVERN: I don't think we've analyzed that, sir.

COL MORRIS: So nothing came out from the defense guys then on that. Whether it was kind of an over-referral at all levels.

BG DUNN: Well, one thing they did say, that in the Marine Corps sex in the barracks is illegal across the Marine Corps.

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And so that in a lot of these cases you may roll down to just that in the end of having sexual relations in the barracks which is not an issue in any of the other services as a general rule.

CHAIR HILLMAN: The prosecutors did say -- I put this to them. I said would you say that you're well prepared to try cases you can't win. And they said yes. I don't know, those were my words.

Because it really does feel like they've become very expert in bringing these cases, but even when they can -- they go far the panels are nullifying when they've proven all the elements. I mean, they feel specifically they've had nullification when they've proven all the elements and the panels are refusing to convict.

COL MORRIS: And I was going to ask. Because the example you gave after mention nullification was Ambien and alcohol and stuff like that which could be reasonable doubt

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issues. So, prosecutors are quick to assess responsibility for what they think is bad justice.

Do we have a sense that panels are nullifying in the sense that we're sending some distorted message by truly walking a guilty person here? Or is it mainly --

BG DUNN: Their discussion of that particular case was that they had a forensic psychologist there to discuss the effects of Ambien and alcohol.

But in that specific case the victim was walking, talking, reacting and that evidence was in as well before the trier of fact. And the trier of fact --

COL HAM: Which is a warning on Ambien. You could have sex and not know it. That's a specific warning on an Ambien.

BG DUNN: And so the trier of fact made their own determination apparently that she was walking, talking and interacting and

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chose that evidence over the forensic psychiatrist testimony. Interesting.

LTCOL MCGOVERN: More than the particular cases I think the thing that stood out was the senior trial counsel stated that if the victim wants to go forward we will take a case forward. That seemed to be their standard rather than reasonable probability of success which I think could be an issue.

BG DUNN: But underscored with we believe the victim and the victim wants to go forward. So, there's no ethics issue. But we believe the victim, the victim wants to go forward.

CHAIR HILLMAN: That's right. The prosecutors did not tell us that they're prosecuting cases they did not think involved a crime.

BG DUNN: Right.

CHAIR HILLMAN: They were -- that's not what I heard. Dillon, did you hear

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something different?

MR. FISHMAN: I didn't hear something different, no.

CHAIR HILLMAN: Okay.

BG DUNN: And we heard the same thing with the Navy in Norfolk.

LTCOL MCGOVERN: I did have a captain come up after the panel because there was -- the SJA was sitting in on that conversation. So, although it's non-attribution people may not have been as forward.

But he did come up to me in response to the question whether there was political pressure for these commanders to proffer charges. And he felt that there was pressure to go forward in these cases.

CHAIR HILLMAN: There is pressure. There is political pressure. That's why we're here.

MEMBER STRAND: Well, when we talk

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about the ethics, it's not really a legal ethical because the JAGs aren't the ones that decide to go forward, correct?

BG DUNN: No, it's legal that you're talking about.

MEMBER STRAND: It's the commander.

LTCOL McGOVERN: As a lawyer you -- can go to court.

MEMBER STRAND: But if the prosecutor believes ethically that they shouldn't go forward and the commander believes they should go forward --

LTCOL McGOVERN: You go to the higher commander.

MEMBER STRAND: You go to the higher commander. That higher commander still decides to go forward.

LTCOL McGOVERN: You go to the higher commander.

BG DUNN: You go to the next higher

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commander.

MEMBER STRAND: Okay.

BG DUNN: That's not -- in everything we've heard across the board with people talking about taking these cases to trial, consistently all the prosecutors have said it's not an ethics issue. We believe the victim. We just know that we're not likely to win the case. But we do believe the victim. So there's not an ethics issue.

COL HAM: And the standard to refer a case is not a reasonable probability of conviction.

BG DUNN: Right.

COL HAM: It's probable cause to believe an offense --

BG DUNN: That offense occurred, right.

LTCOL McGOVERN: Well, I guess they didn't see that, that it was if a victim wants to go forward we will go forward. And that's

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where I thought there was a bit of a disconnect. That is, like, well don't you need a prima facie case. And there seemed to be a gap.

BG DUNN: There is clear deference to the victim's desires in very tough cases.

MS. JAUS: And you have to believe the victim also. Not just any person --

MEMBER BRYANT: Well, that's just not always the case, since we're talking about comparative systems, in civilian prosecutions and I doubt it's always the case in military.

Sometimes there are times where you're just not going to go forward despite the fact that you believe the victim. That's when the prosecutor really has to make the tough choices, you know, talk to the victim as sensitively as you can about why you're just not going to go forward and hope they and their families understand.

The other question, the real question though in these cases that you all

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discussed at Quantico and what you heard from the prosecutors is that, okay, we'll well prepared to try cases we know we can't win. Would you, Mr. Prosecutor, have referred these charges to start with? Or do you just like going to the court when you know you can't win? That's really -- that's one of the questions that is the key to a lot of our discussions.

CHAIR HILLMAN: You know, Harvey, I felt like what they reflected to us was that they're working in a system that's under transformation. And they actually don't know what they're going to win because things are changing in terms of what kinds of cases they're bringing.

And the training of the individuals who are the fact-finders and then sentence adjudicators in these cases, their members.

So, I don't think that they know they won't win, but they're getting a better sense now. This is sort of another snapshot of

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data.

I mean, we had a few counsel from one base to talk to us about what they've experienced. And yes, I don't know that it will continue in this way but right now in this transformation that's where they are.

MEMBER BRYANT: Well, I thought you said some of them used the word -- well, maybe not no, we can't win, or shouldn't win, or not going to win, something to that effect. That their perception was based on their experience that they weren't going to win this case from the time they started.

COL SCHOLZ: I think Dean Hillman makes a great point. There has been a huge sea change.

Back in the day when I was an SJA I can think of 10 cases I remember one year we had that were date rape, kind of social drinking that we just, we at the legal office decided we couldn't win and we didn't go forward. We just

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didn't.

And it was horrific, it was bad. And what we ended up doing was having a lot of training sessions in the dorms about what was going on in the dorms as a result of it.

But I think things have changed and there is the political pressure obviously. But also now the requirement to investigate no matter how low-level we might think the sexual assault or sexual harassment is. So, there is a sea change going on.

And I think that's right, people are grappling with in the legal offices and in the investigative world too. And the members for that matter.

So, I think that's a really good point, that we don't really know what's going on. And maybe the young trial counsel do think, gosh, I'm going -- this is a dog of a case but I've got to go forward. There may be some of that going on.

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But it's probably a natural reaction to this large transition.

BG DUNN: Along those lines I think it's important to recall what Professor Hillman said earlier. There were a couple of remarks about younger panel members seem to have a different approach that perhaps the older panel members. Which is reflective of that training and change and maybe societal approach.

MEMBER STRAND: Well, even on the investigative standpoint I think there's a real change because in my day we never would have taken a case. We wouldn't have normally investigated a case unless we had a rape victim that had injuries and we had a rape victim that had broken bones. I mean, so there has been a huge culture change along the whole way.

MS. JAUS: When was that? That's crazy. The vast majority of sexual assault cases --

MEMBER STRAND: Back in the

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seventies and eighties, you know.

MS. JAUS: I just want to point out that most of the sexual assault cases in very little proof. It's usually a delayed outcry. It's a he said/she said. And so most of the cases are what a prosecutor would consider weak.

But still, if you believe the victim they have a right to go forward. Just because you may not be able to prove it beyond a reasonable doubt doesn't mean a person doesn't deserve their day in court.

Because most of the cases are inherently difficult. I think nationally we were talking in our meeting that less than 50 percent of sexual assault cases are won across the country. Not just the military and now civilian jurisdictions.

They have a built-in defense of consent unlike any other crime. So it's very rare you're going to have a case where there's

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broken bones, you know.

MEMBER STRAND: Right.

CHAIR HILLMAN: Point made. And not to be too expansive on this, but this is one of the struggles that I have with how we're setting up the Sexual Assault Response Teams is that it's still -- our response is set for that initial fresh report, that fresh complaint which is not what we experience generally.

So, for instance, one of the things they mentioned at Quantico and they have elsewhere, we need a 24-hour center. We don't have that right now so some of the reports go to the civilian hospitals rather than coming here.

But that's actually not the majority of the assaults that will eventually be prosecuted and reported. Actually, the majority will come in through these other means and not in that place where we're actually going to build a forensic case in exactly the same

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way. So that's a key point overall of the larger landscape.

Okay, so that's our report from Quantico. So, next.

LTCOL McGOVERN: In order to get through the information today if we can try to do them in each session in 30-minute blocks that may help us catch up. And Russ, we have you running through the findings and recommendations that you all have. We can discuss along the way, but again, the idea here is to hear what the team did and then if there are other issues with those that the group would like to fine-tune now would be the time to do it.

MEMBER STRAND: All right. I want to start by saying we didn't get through ours. We still have some more work to do. There's many issues and findings we didn't get to so we'll have to follow up probably at our next meeting.

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The ones we did get through I'll just abbreviate. I suspect I don't need to read word for word, just kind of give the highlights.

The first issue was -- it was a question. Do agents assigned to SVUs have the required training and experience to be effective?

The finding was the military has a systemic robust training requirement for the criminal investigators, especially for those assigned to special victim billets.

The services have a working group to ensure they share information resources. They have experienced agents and investigators that -- many of the general crimes agents have the same training and experience as well.

Compared to civilian organizations there is no comparison. Military receive far more training than their civilian counterparts on the whole.

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The recommendation though is to sustain the effort but to sustain the effort in amongst all the downsizing and all the financial reductions and everything else.

To ensure the continuation of training money must be fenced, i.e., congressional earmarks or funding similar to DoD FAP dollars, Family Advocacy Program dollars where it comes in, Congress says here's the money.

And I think it should go along -- maybe even along the whole route, not just with investigations but with everybody, to where the money is designated by Congress this is earmarked and it goes all the way through.

If it doesn't happen that way what can happen along the way is the money is set aside for sexual assault, for example, and then the DoD can say well, we need to put this money somewhere else. And the Air Force says well, we need to put this money somewhere else. And

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that's generally what happens, especially in constrained environments. So, a recommendation is that there be earmarks and they put those dollars.

But it also is not just the funding. Again, one of the biggest pressures on the services right now is to reduce personnel, military personnel, contract personnel and civilian personnel. So, there also has to be some protection of authorizations.

Again, in constraint environments when you're drawing down oftentimes it's the low-hanging fruit and whatever the priority for the service is, whether it be combat support, whether it be pilots, whatever, that's of course, those are going to be the protected species. And so there has to be some consideration for protecting current authorizations as well.

So that's the first thing. Any comments or questions on that?

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CHAIR HILLMAN: I have a question. To what extent -- I mean, with training of counsel we realize the rotation of the military is a challenge in terms of -- and so training is a substitute for experience. Is that the case with investigators too?

MEMBER STRAND: Yes and no. It depends on the service. With the NCIS they are civilian investigators and they don't have a lot of turnover.

Although right now they've got a huge deficit in their specialized sexual assault investigators that have not been through the training yet, the advanced training. So there's a backlog there.

CHAIR HILLMAN: So pause right there. And let me just say then this first sentence is really, this is too generic for us to be able to say the military has a systemic robust training requirement for their criminal investigators and for those assigned to special

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victim unit billets.

But we don't, actually. And when you look at what's actually happening then it's distinctive to each service and it's complex. The Navy has long-term investigators. Do you know what I mean?

BG DUNN: But the other service -- see, lawyers are different than investigators because the investigators are always investigators and they're always -- so if you train somebody in sexual assault they can be at Fort Hood, they can be at Fort Bragg, they can be in Korea and they've got, they take that expertise with them.

CHAIR HILLMAN: Is that what we do? Is that how we assign?

BG DUNN: Yes. That's how the military investigators are.

CHAIR HILLMAN: That's what my question was.

BG DUNN: Whereas the military

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lawyers change jobs.

MEMBER STRAND: Well, yes and no. Yes and no. Again, service-specific. NCIS knows I have the counterintelligence mission. So half of their career or most of their career might be counterintelligence. They might go into a criminal investigative billet, or they might be in a criminal investigative billet for most of their career and go to a counterintelligence billet.

CHAIR HILLMAN: We spoke to agents who want to be doing counterintelligence and not be doing sexual assault.

MEMBER STRAND: And they're being forced to do sexual assault.

CHAIR HILLMAN: Being forced to do sexual assault and they're not happy about that.

MEMBER STRAND: Right. And so I understand your point, Professor Hillman. We can take another look at that.

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Because it does bring up another real problem. I mean, there's a systemic robust training requirement. So there are requirements. But there's a huge backlog in the advanced training.

And I think you brought it up at the RSP about doubling or tripling our efforts. Right now we're constrained by how many people can train by the current funding that we have and current authorizations we have.

We are currently doing some requirements checking and we really currently have a huge backlog in all the services for training all the services in what's required in the advanced training. So that at every installation, on every base, on every big ship that we have the same highly trained person. That's with the advanced training.

So, we can probably take another look at that and possibly even ask for increases in funding and authorizations to meet the need.

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CHAIR HILLMAN: I'd like us to soften that finding to say that it varies and that we're in progress towards meeting the requirement but we haven't met it yet.

And to say that -- rather than saying there's sort of no comparison to civilians, there's a wide variety of expertise levels among civilians. And in generally you can say military receive far more training, I think that's absolutely fine and accurate.

But I also wonder if we should gesture there, because that first question is so big, to be effective. You know, they have what they need to be effective. Right now their case loads are skyrocketing. I mean, they're getting because of the increased reporting. So they can't be effective if there's not -- I mean --

MEMBER STRAND: Right.

BG DUNN: But there is a difference between the training to be effective and the

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resourcing and billets to be effective.

CHAIR HILLMAN: So if we address also that's fine.

BG DUNN: Yes.

MEMBER STRAND: The resources is a huge problem.

BG DUNN: I just think we need to distinguish between that. The training is there. The training is excellent. Getting people to the training and having enough people to do the number of investigations also relates to that.

COL SCHOLZ: And now they're getting experience too. Now they're getting more experience to be effective too. That was his point.

COL HAM: Do you want to assess the cost that you are recommending be fenced? That might be something you want to look at. You're recommending fence training money but there's no indication of the cost that you're talking

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about.

MEMBER STRAND: We can add that. That would be fairly simple.

COL HAM: And you're talking about fencing it at a DoD level? Whereas for comparison all the training money for counsel I believe is left to the services, how they want to distribute it or fence it.

BG DUNN: This does say "do agents assigned" at the top. I mean, this particular question doesn't apply to counsel.

COL HAM: Which is a -- I'm throwing out should that be a consideration for you for any recommendation that involves funding. Do you want some idea of the cost of that recommendation.

CHAIR HILLMAN: Yes. Absolutely.

MEMBER STRAND: Yes. And we can add that in there. I've got some figures that I can put in there for the next meeting.

Also, on FARs, the fence funding,

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the way family advocacy dollars work is Congress earmarks the money this money goes to family advocacy. They give that money to DoD. DoD then gives that money to the services. The services put in the requirements for what they need and then it comes down through.

Which protects it all the way through the entire -- to the user which is really, really important. Even when they sweep money at the end of the year they can't -- sometimes they're starting to sweep the money in the last quarter, even at the beginning of the last quarter.

And so if the money's not protected that money gets swept in. So if you haven't spent it in whatever area and you need to spend it you still don't have it sometimes.

So it's really important that it be fenced from Congress to DoD, but DoD have a mechanism to make sure the services get what they need in the budget request.

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So what we do in family advocacy is we give the budget request to our service component. They send them up to DoD and then it's getting paid out of this fenced fund.

So I will add some cost requirements and also look at increased requirements and then change the wording on that.

COL SCHOLZ: Or that the cost be assessed if you don't know. If we can't come up with that maybe they need to be assessed.

COL HAM: We need to request the information for funding to be provided I believe to the subcommittee.

MEMBER STRAND: Okay. Role of patrol officers. The big issue here is to make sure that they ensure the case is properly documented and referred to investigations.

Civilian patrol officers and military patrol officers are vastly different. Civilian patrol officers may be the one conducting the entire investigation. They're

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certainly the ones that conduct the preliminary investigation in most cases.

In the military initial responders do not do that. In fact, in most cases the initial responder is never called. So, we basically said that they have limited responsibility and no discretion in referring cases which we think is good. So, our recommendation is the military model be sustained.

DoD policy requires that all sexual assaults be referred to and investigated by an MCIO. MCIOs have the policy that they will initiate an investigation on all sexual assaults they become aware of.

They have policy requiring specially trained and selected MCIO investigators be assigned as the lead agent for all sexual assault cases. Because the case load is higher cases involving penetration or work by SVU while touching cases involving

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adults may be assigned to a general crimes agent.

There has been some concern both with Marine Corps and NCIS. The Marines say they're trained at the level, they're trained, they can handle these cases but by law they can't. NCIS says they're overwhelmed. So our recommendation is NCIS utilize the Marines CID to assist them in the investigation and provide investigative oversight.

And if the Air Force has that same problem they can utilize Air Force security forces investigators. You know, they bring them in their office just like we do with drug suppression teams and they have them do the cases there.

And they provide investigative oversight. They put the final stamp on it. But they can also see trends. They can see possible other victims, they can see other possible things and so I think meet the meaning

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of the law.

CHAIR HILLMAN: I like that. I think that that's devolving discretion further than what has been allowed actually in the process. And I think that's a really critical piece. That's great.

MEMBER STRAND: Okay. Civilians and DoD are both taking a multidisciplinary approach to responding to sexual assault cases.

The DoD has implemented special victim capability and it's being implemented differently in each service. Sometimes the differences are a good thing.

Our recommendation is to continue to monitor what works well for each service in each location, and that DoD be tasked to monitor and ensure the sharing of best practices. Because it really isn't one size fits all is the best as we've seen along the way.

Consolidated facilities. This was a big one. We've seen it be used in civilian

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jurisdictions and also military jurisdictions. They can provide easier services for victims but require a lot of resources and the right mix of people.

So our recommendation is establish an assessment to see what works well for each service. Use this as a potential model for places where resources are available but not a requirement. At smaller installations consolidating would be effective and encouraged where feasible but must be sensitive to the needs of the victim, also ensuring there are other avenues to report the incident.

One of the big things that we were concerned about is if there's a one-stop shopping we have to significantly emphasize there are other places you can go and not just here. There are other avenues of reporting, not just here.

CHAIR HILLMAN: Great. I wonder if we could add assess what works well for each

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type of installation apart from each service. Because the different types of Navy installations, those co-located with major urban jurisdictions, for instance, are going to be different than the ones that are, you know, big posts that are overseas or whatever it's going to be.

So I think it's so distinctive to the type of place that has to do with -- maybe something specific about leveraging civilian resources in some instances too. Because actually building out the sort of consolidated model, just super expensive and not clear that it makes any sense in places that have alternatives.

MEMBER STRAND: Right.

LTCOL McGOVERN: Would you like to consider the different models where some is prosecutor-investigator, or some other models are all services?

CHAIR HILLMAN: It would be great

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if we actually listed what the different ones we saw that worked. Because that way if a post unit commander is realizing there's a problem they could look and see what the list of possibilities would be. Plus any future group could look and see which of these approaches they were taking. So, if we could do that without too much trouble that would be great.

MEMBER STRAND: Okay.

CHAIR HILLMAN: If we even just did it for the sites that we went to. Like just a list from the specific places we went to that would be great.

MEMBER STRAND: Okay. The next one is rights and advisements for servicemembers regarding collateral misconduct. That was an issue that came up at a couple of different site visits.

The MCIOs believe that the requirement to interrupt a victim's interview to read them rights for collateral misconduct

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can have a chilling effect, causing the victim to lose trust in the investigator or shutting down the interview.

Unlike the majority of civilian agencies MCIOs are required -- whether you're in the military or not, if you're an agent of the government under Article 31 if you suspect a member of the military subject to the UCMJ of violating any law you have to read them their rights.

Our recommendation is that it be reviewed, that JPP review victim's rights advisements for collateral misconduct to determine the appropriateness of segregating certain misdemeanor offenses from the requirements of rights advisement.

Again, that's on the follow-on panel. We believe that there's probably -- we need a lot more testimony, we need a lot more information. And that's got a whole lot of potential unintended consequences.

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But we didn't feel that we had enough information to make a recommendation that either all victims be read their rights or that we try to cull some out.

But in the meantime we would recommend that people follow the law.

(Laughter)

CHAIR HILLMAN: I think this is not

--

MEMBER STRAND: We can add that in there.

CHAIR HILLMAN: But do we want to recommend they follow the law or they do what's working in practice to actually bring these cases forward and is making victims feel more of and increasing reporting rates in some ways? Because their friends are getting prosecuted. Right? Like this is a tricky one.

MEMBER STRAND: It's very tricky, especially on a joint base.

BG DUNN: Well, the problem with it

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being in the UCMJ is -- see, NCIS all being civilians are not subject to the UCMJ themselves so it's not going to come back on them.

But a military, an active-duty military investigator will be held accountable for violating --

COL HAM: It's a violation of Article 98.

BG DUNN: Right, for violating Article 98 by not reading their rights.

CHAIR HILLMAN: But when do we see prosecutions for violations of Article 98?

MEMBER STRAND: Well, during Aberdeen the agents took it upon -- actually, the leadership told the agents don't read rights. We want to make sure that -- we're not worried about all the underage drinking and everything else so the agents did not read rights.

The leadership supported that.

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But then somebody in Congress got really upset because a victim went to them and said well, I wasn't read my rights and I was held responsible for this.

And so the commander of CID received a letter of reprimand and every agent that worked that case got a letter of reprimand.

BG DUNN: So it's a difficult issue.

CHAIR HILLMAN: Right.

MEMBER STRAND: So, you know, it came up through a victim's right part.

CHAIR HILLMAN: I defer to the advice of the investigation.

COL HAM: That's actually not true that they aren't subject to the code. They will be subject to the code when they're deployed under Article 2.

BG DUNN: NCIS.

COL HAM: They are subject --

BG DUNN: Yes.

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MEMBER STRAND: But whether they're subject to the code or not, they're an agent of the government and they're required.

Now, the remedy for that if they don't read somebody their rights is later on you either can't prosecute or you have to have other evidence.

COL SCHOLZ: Or you decide to give a referral. Say I'm not going to pursue the collateral misconduct and you don't.

CHAIR HILLMAN: The authority is the hard thing there though. It's the convening -- who has the authority to do it. The investigators, the convening authority, the prosecutors that are involved in the process. It's that particular challenge that's difficult here on the ground.

COL MORRIS: I mean --

MEMBER STRAND: In practice --

COL MORRIS: I mean you're talking about the dynamic of an interview that ideally

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is happening really close in time to an event if our system is working right. So they have to -- there's no call up the chain and get approval. There either has to be a cut-out area or some level of investigator discretion.

BG DUNN: Right.

MEMBER STRAND: Well, the other concern too is when we have special victims counsel sitting there and we have to read someone their rights what is the obligation of special victims counsel? You know, so there's a whole host of things that I think the judicial panel can review. I don't think we can solve it here.

As in civilian agencies the language used in writing and discussing sexual assault may show bias and not properly capture the events as a criminal act.

CID issued a policy requiring agents not to use terms that imply consent but acts that should be described.

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Our recommendation is that all MCIOs provide specific policy and training on the use of consensual language and it should be done consistently across all the services.

We had no specific indicators from the services but we didn't have a lot of confidence that the other services had specific policies and training to avoid that consent language.

Like civilian agencies, investigative teams' response to sexual assault can be impaired by prejudices and biases of responding police and everyone else.

CHAIR HILLMAN: Hang on one second. Does Harvey have copies of this? Could we send it to him?

Harvey, we're walking through like recommendations that we have on all these. So are you doing okay following all these? Because Russ is reading from a multi-page document.

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MEMBER BRYANT: I don't think that that -- if that was one of the things that Kelly sent then yes, I have it. But I'm doing a good job I think of following.

CHAIR HILLMAN: Okay. These were created in response to this morning's discussions including the ones that you were in.

MEMBER BRYANT: I know.

CHAIR HILLMAN: So maybe -- can we send them to him?

MEMBER BRYANT: No, I don't have them in front of me but I'm following Russ I think fairly consistently. And if I have some comments I'll jump in. You all know that.

CHAIR HILLMAN: Dillon is going to work on getting you copies of some of these.

MEMBER BRYANT: All right, thank you.

CHAIR HILLMAN: Go ahead, Russ.  
Sorry.

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MEMBER BRYANT: So, culture change is important. We talked to several police departments where they've seen the need for culture change.

Some police departments have adopted the Start by Believing campaign approach to all sexual assault investigations. Best practice is if an investigator has issues they do not stay away, they have volunteers.

So, across the services there are agents assigned who do not want to work on these cases. And this was very clear to us and as you just brought up, Professor Hillman.

And we've seen it in our training that there are people that don't want to work these cases. There are people that aren't good at working these cases and there are people that are forced to work these cases.

So we had some discussion on this. And so our recommendation and subject to any other thoughts. MCIOs ensure that those

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assigned to an SVU are trained, screened, monitored and evaluated and removed if they demonstrate negative biases.

Beyond that we could have been more strict. We could have gotten more down in the weeds. But these really do have to be voluntary. They have to be.

Because if you have somebody that's not happy doing what they're doing, especially dealing with these highly sensitized investigations, these hyper-vigilant victims and everything else, even the quality of the investigation is going to suffer.

BG DUNN: I'm not sure I would put that sentence the way it is, across the services there are agents assigned who do not want to work these cases.

I think I would be more inclined to say services must ensure that agents who work these cases are, you know, or volunteers are properly trained.

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It sounds like my God, nobody wants to investigate the cases which I don't think is what we've heard. I mean, it's an issue in the civilian world. It's an issue in the military world. But I think it should be phrased a little differently.

MS. JAUS: I mean, sexual assault cases are not for everyone. Not everybody should handle them.

MEMBER STRAND: But the problem is in the military you're told you're going to do this.

COL SCHOLZ: And honestly, Russ, we have to maintain some of that flexibility. I think we should be encouraging them to put people there that are interested and also have the right skills.

BG DUNN: Right.

COL SCHOLZ: But the fact of the matter is when the need's there and we don't have one of those willing persons we're going

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to say go investigate that case.

BG DUNN: Correct.

COL SCHOLZ: It's the nature of our business. I mean, it depends on where we are. We may not have that ideal person who wants to be doing this.

BG DUNN: Which is why I think that sentence should say services should strive to assign agents.

CHAIR HILLMAN: But that's not a finding.

MEMBER STRAND: That's not a finding. But that's not a finding. Military services strive. What's the finding?

The finding is that we've heard that there are agents that don't want to work these cases.

BG DUNN: Right. But when you put it like this it sounds like you have hundreds of them and I don't think that's what we've heard.

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MEMBER STRAND: Well, we could say a minority of agents, or a small --

CHAIR HILLMAN: Could we say that given the sharp increase in the numbers of sexual assault cases many agents are working these cases who did not expect to do so, or who have not volunteered to do so, or something along those lines?

MS. JAUS: Maybe not many. Maybe some. "Many" sounds like so many.

LTCOL McGOVERN: How many did you interview that said they were not happy doing it?

CHAIR HILLMAN: Harvey, General Cooke just joined us. Harvey Bryant is on the phone.

You know, some of them --

MEMBER STRAND: Hey, General.

CHAIR HILLMAN: There's like two-thirds. Some of them said two-thirds of their investigations now involve sexual

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assault. Like just in general their docket is like two-thirds sexual assault. We had a -- selected military investigators for people who want to be specialists in sexual assault.

So, there's go to be a lot of people who weren't drawn to this. They didn't join a special victims unit when they came to the military five years ago but that's what it looks like right now.

COL. HAM: Does that mean they're not good at it?

CHAIR HILLMAN: No, they don't want to work.

COL. HAM: The assumption seems to be that they are not doing a good job at it.

BG DUNN: Right, and that's not what we've heard.

MEMBER STRAND: No, that's not what is --

CHAIR HILLMAN: All right. Let's work on that.

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MEMBER STRAND: Yes.

CHAIR HILLMAN: We'll soften that language.

MEMBER STRAND: Okay.

COL. HAM: It sounds like that people don't want to do it, it's so negative.

MEMBER STRAND: Well, I will tell you from practice in teaching these agents, especially the ones that are forced to come from Counterintelligence to criminal investigations which they didn't sign up to do, they are very bitter about it, and they're very -- so, yes, they're going to probably do an okay job, but I'd rather have somebody that wants to do a really good job; not to say that they're not professional because they are.

BG DUNN: But that's a training process for Commanders. It's a training process for --

(Simultaneous speech.)

COL. SCHOLZ: It's career broadening

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like any other career would have. You have the career broadening. If you want to get promoted you have to do all those things. You know, it's that kind of thing, so that's the incentive, that's how you kind of incentivize it like that, I guess.

MEMBER STRAND: Right. Back in the day when we were requiring obstetricians to come in and do rape kits, some of them did a really good job, and some of them didn't want to be there at all and they made things worse, so we'll work on that.

Collection of SAFE by someone than a SANE may bring the collection process into question making evidence inadmissible in court, not all civilian hospital use a certified SANE to collect the forensic evidence, and we've got a big description there about certification is not required to be an examiner/SAFE/SAFME is required to be a SANE. So, our recommendation is to create a working

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group to review and align training of SAFME, Sexual Assault Forensic Medical Examinations for uniformity and to consolidate and share resources, determine if a qualified SAFE SAFME meets requirements of MDAA 14, Section 541. We punted.

The next issue we recommended to be removed. We had a discussion about SAFE exams not always being conducted on the installation causing delay and additional stress. We removed that, or recommend removal because distance always isn't a major factor. Sometimes it is, sometimes it isn't. Quality, what you're going to get, where you're going to get it --

BG DUNN: Where you --

MEMBER STRAND: -- with our resources, so we decided to remove that one.

BG DUNN: Sometimes the victim wants to go off base.

MEMBER STRAND: Right, sometimes they prefer to go off base even if it's a longer

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drive. So, the facilities conducting SAFEs for DoD are not all used in the DoD evidence collection kit, so we recommended the study of DoD -- use of DoD versus state-supplied kits and clarify policy. This certainly doesn't appear to be an issue, although we heard some testimony from some of the service reps that it's required if they're under contract, but then we went out to the field and found out they weren't using the kits, they were using their own kits. But the lab says there's no real problem, so it may be a non-issue.

The instruction in the DoD SAFE kit, this is a huge issue. The instruction in the DoD SAFE required the plucked hair samples be collected. This appears to be an unnecessary invasion. Most civilian agencies no longer take plucked hairs as they're of little probative value. The Director of the crime lab, the DFSC agrees there is no need to collect plucked hair samples. Our recommendation is remove the

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requirement to take plucked hair samples.

MS. JAUS: Is that head hair or pubic hair?

MEMBER STRAND: Pubic hair.

MS. JAUS: Pubic hair.

MEMBER STRAND: It's an archaic practice. There really -- and even back then, I mean, when it first started we were using hair for general characteristics, and that's all you can get from a hair sample anyway.

MS. JAUS: Right.

MEMBER STRAND: That started back in the days when we were using A/B/O, all this other stuff, you know, sperm and things like that, but we've gone way beyond that. And the DNA, we don't need it. We're really one of the only ones in the country that still plucks.

MS. JAUS: No, New York is still plucking, but to be honest it's cut. They don't --

MEMBER STRAND: There's no need for

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it.

MS. JAUS: There's no need for it. A lot of young women don't --

MEMBER STRAND: Well, that's true, they shave themselves. Right.

COL. HAM: Threatening to pluck, is that what you're saying?

MEMBER STRAND: Right.

MS. JAUS: I'm trying to say it, you know, the right way.

MEMBER STRAND: But it can dissuade victims from, you know -- and it certainly makes everything more uncomfortable if they haven't shaved if they're not up with the --

CHAIR HILLMAN: Sold. Next.

MEMBER STRAND: Okay. No plucking. Is the DoD crime lab effectively and efficiently processing evidence in sexual assault cases? I'll tell you what, we were just absolutely impressed, bowled over by the exceptional skills and enthusiasm and way ahead

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of the crime lab. Our recommendation is to continue to fund them. There's some issues because with the increase in reports they've got an increase in examinations. To insure continuation of training money, it also must be fenced, kind of the same recommendations we made for the investigative training with Congressional earmarks. But we need to make sure that their resources in both -- the investigation, the training, and the crime lab were impacted by the furloughs and by the government shutdown and things like that. There's no exceptions for those.

There was broad exceptions for sexual assault, people who worked in the sexual assault, but there were mainly applied to Victim Advocates. We actually had investigators that were furloughed, we had crime lab people that were furloughed, we had trainers that were furloughed, so we have to take a look at that.

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CHAIR HILLMAN: Can I just make a comment with respect to that? It sounds like we looked at the top of the pyramid of the forensic structure in the military, but not at the bottom of the pyramid. Is that -- in other words, we're not an in-between, so the collection of the material, and then the processing of it at the end, some of the allegations have been about loss of that, or whatever. Is there anything to note in between that, do you know what I mean, the chain of the in-between? Does that make sense? The processing is the forensic lab that you're saying is state-of-the-art. The collection is the -- you know, what's happening at the tip of the spear when they're literally in the field. Is there anything in between there that we need to address, or no?

MEMBER STRAND: There really isn't anything in between because --

CHAIR HILLMAN: Okay.

MEMBER STRAND: -- that goes

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directly from the agent through the evidence room to the lab.

CHAIR HILLMAN: Okay.

COL. SCHOLZ: The training is the big issue there, and whether they're properly trained in evidence collection and chain of custody, and that kind of stuff. I think that's a training issue. You know, you feel like the training right now is --

MEMBER STRAND: Well, but even the crime lab said they don't have any issues with what they're getting.

COL. SCHOLZ: Well, there you go. That might be the answer.

CHAIR HILLMAN: Okay. We just want to frame that in a way that says we're addressing the entire concern about the collection, and retention, and processing of that because that has been an issue in the past.

MEMBER STRAND: Okay.

CHAIR HILLMAN: That comes up in the

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survivor stories that circulate.

MEMBER STRAND: Next one, the requirement of DoD to approve -- obtain approval for agents to utilize pretext phone calls and texts is cumbersome and unnecessary time delay. It appears at different military service General Counsels apply different standards for that.

Some of the background on that is, you know, the Army is required to go -- if I want to do a pretext phone call as an agent, I have to get permission from my boss, the next boss, the next boss, all the way up to the Army General Counsel in Washington, D.C., and it's really cumbersome, and it takes a long time, where other service agents might just be able to get permission from a local Commander or local boss. So, our recommendation is that DoD review and standardize electronic intercept requirements across all services to make sure they're streamlined to the maximum to effect

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expeditious use of investigative technique.

CHAIR HILLMAN: We don't want to just recommend the Army process be adopted?

MEMBER STRAND: No, no, no, I think that would -- we would be against that.

COL. SCHOLZ: Or the other --

COL. HAM: Yes, not the Army process.

COL. MORRIS: The most decentralized one.

CHAIR HILLMAN: Why don't we just go ahead and recommend that instead of having them do another study they just do the fastest without a process.

BG COOKE: Have we looked at the legal arguments for why they're -- I imagine these are based on different legal interpretations.

MEMBER STRAND: They're all based on WIMEA, the wire intercepts, whatever, there's a big, long term.

You know, we got into trouble in the

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'80s. We got into trouble because people were recording other people, so DoD and Congress got together, and there are a lot of rules. There are regulations, there's policies that are very strict. Some of the services have decentralized permission for recording.

Now, the pretext itself is not a problem. It's recording them, so some of the services have been delegated down to lower levels. And there was a test in the Army where the General Counsel for a period of time delegated to the Commander of CID that authorization to do intercepts. And it was a small period of time that they did the test and it seemed to be successful from the investigative standpoint, but following that pilot program, that test period, it was pulled back up to the General Counsel.

BG COOKE: We don't know why?

MEMBER STRAND: Don't know why.

COL. SCHOLZ: I think, General

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Cooke, sir, I think it had to do with the legal interpretation by the different General Counsel offices of the services, so therefore it's really hard for us to decide which one is best at this point. I don't think we have enough information to do that because we don't know why.

MEMBER STRAND: Right.

BG DUNN: Well, but we had investigative services, other investigative services besides Army CID who said this is a simple process for us. And when we are in the middle of a sexual assault investigation we can quickly get the authority to do -- to record a pretext phone call, not the case in the Army where it is virtually impossible because the way General Counsel's office has withheld the authority.

BG COOKE: It seems like DoD General Counsel ought to weigh in and try to work with the services to come up with a common legal

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interpretation that permits --

BG DUNN: Right.

CHAIR HILLMAN: Except -- you're right, General Cooke, but that would be -- in the abstract that would be what I would recommend, but here in our role as improved sexual assault responses, I --

OPERATOR: Joining the meeting.

MEMBER BRYANT: Harvey Bryant. Sorry, guys, I fell off there for about five minutes.

CHAIR HILLMAN: Welcome back, Harvey. Because of what our role is, I actually don't want to send this to the DoD General Counsel and let them adopt whatever standard they might see is right. I want to adopt the fastest one because I actually see the -- in our age of recording and, you know -- I don't feel like we're at a time when there's a lot of restriction. This is not -- this seems like a relatively minor part of recording that

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government is engaged in now in terms of the rights of individuals. So, I'd be inclined to say take the most liberal standard. Do you see why I would do that?

BG COOKE: Yes, but I don't agree. It seems to me we shouldn't be recommending something that we are not -- I mean, I haven't studied this myself. I don't -- I can't legally opine what's the, you know --

CHAIR HILLMAN: But we're not being asked to make that determination. We're being asked to what would improve sexual assault response, I feel like within the realm of what's reasonable, and given that this has already been decided in a different way.

COL. MORRIS: Aren't we disagreeing about -- we're not talking about what the standard would be. We're just talking about the approval level, but in light --

MEMBER STRAND: It's the delegation.

(Simultaneous speech.)

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COL. SCHOLZ: And maybe you qualify it with the most legally -- you know, expeditious and legally approved method. I mean, we could always, you know, make sure that that's --

MEMBER STRAND: Or we could say delegate down to the lowest level possible, but standardized across the services.

BG DUNN: But that's not going to help in the Army, no.

MEMBER STRAND: No.

BG DUNN: I mean, it has to be something, I agree, it's been said it's got to be -- you know, the three investigative services reported very different approval processes.

COL. MORRIS: Could you say something like approval at the installation or equivalent level with a common standard, you know, all applying, or however you want to put that, you know, a DoD-directed standard, but

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that you --

BG DUNN: Right, that you push it down.

COL. MORRIS: Installation should be allowed --

LTCOL McGOVERN: I think you can -  
- what you may want to do is state what your finding is among the services' best practice, and then based on that come up with a more neutral possible recommendation saying this is what we saw as a best practice, but still respecting the legal counsels weighing in.

CHAIR HILLMAN: Let's ask the staff to help us with that.

MEMBER STRAND: Okay. The next one is as a result of delays in reporting sexual assault there's not always a fresh crime scene, or in cases not involving penetration the crime scene may not contain forensic evidence. DoD IG had noted that there was a deficiency in several reviewed cases where the MCIOs did not document

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the crime scene, go to the crime scene. Our recommend -- and they found that, and they documented it. They worked with the services, so our recommendation is that DoD IG needs to continue surveillance on this issue and resolve any future issues on this with the services.

The next one is pretty interesting. There's a concern that there's a number of incidents that may be reported through strict reporting, that they are not allowing possible serial offend -- which are allowing possible serial offenders to go undetected.

We brought up one of the findings from Ashland, Oregon which really impressed us where they have a victim, you know, capable of going to talk to the police, and then they decide whether want an investigation or not. So, our recommendation is to go along with that. Change the DoD policy to allow victims of sexual assault to choose to report these cases to the MCIOs. MCIOs will only notify the chain of

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command an initiate an investigation if the victim chooses the unrestricted reporting option following initial interview. This is a big change.

COL. SCHOLZ: It's another option under the restricted reporting.

MEMBER STRAND: Right.

COL. SCHOLZ: They can still report restrictedly, but have the option to talk to the investigators, and then decide from there whether they want it investigated or not.

MEMBER STRAND: What that will allow us to do -- because right now even in the restricted reporting databases there really is no offender information because Victim Advocates are trained not to really go there, and they may not write it down, they may not record it. There's no requirement for them to record it.

LTCOL McGOVERN: Would there be another solution then, since this is such a

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large change, to require Victim Advocates to track or develop an offender database, or an accused defender database?

MEMBER STRAND: They already have one, they're just not using it. I mean, there are elements in there but their job is not to get facts of the case.

LTCOL McGOVERN: Right, but --

MEMBER STRAND: And it would be changing their role.

LTCOL McGOVERN: It's all --

MEMBER STRAND: But we also thought this was also a good opportunity for us to gain other information other than just the offender location, places, things that we put into our raw data that we use in our intelligence systems to help us with additional cases. And even if the victim says they don't want that offense investigated with their experience, we might already have other data that we wouldn't get from the SARCs, from their database because we

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don't have visibility of that. And there's a lot of information that we might from that piece of information say well, we've got information from this person over here in an unrestricted case, and then we can develop that and maybe find other victims in other offenses, and then go back to the victim who wants to restricted report and say we've got all this other evidence. And I think it would help in a lot of these cases. It certainly wouldn't take away any of the rights, or not rights, but the policy avenues that victims currently have. What it will do is increase -- it'll expand their ability to get a restricted report after talking with an agent, after talking with them, and we still have that information.

LTCOL McGOVERN: Would your proposal then still be that they report it to a Commander or a friend, it's automatically unrestricted?

MEMBER STRAND: Well, if they report it to a Commander, it's automatically

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unrestricted. If they report it to a friend, it's not.

LTCOL McGOVERN: Right. But, I mean, if the friend then --

MEMBER STRAND: If the friend reports it then it's automatic -- well, actually, no, it's still not unrestricted. If they have a restricted report under the current system, under the current policy if a victim is sexually assaulted and they report it to a Sexual Assault Response Coordinator, a Victim Advocate or what, they get a restricted report and then they talk to the friend, and the friend tells the chain of command or law enforcement, we're going to open up an independent investigation but it's still restricted report. We'll go back to the Victim Advocate and tell them we're investigating it, try to get them to talk to the victim, give them another option to go unrestricted now that it's out in the open. But even if the victim still wants

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restricted report everything they said before, the examination, all the evidence that was collected is still restricted. So, what this will do --

LTCOL McGOVERN: And what Congress has asked is to -- whether or not there is a database to track offenders, basically, and that's where the Ashland model came in. But could you tell us a little bit more then about what Victim Advocates or SARCs have at their disposal which could satisfy that requirement if they were to just share that with the MCIOs? I mean, that's the first time I think the Subcommittee has heard that there might be a database already developed by DoD or the system that could contain this information that Congress has asked about.

MEMBER STRAND: Well, when SADMS first came out, the Sexual Assault Data Management System, database for the Army came out, it had fields for everything, victim,

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location, subject, things like that. I don't know that that's changed, but we had that in a database at one time.

What my experience has been is that Victim Advocates were also trained at the same time, don't worry about all that stuff because the more you learn, because that was even before they had privilege, the more you learn, the more you're going to be subject to have to talk. So, they were focused, and the training was focused on just finding out what their needs are.

LTCOL McGOVERN: Right.

MEMBER STRAND: Not what's going on. And many victims won't share.

LTCOL McGOVERN: But would it possibly be more palatable for the system to use a database that's there and say well, at least obtain subject's names and share that with MCIOs because we want to insure they still are reporting?

MEMBER STRAND: Well, yes and no, but

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I am aware of a case, I can't go into any details, but there's a multiple victim case right now with a lot of victims. The agency working this particular case, the MCIO working this particular case has contacted the service headquarters to find out if there's any way to search the database for any other restricted reports. The answer this agent got was, from the service headquarters, well, there's really currently not because the databases aren't being used, I mean, the fields aren't being used, and that's not what their job is, so there really is no way to do it currently.

COL. SCHOLZ: You'd almost have to train them to be somewhat investigative --

LTCOL McGOVERN: All you have to ask is the accused's name.

COL. SCHOLZ: Well, no. I think Russ' point is he thought that they could try to get more information, the investigator could interview and try to get more information that

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might be useful in trying to identify or connect this potential --

MEMBER STRAND: Even more than a name, even more than a name, the location, the MO, all that stuff that we're not going to get from any Victim Advocacy database.

DFO FRIED: Russ, did anyone give a briefing on the Defense Sexual Assault Incident Database to this Committee?

LTCOL McGOVERN: The Victim Advocate, or Victim Services is covering that much more.

DFO FRIED: Because that might help answer some of the questions and concerns.

MEMBER STRAND: But the word that you used was unpalatable. I don't know what's unpalatable about this.

LTCOL McGOVERN: Well, I'm just saying if you can all consider this -- there's the Ashland model for anonymous reporting, but the military already does have a restricted

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reporting model, so you may want to think about ideas how you can maximize that since victims are feeling comfortable going to those sources; whereas, they may not be so comfortable going to our CID agents.

MEMBER STRAND: Right, but it's still an option. They don't -- they can still go to those sources as currently --

LTCOL McGOVERN: But if they go to those sources you're not tracking the information.

MEMBER STRAND: Correct.

LTCOL McGOVERN: So, if they are going to those sources would you consider recommending something which would have them -- have those -- where they are reporting the most, they go to the SARC first, not CID.

MEMBER STRAND: But in the Criminal Intelligence realm it's not just a name, it's much more information than that.

COL. SCHOLZ: But maybe there should

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be both. You're making a good point. If they don't want it thoroughly investigated, they're so intimidated that they don't want any part of that, maybe there does need to be the requirement to fill out that database from - - as best they can, and not from an investigation standpoint, necessarily, so at least we're capturing the data.

MEMBER STRAND: We could add that as another recommendation.

COL. SCHOLZ: And then they have the option if they want to go to an investigator to provide more information. But you're right, it could be intimidating. You know, that's one of the reasons we have that restricted reporting so that they'll feel more comfortable.

MEMBER STRAND: Right.

BG DUNN: But when we had the discussion about this just amongst the small group the focus was on if the victim wants to, only if the victim wants to talk to an

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investigator, that then she could do so still under the umbrella of restricted reporting.

COL. SCHOLZ: Right.

MEMBER STRAND: So, to meet both --

BG DUNN: Because they do have that program in some civilian communities. That's where it came from.

MEMBER STRAND: So, DoD develop an offender information database, or offender information data fields in their database that can be shared with MCIOs, as another recommendation --

COL. SCHOLZ: Assuming it doesn't already exist.

LTCOL McGOVERN: You all want to deliberate that.

MS. JAUS: Would you say it again?

MEMBER STRAND: DoD develop an offender information data field for the databases because they already have databases that they go in. That can be shared with MCIOs.

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CHAIR HILLMAN: I'm having a hard time understanding all the different pieces on this, to be honest. I understand that we want data, we want as much data as possible on prior reports so that when there is a fresh report it becomes that investigation into all of the potential persons who might have reported and not just that particular incident. I understand that, but this protected searchable database accessible only to the military criminal investigator just sounds like we're creating a potential liability for persons who haven't actually been the subject of any kind of investigation yet. There's been no check on whether or not that report was legitimate, and I worry about that. Am I wrong to see that as a big change, or --

MEMBER STRAND: Well, we do that all the time with drug information, with child abuse information, with all kinds of other information, pieces of information.

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CHAIR HILLMAN: But based on a report that's just assumed to be true without any investigation whatsoever, we put -- we log that into a place that can be searched later. We do that all the time now.

MEMBER STRAND: Yes.

MS. JAUS: Well, in an arrest report, no, in a complaint report in the police department, let's say you go and you report a crime and you say John Smith robbed me, it goes into a database.

MS. JAUS: But these people are not reporting a crime, necessarily. They're reporting an incident that they don't want to go forward, and then somebody is making a decision that the name of the offender, the alleged offender in that case is going to get recorded for posterity.

MEMBER STRAND: Well, they go into -- they don't go into NCIC. They don't go in the National Criminal Investigation Center. They

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don't go into anything unless it's, you know -  
- which is another point we're going to make,  
unless it's bounded or whatever.

What it does, it goes into our criminal intelligence database and each service has their own thing, so that -- we don't cross-pollinate that with the other services, so within CID, for example, or OSI, or NCIS, I get fragments of information on stuff. It goes in the criminal intelligence database that we use. It's not for background checks, it's not for -- and it can't be used for any of that.

MS. JAUS: It's for crime solving.

MEMBER STRAND: It's for crime solving.

CHAIR HILLMAN: But you don't cross-pollinate.

MEMBER STRAND: We don't cross-pollinate currently amongst the services.

CHAIR HILLMAN: Why not?

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MEMBER STRAND: Because we all have different databases.

COL. HAM: Does it go in a DCII?

MEMBER STRAND: No.

COL. HAM: Defense Consolidated Index and Investigations?

MEMBER STRAND: No. They are simply -- in fact, even amongst -- and they are working on changing it, but forever the MPs had a different database than CID did.

CHAIR HILLMAN: Shouldn't we recommend that we standardize the databases first, and that we make them compatible so you can search across them, because all these joint bases and consolidated facilities, or whatever. I mean, isn't that sort of a first step?

MEMBER STRAND: What we routinely do is if we have somebody from another service or somebody that's been on a joint base, or somebody's been, you know, working for the

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other services, if we initiate investigation that's part of our normal process is to get with that agency, normally get with that installation and find out if there's any criminal information data already. And that seems to work. We do the same thing with civilians.

CHAIR HILLMAN: Okay. So, what this would do then, then you're saying the coordination issue is actually not a problem once an investigation ensues. You can get the information that's already been collected. There is also this -- the Defense -- whatever the registry that Maria just mentioned that we talked about earlier, too, that's available. But then you want a new one that would be -- that would flow specifically from restricted reports, and that would enable investigators to talk to somebody who wanted to make a restricted report which they cannot right now. That's what this difference is.

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MEMBER STRAND: Yes and no. We don't want a new database.

COL. SCHOLZ: Congress.

MEMBER STRAND: Congress wants a database that Victim Advocates can use to --

CHAIR HILLMAN: Well, they said an assessment of the means by which this stuff could be done. Right?

MEMBER STRAND: Okay. So, we wouldn't capture all of the restricted reports. We would only capture restricted reports where the victims come to us, so there would have to be a dual thing where they'd still have to develop their own.

CHAIR HILLMAN: So, they still -  
- this doesn't then touch the privileges, apologies if I'm slowing us down on this, but this is tricky for me to follow. It doesn't touch the privileges that currently exist for the Advocates that the victim might report to. It only means that for those victims who choose

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to go to an investigator who want to make a restricted report --

MEMBER STRAND: Correct.

CHAIR HILLMAN: -- they could put that information into this database.

MEMBER STRAND: Correct.

CHAIR HILLMAN: Is this like one person? Like how many people are going to want to talk -- if they don't want to make an unrestricted report, who wants to talk to a criminal investigator?

MEMBER STRAND: It's an option that they'll have, because here's what happens sometimes. The Victim Advocate will go through the whole long list of their options. Right? And one of those options is you don't have to talk to criminal investigator. That oftentimes sends a very bad message right away, and one of the things I think Ashland PD talked about is because they may be tainted about law enforcement, they may not understand law

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enforcement, and by talking to law enforcement they at least get another ability to have another option that they may not even consider because they're already been told they don't have to. But if they talk to an agent and they feel confident in what's going on, they ask questions about what the investigation is going to entail, they get their questions answered, they may be more likely in some cases to make an unrestricted report.

CHAIR HILLMAN: Okay.

MEMBER STRAND: Which we currently don't have.

COL. SCHOLZ: I'm just wondering that maybe we're getting ahead of this, because now the FY 14 report says, basically requiring an assessment of --

LTCOL McGOVERN: But they required us to do an assessment, ma'am.

COL. SCHOLZ: Right. So, we're supposed to --

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LTCOL McGOVERN: Yes, that's why we have this issue.

COL. SCHOLZ: I'm sorry. I thought maybe this was -- maybe we're getting ahead of this. Okay, so they want us to do this --

MEMBER STRAND: Right.

COL. SCHOLZ: -- for this assessment. But you're trying to make a finding that we're going to go ahead and jump forward and go ahead and make a decision on how to do it instead of doing an assessment.

BG DUNN: Although, you know --

LTCOL McGOVERN: Because the assessment right now is, from what I understand, is there is no way to track restricted report -- people accused in a restricted report.

MEMBER STRAND: Correct.

LTCOL McGOVERN: So, they're coming up with possible alternatives.

MS. CHAYT: Ma'am, I'll go ahead and

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do research on DSAIDs and get that information and provide it to you to send to the Members.

MEMBER STRAND: We have a two-pronged recommendation. One is to open it up for the ability, if the victim wants to talk to an investigator, and then make a decision that they don't want an investigation, we don't.

COL. SCHOLZ: And the victim's counsel, this will be -- I mean, I think that they can make an informed decision. They're going to have some legal counsel to --

MEMBER STRAND: Right.

COL. SCHOLZ: -- help them with these choices.

MEMBER STRAND: Right.

LTCOL McGOVERN: If Congress' goal is to really track people what would be your recommendation for the best way to be sure you're tracking subjects?

BG DUNN: Because the issue with what

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we're talking about right now is the voluntary nature of the victim going forward. So, if we're trying to create a --

LTCOL McGOVERN: The conversion rate is 3 percent, the number of people who go from restricted -- we heard that, from restricted to unrestricted is very low.

BG DUNN: So, if we're trying to get inside the restricted reports by 100 percent then the Victim Advocates or whoever is managing the SARCs have got to put that information in their database. And part of that has to be made available to an investigator certainly.

LTCOL McGOVERN: Assuming the person wants to reveal that.

MEMBER STRAND: Sometimes they don't.

CHAIR HILLMAN: General Cooke.

BG COOKE: Well, I'm a little concerned. It seems to me that this is only

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going to solve a small part of the problem given the statistics that we've heard. And it's one thing for us to sit here and talk about going from the Victim's Advocate to the MCIO and understanding that they're making still a restricted report. It's another thing for that to happen in practice.

I just see a high potential for confusion by the victim, by the investigator, so I wonder whether we aren't muddying up the waters for a small gain.

MEMBER STRAND: Well, it's not the - - this is a dual purpose gain. It's not just a gain to get a database of potential serial offenders.

LTCOL MCGOVERN: I think that's the purpose of Congress.

MEMBER STRAND: That's the purpose of Congress, or we could find another finding and put it under another finding. The other purpose is that victims -- when Ashland talked,

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you know, when they talk to victims they initially didn't want to report it, they initially didn't want an investigation, but after talking to a compassionate, highly skilled police officer/detective they decided I wanted to go forward. We don't have that opportunity at all in the military.

CHAIR HILLMAN: I hear you on this, Russ. I think that this is something I -- why don't -- let's go ahead and write this up, and then we'll have to consider again sort of -- I need to look again at the language around the NDAA piece there and see what -- how far we want to go on this, but this is a big change, potentially. And you're right, there's a deterrent effect, but I'm not sure it's a big enough deterrent effect to matter because I think that it's not that most people don't report because they're concerned about how the investigation will ensue, I think they don't report for reasons that are extrinsic to that

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process. At least that's what it seems like from what the -- so, anyway, I --

MEMBER STRAND: But in the military it's different than a civilian because I can report to civilians and my boss isn't going to find out, and my other -- in the military it's automatic. And that's why the proviso is in there, and that's why they don't come to us, and some have told us that.

CHAIR HILLMAN: That might be something that we actually --

MEMBER STRAND: Okay.

CHAIR HILLMAN: That we should leave in here, but we'll just -- we'll defer it for right now. We'll get some more information and come back, but I hear the zeal with which you believe that should happen, and also that your group came up with it.

MEMBER STRAND: Okay. The last thing I'll talk about because we didn't get done with anything else, we have a lot of issues

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surrounding founded and unfounded reports, all this other stuff, so our recommendation is to combine it into one issue and then really that issue is case determination.

The services all make different ideas about case determinations. We're different than civilians, that came out in the statistics, how we make case determination and everything else.

Our recommendation on this, and we didn't really write it up very well because we just got done -- well, we had to go to -- our recommendation is that the MCIOs are required to adopt the UCR case determination standards, use the same language, use the same thing that every law enforcement in the United States does and be done with it.

It's a clean break. I mean, DoD is now studying it. They were told to study it, but there's really no reason not to go to what every other law enforcement agency in the United

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States is doing, so just make them adopt the UCR case determination standards.

CHAIR HILLMAN: Okay.

MEMBER STRAND: And that's it for now.

CHAIR HILLMAN: You guys did great work. Actually, you got really far through this. Thank you for your work on this. Who was on your team, who you were with?

MEMBER STRAND: General Dunn, and also Colonel Scholz.

CHAIR HILLMAN: Yes, that's great work. And we're late, so --

MEMBER STRAND: Yes.

CHAIR HILLMAN: Let's roll into the training of prosecutors and defense counsel and follow on there. And we have -- Harvey, are you still with us?

MEMBER BRYANT: Yes, ma'am.

CHAIR HILLMAN: All right. Are you -- did we manage to send you these forms? Do you

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have these now?

MEMBER BRYANT: Yes, Dillon sent them.

CHAIR HILLMAN: All right, awesome. Thank you, Dillon. Thank you, Kelly. So, we're going to move to the training prosecutors and defense counsel, the issues, findings and recommendations.

COL. SCHOLZ: Dillon, do you have any more? Okay, I found it. Thank you.

COL. MORRIS: Okay. This was Harvey and Russ also on this. So, first question may get more developed farther down. It says can military be compared -- we'll probably ultimately rephrase that, is how do military prosecutors compare to civilian counterparts in prosecuting sexual assault?

To start with, we say training is a function of experience so there are differences, and the differences are appropriate based on who our people are, which

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then opens the door to other discussions about assignment patterns and that kind of thing. But because our experience is always going to be at a certain and often comparatively low level, our training is geared to deal with that. So, we characterize it as specialized systematic and well-funded, and generally formal training as opposed to what is more likely to be some version of OJT in the civilian world.

And why don't we do the second one, you can address them both together. And then the second one is, is civilian training better, worse, whatever? And what's the impact on outcome? And probably may want to rephrase the depends to differently and appropriately different training. And our framework often is looking at the big and busy civilian jurisdictions who have huge amounts of -- giant caseloads so you can do OJT with still a certain amount of nested supervision and all there. And while that's true enough, there also on the

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other hand are a bunch of smaller places where they may not have either the experience or the training that military counsel have. And that then loops you back to again the same point, that our training is generally, you know, career path, take you from the minute you walk in the door through increasingly specialized and particular training in sexual assault. Keeping going?

CHAIR HILLMAN: Any comments on the training, prosecutor training?

LTCOL McGOVERN: General Cooke, would you like to chime in with your overall observation about standards?

BG COOKE: Well, it's kind of an issue. We in our travels and in our interviews and so forth, we've pretty much been looking at people who are at the top of the game who develop pretty strong systems in all these fields, including training. And we're I think appropriately comparing the military to the

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best, and we want to aspire to be the best. But I think we also have to be careful that we not cast the military as constantly deficient somehow because they're not as good as the best in everything that we've looked at. So, part of what I've struggled with is what is our standard here? You know, are we shooting for an A plus in everything, or -- which, you know, we'd like to have, but that's a resource issue and so forth. Or do we somehow qualify what we're saying by saying, you know, the military is not quite where these guys are but they're awfully good. And to get where they are, you'd have to sacrifice some of the other things that it wouldn't be worth it. So, that's kind of a very inarticulate way of saying what I raised with you, Kelly.

CHAIR HILLMAN: No, not inarticulate at all, and a real challenge for us because I think that given the interest in this and the concern with making the military really the

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gold standard for prosecution, we're just -  
- we're in an environment where a lot of  
resources are required to meet that goal, so  
you're absolutely right. I mean, we're not -  
- I don't think we can aim at a B minus.

BG COOKE: No, I don't want to put a  
grade on it, but I do think when we compare  
ourselves with New York City, for example, it's  
really hard to do that, and especially --- it  
may be one thing to make Ft. Hood or Norfolk the  
equivalent of New York City, but to make some  
small installation in the middle of nowhere, or  
overseas the equivalent of New York, you know,  
is another big step. So, somehow we've got to  
address that.

CHAIR HILLMAN: I don't think that  
we're --

MEMBER BRYANT: Well --

CHAIR HILLMAN: Go ahead, Harvey.

MEMBER BRYANT: Excuse me. During  
our meeting this morning, we did address that.

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And I think one of the thoughts was that just because it might not be applicable in Ft. Leonardwood, that doesn't mean that that same military attorney is not going to be at Ft. Benning or Ft. Bragg next year or the year after. So, we're talking in terms of the whole universe of military defense counsel and in this case the prosecutors, we're talking about prosecutors, their training and the standards that we want to be able to bring them to so we didn't want to say, well, to use the same example that was used this morning, well, maybe they're not doing this in Greeneville County, Tennessee, so why should we do it at Ft. Leonardwood either?

And I know, General, that's not your position on this, so we tried to structure this so that we are providing an example and a recommendation on how to increase the experience and the training throughout the prosecutor core in the military. We're not

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trying to make everybody a New York City prosecutor, but we want them to be as well trained and as experienced as we could possibly suggest based on what we've heard over the course of time.

CHAIR HILLMAN: Agreed. I do think in the interest of trying to be fair, too, we did visit small remote outposts with limited -- we visited the military installations that would actually compare favorably to civilian installations, too, in search of best practices. But we do need to be careful here and throughout to not recommend unsustainable mandates for smaller population and fewer resources posts.

MEMBER BRYANT: Well, that gets us back to our discussions of joint or combined training facilities and programs, too, where the person from the small unit, the small base or post is going to end up getting the same training as someone at one of the larger ones,

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just as the county sends their's to the big city for the training, then they've got that sort of training. I think that's the point of this particular recommendation.

COL. SCHOLZ: Yes, so they put in here, however, military prosecutors have more specialized, systematic, and well funded training than do many civilian prosecutors handling these cases. So, I think they've done some qualifying to deal with some of the apples and oranges of the comparison that we have to do.

CHAIR HILLMAN: Okay.

COL. MORRIS: Let's go to the next. Civilian counsel training then, defense counsel training in general is less systematized than on the prosecution side which is really the main observation about the civilians. And then on military defense counsel, we talk about, of course, the same coming-in-the-door training applies to

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everybody because we haven't yet differentiated people as counsel for one side or the other.

And then moving to the next stage then when you start to get particular training in sexual assault, how do they compare? And, again, the main point is we think we have plenty of it. And, more importantly, it's systematic in that you identify and build on skills at each of these levels so there should be less duplication and more that the training is intended to be to meet you where you are in your experience continuum with the overall point being better at these kinds of cases, but also recognizing that you're looking at kind of corporate experience across all of military counsel.

MR. FISHMAN: Sorry, can I ask a clarifying question here, because sort of since we're doing this all on the record, and when we go back and review this, everything on page 1

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were we clear that people are satisfied with that, sort of treating it like an Appellate record here, and --

CHAIR HILLMAN: Yes. I think the problem here is that these first questions are actually the ultimate question. Who's better, civilian or military? And we sort of try to answer that in these first questions, then we actually get to the specific where we do that. So, I'm not sure I would -- a summary of these first questions would maybe be appropriate to front our conclusions about the distinctions between military and civilian, but this is pretty conclusory.

COL. MORRIS: But isn't that question -- and maybe I made a wrong assumption as we began here. That first question there, can they be compared? I thought that meant in the way of training.

CHAIR HILLMAN: Right.

COL. MORRIS: You mean just period?

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Because period it is an ultimate question, but I thought it meant just in the training realm.

CHAIR HILLMAN: No, I think it's just in the training. You know, that phrasing of the question, we had in our part, too. I mean, they're being compared. Our job is to compare them. Whether it's possible to compare them -  
-

COL. MORRIS: That's right. It's the how, right, how do they compare?

CHAIR HILLMAN: Right, so the how part. I just --

MEMBER STRAND: It can be a little confusing because we're -- the big question is taking everything into account, how would you compare civilian prosecutors with the military prosecutors, the civilian defense attorneys with the military defense attorneys? And we're trying to tease out variables in that, but the real question is on the comparison, can you separate training and experience? Really, no,

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because training and experience can work in both ways, so -- but we've separated out training, then experience.

COL. MORRIS: Oh, but we say at the outset, and I'll fix it if it's not said right, that they are absolutely related, and the training is targeted in light of the experience you have or don't have --

MEMBER STRAND: Correct.

COL. MORRIS: -- in this type of case, and at this point in their career. So, if we need to say that more explicitly, maybe we should. Maybe it's too --

MEMBER STRAND: Or maybe just under that heading of -- no, I guess, yes.

LTCOL McGOVERN: Dean Hillman, to address your concern, these are just lifted out of the outline, and I think as far as organization those conclusory, or conclusions, we can talk about where to put those, maybe at the end once we've discussed the specific

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training and build on that, so we can work that out.

CHAIR HILLMAN: Okay.

MS. JAUS: I just want to say this. I was reading this line because we're supposed to be adopting what's on this page. It says here in the first paragraph, "Civilian prosecutors also have significantly higher caseloads," that's true, "and tend to address only the most serious sexual assault cases." That's not true. I mean, I come from a big office and we had hundreds upon hundreds of so-called less serious sexual assault cases that we devoted tremendous amount of resources, hundreds of them. So, I don't -- that's not so.

MEMBER STRAND: But that's not what we --

BG DUNN: But do you have none -  
- maybe --

LTCOL McGOVERN: They go in as misdemeanors sometimes.

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MS. JAUS: Sometimes they start as felonies and they're reduced to misdemeanors because they are more fitting under a misdemeanor sexual assault. Sometimes the victim wants a misdemeanor. But the point being that a sex crimes bureau doesn't just prosecute the most serious sexual assaults like the rapes and the sodomies. They prosecute all the sexual assaults, the touchings, the everything.

MEMBER STRAND: That might be true in your jurisdiction, but what we've heard from many of the presentations is they do separate them out.

MS. JAUS: Yes, they separate them out but --

MEMBER STRAND: That the SVU units only work penetration, and they only work the higher levels.

MS. JAUS: The cops, you mean?

MEMBER STRAND: No, the prosecutors.

MS. JAUS: The regular prosecutors?

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MEMBER STRAND: Right.

MS. JAUS: Sometimes they're separated out and they're but into other bureaus, but sometimes they not. And, nonetheless, they're all prosecuted. I mean, they're all prosecuted and taken seriously, so to say civilian prosecutors also have significantly higher caseloads and tend to address only the most serious sexual assault cases, it's not so. And I think it's pejorative. I mean, I also think it's untrue.

LTCOL McGOVERN: I think you raise a great point, that we need to be very careful about our conclusions with civilian counsel, or ever saying all or disqualifying language.

MS. JAUS: I mean, we have hundreds upon hundreds of less serious sexual assault cases, touchings, every which way in the world that you can imagine, and they're taken seriously, as serious as they can be.

MEMBER BRYANT: I'm going to bet that

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you're low, because in Virginia Beach we have hundreds and hundreds and we only have 440,000 people here. So, in New York I'll bet it's - - in the city it's much, much higher that you are doing those cases, and we are doing those cases. And as I said this morning, it's maybe not the most experienced people handling the less serious sexual assault cases, but the public and the police department, and everybody else would be going wild if, you know, these sexual assaults in the malls, or at the ballpark, or in the school halls went unaddressed. Well, there's no penetration, so the heck with that. I don't think that's happening anywhere. Maybe you all heard somebody say that they just weren't taking these cases, but I would think -- tend to think that what they maybe weren't taking were the, you know, the tap on the shoulder, and the stroking of the hair cases that we heard about them complain about at Quantico.

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CHAIR HILLMAN: So, I think these are points well taken. I don't think you should look at this draft as having the precise language that will actually be in the findings despite the fact that this -- you're right, you're looking to adopt them. That's why Dillon said that, but I actually don't think we spent the time going through this for this to quite be perfect yet. So, this is totally helpful. Go ahead and say it, but we're not going to draft on the fly here. We'll take this under consideration and revise it. Is that okay with you, Dillon?

MR. FISHMAN: All right.

COL. MORRIS: Yes, we're in the middle of the second page then, military defense counsel sexual assault training. Again, based on comparison we say again tend to have more methodical, more programmed-out training than civilian counterparts. But then add some recommendations. One is to increase or

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to -- so that military counsel have equivalent resources for training with prosecutors, and then a suggestion of three areas to emphasize in light of in part what we've heard from so many about the inclination to go to civilian counsel, and perhaps these areas, overall ethics training, but in particular then training on the mess and complexity that is 120 so that our counsel are so facile in that that they rightly gain the confidence of their clients and are able to competently meet a challenge that a civilian whisper in their ear might suggest that the military guy can't quite untangle all that mess. And then the unique challenge that uniform military counsel have being young and wearing the prosecutor's uniform and giving some particular training and guidance in how to communicate that independence and competence to gain the trust of their military clients.

BG COOKE: Can I just ask a question?

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And I was absent from the school when you guys studied this, I guess, but so we really concluded that there are inequities in the funding for prosecutors and defense counsel, funding for training?

BG DUNN: Yes, because this went across the services.

COL. SCHOLZ: Yes, I didn't see that either. That's not my experience in the Air Force. Our defense counsel -- every single one of them didn't -- became defense counsel got trained immediately as defense counsel, so I didn't -- I never ever felt that there was an inequity in training --

COL. HAM: There's testimony -- we'll have to review December, at the December public meeting, there was testimony from the services on that. Do you mean to -- I'm asking, I guess. Do you -- clarify the meaning of training and ethics that you say only the defense counsel need.

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MS. JAUS: And the message that that made sense.

CHAIR HILLMAN: Actually, I'm not sure that my impression was so much that defense counsel training was insufficient as compared to prosecutor training. Resources of defense counsel seemed incommensurate with the resources available to prosecutors, the investigators, experts, et cetera.

BG DUNN: That's what it says, the inequities in funding.

CHAIR HILLMAN: Inequities in funding, but that's not about training, I didn't think, anyway.

BG DUNN: Yes, for training.

CHAIR HILLMAN: Right. That's not what -- that wasn't my impression, actually. And, in fact, I thought that the trial counsel seem to be dissatisfied with their ability to go to training because they just don't have any time away, but defense counsel seem to get it.

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That's what my impression --

COL. HAM: We'll pull the transcript for the December meeting and then you heard from the HQEs, I'm thinking of the Marine HQE who was on the end who didn't have --

MR. FISHMAN: Kate Coyne testified about this as did Captain Scott Shinn from the Marines, very explicitly about this, but there are others. And I'll send you all --

CHAIR HILLMAN: So, that is about -- again, I find that to be resources in that they want the -- I mean, they could get the broad-gauge training that would make them experts, but the HQE is about their reach-back capability to get what they need to prosecute or to defend the case, you know, successfully when they're in the process, not so much the standardized training that they're going.

BG DUNN: But HQEs also do training.

CHAIR HILLMAN: Right, right.

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BG DUNN: And they can't -- what they were saying is they can't travel.

CHAIR HILLMAN: Yes, she can't travel anywhere.

BG DUNN: She can do it by VTC, but she can't travel and do it face-to-face.

MS. JAUS: Because she didn't have the funding. That's what --

LTCOL McGOVERN: For the background information writeup, we can take a closer look at the RFIs and the information to see are defense counsel provided the same number of courses at the JAG schools as the trial counsel to see is there inequity in training there, do the DCAPs do the same number of conferences as the TCAPs.

BG DUNN: And the sexual assault folks.

LTCOL McGOVERN: Right.

BG DUNN: I think we're beyond your basic defense counsel training when you first

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become a defense counsel, we're into the adult sexual assault training, specific training. Right?

CHAIR HILLMAN: I have to admit, I see kind of a global problem with this, too, is we're talking as if there's one military, and that the training that prosecutors go through and defense counsel go through is the same, and there's not. I mean, there's some cross-listing of training and they share some courses but each of them, they're running their own ships. So, I feel like we actually have to specify in the findings what's happening in each of the services because we've actually collected that information, because we over-generalize here and set forth -- I mean, we're just massive, we're gross -- making gross generalizations with respect to the civilian sector relying on our prosecutors, and so we can do that with respect to the military, but we have to add the fine-grain piece that at least addresses what's

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happening in each of the services, I think. So, the comparative challenge continues. This is just -- this is --

MS. JAUS: The report is getting bigger and bigger.

CHAIR HILLMAN: It is.

COL. MORRIS: Next up, "Civilian prosecutor experience, do they have more experience," same -- a little bit of rewording now, but down to experience as opposed to training. This is where then it mentions that bigger offices have, even if not formal training, a programmatic path that counsel work their way up so that they gain supervised experience. And in the military it's compensated for by overall corporate competence of counsel and supervisors across the board.

And then I think we did talk about, but it opens the door also to the related issues later on of assignment practices. You know, if

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you have an inherent diffusion of experience is -- do you want to pick from among the ways to solve that one, which is the kind of career track, the quasi-career track thing, and then the costs to that in terms of force management and breadth of experience that the military also looks for.

COL. HAM: When you say trial, Colonel Morris, do you mean contested cases, guilty pleas, all -- some of the site visits when we would ask how many trials, that was very clearly asking how many not guilty plea jury cases versus --

COL. MORRIS: Actually, we didn't put them --

MR. FISHMAN: We can clarify that.

COL. HAM: I think you mean all, but should you clarify?

COL. MORRIS: I think we did somewhere say -- I think we talked about, anyway, putting in there contested cases,

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contested jury cases.

MR. FISHMAN: I think, yes, the military -- we should probably break this language out because the military is the only place, and maybe other people know about this, where the term trial is used and not mean trial, so we can use the parlance of contested case that they use in the military.

The reason I think, and somebody else can add if they want, but in the military they will use the term trial to mean guilty plea sometimes, what in civilian jurisdictions are called guilty pleas. So, they'll use them sort of interchangeably, and they'll say contested case when they mean what everybody else calls a trial.

COL. MORRIS: Next page, defense counsel experience, similar language as you'll see there. Function of size and opportunity to gain experience. You really have two here. We say civilian defense counsel, and it might be

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worth fragmenting it out at the outset between civilian public defenders and civilians who have chosen to be career criminal defense attorneys where there's, of course, a whole different development --

MEMBER STRAND: And you may have noticed we didn't put any recommendations on any of the civilian parts of the comparisons.

LTCOL McGOVERN: Well, the recommendations are designed not necessarily to recommend what civilians need to do, but whether or not to adopt the civilian practice, so I think that's where Colonel Morris had said it leads to the career track discussion type of thing.

And what we may want to -- or what you all may want to consider in both the prosecutor's experience and counsel experience, that we'll take a closer look at the JSC-SAS report, provide some additional information to break this down because -- and

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these are pretty broad generalizations.

COL. SCHOLZ: I think so, too, talk about the three to five years of trial experience. I mean, effectively other folks have that, too, because lots of times we'll bring in the more experienced people to do a litigated sexual assault case, help our young counsel until they have a number of cases under their belt and have that experience. So, I think that's kind of similar, and maybe not necessarily different. You're saying that they typically have at least three to five years of trial experience and have progressed through the misdemeanor and lower level positions. We do something similar by just bringing in our senior trial counsel to help our younger trial counsel for the first few years. So, that might be, like you said, maybe a --

LTCOL McGOVERN: Right. And these were -- it looks like you guys did very specific findings as to what you found for civilians

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versus military, so the comparison would be a conclusion. Did you guys do that, as well, or just that was up front, the comparisons complex?

MEMBER STRAND: It is complex.

CHAIR HILLMAN: Okay. We're going to take a break after we finish this. Let's get through the rest of this, though. So, we're on defense counsel experience. Are we there yet?

COL. MORRIS: I think -- didn't we just finish that?

LTCOL McGOVERN: Military prosecutor.

CHAIR HILLMAN: Military prosecutor, okay.

COL. MORRIS: Again, the experience issue straight up compared to civilians and in general, of course, less, mentions the Navy's litigation track, the Army SVP program. This is really good work for as fast as we were working. I guess I'm editing as I'm reading along here.

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I consider altering that last sentence there, instead of saying, "Those who specialize shouldn't be punished, to look at the impact on the needs of the military value of specialization," and all that. If somebody opts out it's not necessarily a punishment, but part of a bigger array of looking at assignment practices. So, I think we may want to say in a way that doesn't make it look like we're screwing people for wanting to work hard in a particular area. And then mentions the need for specialization and experience in the aggregate, and mentions the Navy's litigation thing as one to consider without -- I think without our endorsing that we need to go to a career justice track or something even more specialized than that. Though, I think we had a difference of views among ourselves, as well. I think my colleagues felt more strongly about explicitly calling for a specialty track.

MEMBER BRYANT: Yes, that -- I agree

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that we don't have time to fully edit this, but somewhere to please make a note, I don't -- up there where it says specialize, they are not punished, a better word, not impeded in their career progression to punish, assumes that somebody would be punishing them. I'd like to see us change to impeded, I'm sorry.

CHAIR HILLMAN: Good point, we're on that.

BG DUNN: And I'm just wondering whether there should be an additional sentence in there that reflects the assignment of senior experienced counsel to manage the -- you know, because we do talk about the lack of experience, but to mitigate that.

COL. MORRIS: That would be great to put that -- you know, we talked about that a little bit in the defense area, but an intended and particular assignment of people to jobs based on -- it sounds so obvious, but we know we assign people out of convenience, out of

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spouse needs and that kind of thing, and that in those critical jobs that it's -- probably it does sound so cliché, but that it is an intended evaluative process so that people -- I think of SDCs and Chiefs of Justice in my view are the most significant positions, not RDCs and SJAs, those people who are day to day leading, and managing, and developing three, or four, or five, or eight, or ten counsel are the quick response.

BG DUNN: But we even -- listen in the services you've got, you know, the TCAP function, the DCAP function, all of which assist in addressing this experience issue along with the training.

CHAIR HILLMAN: I'm astonished that I can actually follow your conversation right now with all these acronyms but --

MEMBER STRAND: Welcome aboard.

COL. SCHOLZ: Yes, and I think you all -- the Air Force hasn't seen a trial counsel

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program where they kind of rotate in realm and go into, you know, just provide a lot of supervision, too. I notice that you've got the -- maybe an Army program that you may want to mention, the Air Force has got something similar to that. Yes, if we're going to, you know, divide them out.

COL. MORRIS: Next one wasn't too long, that do military counsel have enough experience, so this I think is an artifact of our --

CHAIR HILLMAN: Okay, So, we should file this.

COL. MORRIS: No, we did get to the next one, so if you want to jump to that one instead, or to the last one. We did the last -- so, on page 4, the last entry on page 4, should we consider consolidating training. We talked about it and just didn't finish writing it out, so my thought is that under findings we could say something along the lines of there are very

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few service specific issues relating to sexual assault; therefore, it's wise in general to explore joint training, where appropriate, something like that.

And then under recommendations, to set training standards, you know, common training standards to collaborate where possible to maximize shared expertise across the services, and in addition, to seek efficiencies in light of resources and proximity, something along those lines, so that we're talking not just go together to save the heating bill, but that there's just stuff that people are learning in parallel lives in different services, that if you stick them together everybody is better, and there are so few things that are really -- like we talked about the issues on a ship because of the peculiarities of opportunities that ships provide. But those are so minor compared to the value of grabbing experts from across the

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services.

CHAIR HILLMAN: So, the findings there are -- part of your recommendations, actually. Right? They're recommendations, but the rationale for consolidation is a point that's not here that you made, which is there are more common issues than distinctive issues in the prosecution of these cases, so consolidation and collaboration makes sense to leverage the resources that we have.

MEMBER STRAND: Well, in one year I went to TCAP training through each service teaching the same exact thing to, you know, different services teaching the same exact thing, traveling to different places, different audiences when they could have combined some of those to -- or all of them to hear -- and, also --

BG DUNN: Although, you do get into issues of the number of people you've elected to train at one time, which --

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MEMBER STRAND: Right.

BG DUNN: -- again, the auditorium approach does not work training, questions of def counsel, and you've got to have --

MEMBER STRAND: What I also saw in that was that when I went to a particular service audience, they had some really good insights and questions, but when I went to the next service audience they had different good questions and things, and they weren't sharing all of that.

LTCOL McGOVERN: So, would the -- Dean Hillman, it sounded like when you were summarizing you were talking consolidating; whereas, it sounded like Colonel Morris was talking about establishing common standards. Could you guys just clarify as to what your recommendation would be? Is it to standardize throughout DoD, or consolidate among the JAG services?

COL. MORRIS: I mean, you couldn't do

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the first without doing the second.

LTCOL McGOVERN: Right.

COL. MORRIS: So you do the first now and standards, and then work toward figuring out where and how to collaborate. So, I don't think you're going to have to mandate to --

LTCOL McGOVERN: To collaborate or to consolidate, sir? We've talked before about service discretion and --

BG. DUNN: Well, and you also talk about the three -- you say it's all getting done at one of the service JAG schools.

COL. MORRIS: I can disagree with that, but I didn't think there was a need to say it has to be done with the --

LTCOL McGOVERN: I just wanted to get clarification because my interpretation of what Dean Hillman was saying is that we were talking consolidation, and I didn't know if we're talking establishing standards or consolidating.

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CHAIR HILLMAN: If we were at a new universe, I would definitely consolidate, but since it's not, I think you're right. I agree with Colonel Morris that the standards, there's no rational for distinctive standards. I think we should articulate a standard that applies across the board.

I think that collaboration we should also require, that is they ought to talk to each other, and we ought -- that ought to be something that happens. It happens informally now. It's happening more as a result of all the mandates that are rolling now, but that should certainly happen. But I don't think we should mandate consolidation. I don't know that it would be effective, and I think it could be expensive, actually. Although, in the long run I think it would be more efficient. I don't think we should meddle in that now.

LTCOL McGOVERN: Thank you.

MEMBER STRAND: I have a question on

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standards. Already DoD has set standards for all responders to sexual assault, chaplains, lawyers, cops. They already have some standards set. The problem I have with standards is this; when it comes down to standards they talk about topics. Okay? You're going to talk about sex offenders, victimology, you know, you have to have training on all this. But what they don't do is they don't get into what -- because there are some really differences of opinion in some of those topic areas, and some of them are harmful, and some of them aren't harmful. So, when we talk about standards, I think I'd also like to make sure that we look at quality and best practices, because one service can be talking about a particular topic that meets the standard in a totally different way.

LTCOL McGOVERN: Well, I think an example would be the Army, what they require for a Special Victim Prosecutor, and they put people through a two-week course in a civilian

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jurisdiction and she also pointed out that she would recommend it be longer, so those are the types of things that we could work in, too, as possible recommendations for standards.

MEMBER STRAND: Okay.

BG COOKE: Your standards really ought to be standard in terms of what I'll call competencies. What do we want them to be able to do? We shouldn't say they're going to get four hours on X, or 12 hours on Y. It should be what are the key things that you want a prosecutor, or a defense counsel, or whoever to be able to do? And then the services can figure out how best to do that.

MEMBER STRAND: Who would you want to build those standards? Because as we make this recommendation, we're going to have to pin the rose.

CHAIR HILLMAN: Go ahead, Harvey.

MEMBER BRYANT: I was just going to say in follow-up that there's the standards,

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and then there's the implementation. And that's why I think you need to consolidate it, not only consolidate it but collaborate the training. I think you need both, because just as Russ says, you're going to have a standard maybe set forth the same for everyone, but the implementation or execution is going to be different, or even the interpretation of the standard. So, the training would tend to even that out across the military services.

I think it should -- and I also think another reason for both collaboration and consolidation is that a victim in the Coast Guard deserves the same competence, and the defendant, the same competence of counsel and process as those in the Army, Navy, et cetera. So, I would like to see us make this sort of recommendation, maybe we haven't defined it as well as we should for them to be effective, but I think we're headed in the right -- personally, I think we're headed in the right

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direction with both the discussion and the recommendation portion. Well, if someone recorded that or sat down and informed the recommendations or a finding at this point.

COL. MORRIS: And we should be mindful of that now already. I mean, that two-week sexual assault training advocacy course, whatever the first two years of it were 40 percent non-Army attendees so this is not a total revelation. It's just a matter of having -- getting rid of unnecessary fragmentation and duplication, and maximizing the --

MEMBER BRYANT: Sure. And the auditorium approach should be avoided by the number of students that you admit to any one particular session, or that you break them down into tracks within the same course, you break it down. So, I don't know, Russ, when you were doing it at the multiple places what were the numbers you were looking at?

MEMBER STRAND: They were rather

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small, which was a workable --

MEMBER BRYANT: Roughly, yes.

Roughly?

MEMBER STRAND: About 30.

MEMBER BRYANT: Okay.

MEMBER STRAND: Which is a good workable number.

COL. HAM: At the school we used to have a limit of 64 for what they now call Intermediate Trial Advocacy course because you could only break down, is that eight times eight? No.

BG DUNN: Yes.

COL. HAM: Could only break them down in a certain number of groups, so there was a maximum limit. Dean Hillman and Colonel Morris, a couple of subjects you haven't deliberated on are the value or lack thereof, or recommendation of best practice in the DCAP, TCAP, HQE area which is another big area of training. It didn't look like it was addressed.

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Did anybody want to say anything, or address anything about those, or maybe I missed it.

MEMBER STRAND: We had some discussions on the HQEs. You know, it's a temporary thing. It's not a permanent thing, so we had some discussion about, you know, you could bring in a HQE for five years, you can extend it a year if you want, if you can. They're to bring people in, experts from the civilian world into the military to bring us up to speed on certain areas, have us take a look at ourselves in a different way, but those billets basically go away.

COL. HAM: HQE billet goes away. That doesn't mean they can't be converted to--

mEMBER STRAND: Correct. So, what they've done in the Army for the HQEs, they've converted them to term employees, not permanent employees, because again constraints and getting authorization and everything else is another issue. So, if we want that to continue,

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because we're going to lose those assets -- I'm losing an asset. I have an HQE. I'm losing him in January. I will never get a replacement. I can't convert because I don't have an authorization to convert him to. JAGs may suffer the same consequences, so we lose that, not only that expertise, we lose that position because it's always intended to be temporary. So, if we want that capability we need to consider making a recommendation that that capability be maintained in some form or fashion.

COL. HAM: Well, not all services have DCAP, TCAP, HQEs. Not all services have kind of an equality between the TCAP and DCAP. I think you've heard, so I'm just throwing out is there anything you want to discuss --

COL. MORRIS: Maybe I didn't even pick up the statement, I guess. What I took as the obvious, that TCAP and even DCAP now have become so institutionalized you have a

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significant degradation of quantity and competence if you were to remove them. And much of the confidence behind calling our -- saying that we have corporate competence is that there is no person ever trying his first case without that person having all kinds of concentric circles of helpers available or literally surrounding him.

COL. HAM: So, you just want that in as a discussion of background of what's available?

COL. MORRIS: And that those are givens and the sources of our statements of confidence about the breadth and the systematic nature of the training, training and support structure that's there.

The HQE thing I think is worth some debate because we had some back and forth on it. You know, my sense was the ideal world is the HQEs worked themselves out of a job because they came in to provide a support structure to a kind

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of wavering system, and then as the system fixes itself then they should be able to wither.

CHAIR HILLMAN: Would the systems fix themselves.

COL. SCHOLZ: They develop the expertise. Is that what you're saying?

COL. MORRIS: As the system gets stronger based on everything that's happened over all these years. Right? Then you don't --- you shouldn't need arguably, right, and the justification for the temporary jobs and all that to begin with is we need to infuse this imperfect system with expertise that civilians bring, career people which we don't have, different perspective than just military talking to each other, and demonstrable success. They're, you know, harried and overworked, and popular, and highly competent people. So, the question is now five years into a five-year program, the continued stress on

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them, does that -- is that a function of their having been civilians, or is it a reflection of, and it's not a necessary either/or, is it a reflection of the system needing still more live-in help? Because the HQE is not the way TCAP often is, which answer the phone, go to the next person. It's I'm moving in for a month until this case is done, or whatever, and a variation along the way, but deep and intensive case assistance. So, does that mean that's something that only civilians uniquely can do, or can do better than military, or is it just a reflection of TCAP was under-resourced, and you need to double or triple the number of those people and have them available out there. And then, in addition, what you didn't have when they came on was 23 SVPs who are now there, who ought to be part of that cultural reset, and also represents the greatest change in the management of military justice, you know, where the prosecution is no longer jurisdiction

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based. So, that was all -- they're demonstrably valuable. The question is given what we originally intended, do you need a new wave of civilians or something else?

MEMBER STRAND: The way I look at it is we got the additional help. We obviously needed the additional help. We got some really good insights from the civilian world which we needed, and that probably should go away because I think we've advanced in many ways.

My concern is that if we haven't institutionalized those pieces that are doing so much good for us, and they're really kind of either temporary or they out of hide. So, I'm not sure if we make a recommendation that we bolster the expertise and make sure that that's institutionalized.

CHAIR HILLMAN: I am wary of having too many fenced suggestions for resources in this, and sort of setting that side. And I'm also wary of assuming that we won't develop that

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in-house expertise that would allow things, because I do think this has been a moment of so much change and disruption really. Can we recommend the HQE program be reviewed, you know, at the point where it's going to expire? Can we just defer that one? And can we also recognize that there's a connection between the need for HQEs, the TCAP program, in particular. And, actually, we should specify in the report what these different programs are in the services. We really should say, because I think the extent to which, Colonel Morris, you think that these are institutionalized, it's just not true across all the services. So, I -- or just not as robust, so I'd want to set out for an observer to understand what the different assistance -- what the reach-back capability essentially is right now.

And then the last thing we have to connect to this is the career track, because if we don't have a career track, then aren't we

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always going to need HQEs, because we're not going to have experience litigators who actually stay and focus to the extent that probably they need to because I don't think that sexual assault prosecution will be simple in 10 years. It will be different in another way, but still likely require more resources.

COL. HAM: That's how a prosecutor progresses, it's going to become -- you have to stay up on all the latest techniques, there's so many different things that are coming down the pike. So, we're going to need to --

MEMBER BRYANT: Well, won't the -- wouldn't the career track tend to alleviate the need or obviate the need to bring in the civilians because it seems to me, the civilian thing, I don't know the history of it but it probably was not only for the help, but a funding issue because if they -- when they came in and did their thing for five years, they weren't around for 20 years to draw retirement,

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dah, dah, dah, dah, dah, dah, dah. They weren't payroll people, military payroll people, so that may have had something to do with it. But if we go and we can convince somebody to do career tracks that don't impede people's career progression through the JAG Core then we've also maybe alleviated the need for these civilians to come in.

COL. HAM: But the civilians bring something different because they've had a full career in the civilian world and learn different things in different ways, and they're bringing a specific type of expertise from another place.

CHAIR HILLMAN: General Cooke.

BG COOKE: Well, I'm skeptical that the military is ever going to be able to develop a career track that would have a cadre of prosecutors and defense counsel on a par with New York City, if that's our standard. And I think the only way you're going to equivalize

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them, if that's a word, is through additional programs like HQE that can provide them additional resources and expertise that they can use.

BG DUNN: And there are three reasons for that. One is that people will leave the service. You know, you're going to put this training in people and you don't have a way to actually hold them in the service. And, two, just in the nature of the personnel business in all the services, you know, you can say don't penalize people's promotion. That only works up to a certain level because by then if you have not taken broad leadership positions then you're not going to get the broad leadership positions that you need to get promoted to the next level. And my third point I completely forgot.

BG COOKE: And as bad a problem as this is and why we're all here, there aren't enough cases for a number of people to develop

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that kind of expertise.

BG DUNN: Right. If you prosecuted every single reported sexual assault in the military every year it wouldn't be the same number they prosecute in New York City, and you're dividing that up between the services and across the United Nations, yes, yes. Across the world.

COL. HAM: Hundreds of cases a year, hundreds of felonies, hundreds of misdemeanors, I would say 600 misdemeanors, 350 felonies, and those are the cases that we prosecute. Those aren't even the cases that we don't prosecute. That's just one year.

BG DUNN: The military is never going to generate that number of cases.

COL. HAM: Well, I guess that's good.

BG DUNN: No, that is good; in terms of developing expertise, though, that's not good.

CHAIR HILLMAN: Okay. Last word, Mr.

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Bryant?

MEMBER BRYANT: No, I was just going to make the same point that she was making. I understand we're never going to do the numbers. We're not -- Virginia Beach is not New York City, but as I said in one of our other meetings, we have year after year 2,500 domestic violence cases, individual defendants, so we're -- I don't think anybody is thinking or aiming, at least I'm not thinking that the military prosecutor is ever going to have the same times at bat, the number of times at bat as civilian prosecutors are, but I think what we're trying to do is create a Core of prosecutors for as long as we can keep them. And I forget the answer when I asked do they get pro pay. I think the answer was no, but at any rate, that sort of goal, maybe not to make New York City prosecutors. And by the way, I'm sure we all agree that there's some poor New York City prosecutors among the

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hundreds and hundreds that they have, and some that the defense counsel would say boy, I love it when I have a case with him or her because I always whip their butt. So, they're not -- New York City loses its share of cases. But the point is no, we're not going to make golden prosecutors out of all these folks, and we're never going to have anybody in any system who wins all their cases. But we're trying to get them to the point where they feel confident about what they know, and don't know, and can, and can't do. And I think we all saw a high level of dedication among them, and a great feel of motivation, but what we also saw was some -- all them on both sides of the fence and prosecution questioning whether or not they were properly trained and equipped by experience and supervision, and so on to do the job that they were expected to do, and wanted to do.

CHAIR HILLMAN: Thank you, Mr. Bryant. I think we're going to take a break, so

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let's take 10 minutes and we'll come back and move on to the next set here.

(Whereupon, the proceedings went off the record at 2:55:36 p.m., and went back on the record at 3:11:24 p.m.)

CHAIR HILLMAN: Okay, we're ready. So, let's just talk about scheduling for a minute here. Is that okay before we go through the rest?

Okay, so it seems that another in-person meeting would be helpful in moving us forward. We could do more prep sessions. We do have to report back to the subcommittee with each of the prep sessions that we have. But if we had more prep sessions at another meeting and then had a report back to the full subcommittee, we might would better be able to finish this out and make the progress and recommendations and findings that we need to by March 25th, which is our next scheduled meeting.

Lieutenant Colonel McGovern feels

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like the staff will have a better grip and more fleshed out sections of the report for us.

So, the 25th, can everybody make the 25th or some part of the 25th?

COL SCHOLZ: I'm sorry, I lied. I looked at February 25th.

CHAIR HILLMAN: Okay, Harvey, can you make the 25th?

MEMBER BRYANT: Yes, I can.

LTCOL McGOVERN: Okay. And what may be helpful would be if a team cannot meet that day, maybe you all can do a teleconference at a day that is convenient for the three people, rather than coordinating all ten people. And then the people who can make it continue to work the wording on the 25th. That way, Colonel Scholz, you can weigh in with the investigations.

CHAIR HILLMAN: Okay, the other alternative for a date would be the dates in April that we have booked for the RSP. I know

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that I already started to schedule over those but feel like the 9th and 10th, for instance, of April.

LTCOL McGOVERN: And we have to have our report finalized by April 18th.

CHAIR HILLMAN: So, that's pretty close, isn't it?

LTCOL McGOVERN: Yes, that would be a review of a final draft with happy to glads or major heartburn issues that we need to finally flesh out.

MEMBER STRAND: Can we do some of that towards the end through teams as an email?

CHAIR HILLMAN: Oh, we will do.

COL HAM: We have to be very, very careful FACA-wise. And let me back up. When Lieutenant Colonel McGovern was talking about three people, those would be preparatory sessions --

BG DUNN: Yes, most definitely.

COL HAM: -- to prepare a position

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paper. In other words --

LTCOL McGOVERN: What you have been doing.

BG DUNN: Right.

COL HAM: I'm clarifying for the record what that means but for FACA purposes, there has to be a central repository of comments, which will be Lieutenant Colonel McGovern. So in other words, she would send out a draft. You would all make comments and return them only to her. Then she would consolidate them all in bubbles or whatever and send it out to all of you.

I understand that is very cumbersome, but that is how we have to do it, DFO.

DFO FRIED: Thank you.

CHAIR HILLMAN: That sounds like a process to be avoided as much as possible. So, but it sounds like then again, Colonel Scholz, to get your input we will have to do a call. We

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will have to set up a call to make sure that you weigh in on the parts then because you won't be here on the 25th.

So, and then so the dates that we have next are the 25th. Then the panel meets in the two dates in May that we set up before the 5th and 6th. General Cooke, you wanted the 5th and 6th for the RSP and then the 29th and 30th for the final. And the 29th and 30th of May will be in New York. That is tentatively that is what we think.

BG COOKE: That is May?

CHAIR HILLMAN: May, correct.

BG COOKE: Is there still a meeting on the 9th and 10th of April or is that off?

CHAIR HILLMAN: Correct, that is off.

LTCOL McGOVERN: That is why it may be a potential date for us to teleconference or meet.

COL HAM: Also maybe the 25th could

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be the last meeting that we are having as a group.

CHAIR HILLMAN: I think so, right?

BG DUNN: I don't even -- are you on the big panel? You're not?

COL SCHOLZ: The 5th and 6th of May, that is the subcommittee?

LTCOL McGOVERN: That is the main panel.

COL HAM: And an administrative matter to be worked out, Dean Hillman, is how you want to present your subcommittee's findings and recommendations to the full panel. That is completely within your discretion as well.

LTCOL McGOVERN: But for today --

MEMBER STRAND: But she is not allowed to delegate. Right?

LTCOL McGOVERN: For today, I think we can get through statistics, defense, and sentencing for sure. Prosecution, like

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investigations, is long. We didn't get all the way through it as a group but we made a lot of progress. So, we could start on that if there is time. But I think we could get three more topics covered today, if that is okay with you.

I passed out the statistics.

COL HAM: So, what are doing next?

LTCOL McGOVERN: I'm sorry, statistics, defense, and prosecution. But I don't think we have passed out sentencing yet or did you?

BG DUNN: This red one?

LTCOL McGOVERN: Yes, okay.

BG DUNN: Which do you want to start with, Kelly?

LTCOL McGOVERN: Statistics, if you don't mind.

CHAIR HILLMAN: You just have to listen to me talk on this because there is not too much written down there.

So, the four questions that are on

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the -- the statistics -- working on the statistics piece was Judge Jones and Colonel Ham, and Jan and I.

The questions on this page are do we have the right information? Are we asking the right questions? Have we extrapolated appropriately, drawn the right conclusions from those questions, the data that we have.

And then finally, should -- this is a specific sort of the report should have dovetailed with the UCR in the way that actually our investigation report recommended that we adopt, just mandate adoption of the UCR reporting guidelines.

So, let me just step back a little back and say how we were thinking about this. This part of the report will start with a methodology and overview of who we heard from and how we reached our conclusions. That is running down the scope everybody we have heard from and the visits that we made.

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Also, the information that we have received from the RFIs, much of which is very detailed and much of which we will not explicitly reference in our conclusions about statistics but we will report all the statistics that we have received, which are very fine-grained and very incomparable across the services and across civilian jurisdictions. But we will report all that there.

But then the rest of this section about statistics and surveys will focus on how to draw conclusions or not draw conclusions from the civilian and military statistics. So, we thought about really three different main parts to it. First is the data that we have identified the sources from which we are able to collect data in both the military and civilian jurisdictions. That includes surveys. So, that data is the UCR, the CDC, the Bureau of Justice, and then DoD and SAPRO, sort

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of identifying where all that information is coming from.

And then clarifying that they are not exactly the same. These surveys aren't asking the same questions. The statistics aren't reporting the same thing. And so pointing out the sources, that would be the first part. The second part would be to look at the systems. The third part would be to look at the offenses. In each one of these what we are doing is clarifying that what we are reporting in civilian jurisdictions is not directly parallel or sometimes at all parallel to what we are reporting in military jurisdictions.

So the systems piece would focus on the differences in the processes themselves. So specifically, the military justice system's distinctive goals that are addressed in the Role of the Commander Subcommittee. Some of this we won't have to report because it will be

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specified in the Role of the Commander piece but that will sort of explain the differences in the systems that makes the waterfall slide, for instance, different in the military because of the disposition, the variety of dispositions that can result as compared to civilian jurisdictions.

Another difference in systems is restricted versus unrestricted reporting or anonymous reporting in that the minority of civilian jurisdictions that offer that, those sorts of things.

And then the third big part of the statistics and survey piece is the offenses and actually the definitions of the crimes because the actual -- the nature of these offenses is not the same in all these jurisdictions. And the language that we use is often imprecise and it makes for bad connections. So, we will clarify what constitutes a sexual assault here and what is being reported.

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So that is the sort of structure there. Then, the last part of this will be findings. And that is what I am going to talk to you about now in terms of that will be all the background information from which we will draw these findings. The point of presenting all that is to show that we have done due diligence and to understanding where these numbers are coming from and that we actually do understand what is available and the limitations of that data in these different jurisdictions.

And then we get to the hard part, which is what to recommend that we do going forward because we have an opportunity to establish baselines for how information is collected. But we are challenged by the fact that there is a lot of different opinions and practices about this and it is not clear to us where the best institutional capacity for this resides. We have SAPRO. We have the capacity

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to ask the Bureau of Justice or the National Crimes Victimization Survey to do a special study of military crime victimization, for instance. But we don't really have -- we don't have a -- and we have RAND, for instance. We have many military-specific places we could go. We are not sure where that should reside.

So, we have tried to make some recommendations around this and let me run down them. So, the first thing that is on the page here about whether we have the right information, if we could just write that "not necessarily," that would just constitute our full report.

(Laughter.)

CHAIR HILLMAN: And then the first sort of recommendation there is that we think we need an independent assessment of the military, of the incidents and handling of the disposition of reports of military sexual assault, rather than what we are getting right

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now.

And I actually am not quite sure how to -- the content to put into this recommendation. But when we go away, what we will have left is SAPRO and then each of the services reporting data, based on what Congress has required. We have seen how the Congressional recommendations have caused a lot of challenge at the implementation level because reporting requirements alter resource allocation and impose additional burdens. And I am wary of asking for tons more information on all these different pieces of things. But I do think we need a periodic independent review because I don't think that the military has the resources to report on it and to measure itself, despite the fact that they are trying to do this constantly but there is such turnover and there are so many different practices, some sort of independent review seems appropriate.

Now, where that should reside, I am

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not sure. There is great doubt among those who we are talking about it that SAPRO is the right configuration, the right place in order to do that.

And in particular, part of that review seems to be -- this would be another recommendation here. So, an independent review and we can talk more about what that might mean. We will try to flesh that out as we talk about it.

Second would be to separate the criminal justice statistics from the public health perspective on the range of sexual behaviors, misconduct, and attitudes that are sort of causing problems with respect to climate surveys and gender relations in the military, as compared to the criminal justice piece of that and actually the crimes that are being committed and are being investigated and prosecuted because we have conflation of those things right now with the gender relations

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survey.

And putting those two perspectives together, we can actually draw directly on a report that the National Research Council published in November, which specifies these two. And are we going to have the Bureau of Justice folks come back? What do we think about that?

COL HAM: The judge has asked us to contact them, actually for Role of the Commander.

CHAIR HILLMAN: Okay. So, if they did visit --

COL HAM: You could certainly have the information.

CHAIR HILLMAN: -- then we could have the witnesses return. We had a Bureau of Justice statistician, the former director of the National Crime Victimization Survey come and talk to us at a preparatory session. But Judge Jones is working into getting that on the

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record. But basically, that perspective is embedded in this report, which was issued, which says there are two perspectives on this, public health and criminal justice, and sets out some best practices with respect to assessing information there.

So, we would also make a recommendation that we follow the framework that is set out in that report, as we collect data on what is happening in the military.

There is going to be a lot of qualifications in this section. We need to make a finding that the data that we collect is not always meaningful when used for comparisons because of all this background about the disparity of definitions and the different disposition patterns that have been in civilian versus military jurisdictions.

We also wanted to specify that separating the criminal from the sub-criminal or I don't know, what is another word for that,

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the offenses that might not rise to the level of criminal either within or without the military. We need to separate that in the statistics because of the risk that it creates, not only that we are misrepresenting the problem but we are actually collapsing different sorts of things that have meaningful distinctions to victims that is making a difference. Not all of these offenses are actually exactly the same thing. We need to not collapse all those distinctions, even as we recognize that they occur on a spectrum.

We need to return discretion to investigators. That was clear that was coming up but you guys already talked about that, so we don't need to really address that so much here.

And we also talked about, and I don't know that this actually falls under statistics but the strategy to prevent sexual assault, the sort of criminal strategy for law

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enforcement, we want to make sure that that stays at the center of what we are doing here as we collect data, that we are not actually collecting data to support a sort of framework that doesn't focus on prevention and law enforcement, that doesn't allow sort of law enforcement to operate in the ways that it should.

So, in terms of the specifics that we set out to about what matters, and that is asking the right questions here, conviction rates are not the primary means by which we can identify improvement in responses to military sexual assault. So, we need to use more than conviction rates.

We need to look -- we need to focus on reporting rates and a finding will certainly be that reporting rates are comparable in military and civilian jurisdictions. And they are clearly increasing rapidly in the military. We don't fully understand why that is or what

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sorts of assaults those are bringing to our attention but that is clear that that is happening. We actually will add, Jan has already put in everything through FY12. We will add the FY13 data that we have now to that report, which shows these steep increases in reporting.

And the last thing in terms of statistics is that the data in other areas that we are not -- we don't want to make our mandate any broader than what it is, but the data on sexual assault can't really be understood outside of the larger context not only of the workplace and gender relations surveys and data that we need to hold as distinct but recognize as connected, but also to domestic violence. And we have mentioned the Family Advocacy Program and the resources to domestic violence. Sexual assault is very closely related to domestic violence and yet the resources and the statistics that we are gleaning right now on

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military sexual assault are running to military sexual assault apart from domestic violence. And we think that we need to connect those -- to recommend connecting those going forward.

MS. JAUS: Are you saying that there is a lot of resources for sexual assault but not in domestic violence, which is a big problem. Is that what you are saying?

CHAIR HILLMAN: Yes, and for instance, the Special Victims Council Program is for sexual assault but not for domestic violence victims.

COL HAM: Unless the domestic violence includes a sexual assault.

CHAIR HILLMAN: And that is where the connection is, which we see even in --

MEMBER STRAND: But even it is, it still doesn't because it is considered domestic violence.

LTCOL McGOVERN: The special victim capability will address domestic

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violence in child cases.

MEMBER STRAND: Right, serious domestic violence.

LTCOL McGOVERN: So, DoD is trying to encompass assaults.

MEMBER STRAND: I don't know if this will fit under statistics or not but may I make a recommendation?

I think one of the big issues that I have seen along the whole spectrum about what we count, how we count it, how we see it, how we ask. The DoD definition for sexual assault is a policy definition and it doesn't square with the legal definition. And I think that is one of the huge problems because then we have got a whole Army and Air Force and Marine and Navy group of people going out and training a definition --

CHAIR HILLMAN: That definition is where?

MEMBER STRAND: It is in the DoD

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instruction. And all the services have to use the same definition, sexual assault is unwanted touching, all this other. It is very broad.

CHAIR HILLMAN: So is 120. I mean does it map onto 120?

MEMBER STRAND: Well, it doesn't really.

DFO FRIED: It does.

MEMBER STRAND: It does and it doesn't. But what I would suggest is I think what we need to do is take a look at that DoD definition and mirror 120. And teach it 120. We are not teaching 120 when we are going out and doing prevention training and everything else. It should mirror the elements of proof. And I think that would clear up a lot of it, not only in training and prevention but also in reporting.

So, when DoD SAPRO, or when the services report a sexual assault, they have to look at those offenses and put it the right

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categories when they report those offenses.

CHAIR HILLMAN: Colonel Scholz, did you want to add something?

COL SCHOLZ: No, I had another thought but go ahead -- not in relation to what he is saying.

CHAIR HILLMAN: Okay.

MEMBER STRAND: So, I think if we clean that up and we are talking off the same sheet of music, which we are currently not doing --

CHAIR HILLMAN: That sheet of music is pretty hard to follow when it is 120. That is really what -- I keep coming back to that.

MEMBER STRAND: It is but it is even harder to follow when even have a broader definition.

CHAIR HILLMAN: How much broader can you get, really? I mean, --

BG DUNN: Well, I think the DoD definition goes into non-criminal code.

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MEMBER STRAND: It does.

BG DUNN: It eventually is not criminal conduct.

MEMBER STRAND: And so if you break it down and you just basically the definition of sexual assault is in the Article 120 violation and then you talk about what the different things within 120 are and we brief that in wholesale, which we are not doing now, and we report that the way -- if we report is along the lines of 120, it might be helpful.

LTCOL MCGOVERN: I think Nate Galbreath from DoD SAPRO has testified that they are defining a sexual assault as perceived by the victim, not as perceived by a prosecutor criminal element perspective. And, therefore, even though we see it as pretty broad, they can say --

COL HAM: Does that prove Dean Hillman's point of the public health approach of SAPR versus a criminal justice approach of

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LTCOL McGOVERN: Right. It's consistent, I think. You are consistent.

BG DUNN: I don't know if we are willing to go this far but I would like to see something in the notes that there were not 26,000 rapes in the military in whatever year that was.

But I mean that is this issue and it has got to be clarified. And I think the data for 2012 and 2013 is somewhat clearer.

COL HAM: Ma'am, I can't hear you.

BG DUNN: The data for 2012 and 2013 is a little bit clearer in terms of just reporting. But there has not been another survey. Correct?

COL HAM: Well there is a reporting of criminal events.

BG DUNN: Right.

COL HAM: I think the issue that Dean Hillman, if I understand it, as making a

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recommendation on is reporting of criminal events is different than what SAPRO is measuring. Is that --

BG DUNN: Yes.

COL HAM: Is that correct, Dean Hillman?

CHAIR HILLMAN: Correct.

COL HAM: And what you are recommending is an assessment of criminal events.

BG DUNN: And public health, somehow separating it. Correct?

LTCOL McGOVERN: Well, General Dunn, would you be proposing then a background section to clarify there were this many reports. The question here was the information properly extrapolated. But this 26,000 number is a speculation extrapolation and clarify that within our report for the public.

MS. JAUS: And includes these

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crimes because people are left with the impression that it is rape.

COL SCHOLZ: Right. Includes sexual harassment, includes other things that --

MS. JAUS: Touching, unwanted touchings.

BG DUNN: That the time spread and --

CHAIR HILLMAN: We will absolutely do that.

BG DUNN: Who responded may not all be voluntary. Correct?

MEMBER STRAND: Well, we have had a significant increase in reporting --

MEMBER BRYANT: The man who came from the Bureau of Justice Statistics recently retired who was head of that, who came to one of our committee meetings told us that the whole thing was flawed when they extrapolated the 26,000.

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So, you are absolutely right, General Dunn. I don't know whether it is our position or our place to get into that but, I mean publicly, but if there is a way for us to somehow allude to the fact that --

BG DUNN: Well, somebody has to say it.

MEMBER BRYANT: -- but we are not buying it.

BG DUNN: Yes, somebody has to stand up and say that.

MEMBER BRYANT: Yes.

BG DUNN: Because how many time have we heard it? This week, how many times have you heard it on the news, --

MEMBER BRYANT: Yes.

BG DUNN: -- on the Hill.

MEMBER BRYANT: Exactly. Okay, I am agreeing with you 100 percent.

MEMBER STRAND: At the same time, I don't want to shut down prevalence research. I

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think we have to do prevalence research to find out because I think it is a really good measurement. So, but we need to look very closely at what other people have done on prevalence research in the criminal side, the criminal justice side on prevalence research because that prevalence research is going to give us a way ahead on whether we are making progress. Whether we have an increase in reports or decrease in reports, that is going to fluctuate over the years. But we need to look at and we need some good solid prevalence research, not broad public health prevalence research but specific criminal justice prevalence research to help us set the bar. This is where we are at. And then we can see and we can check progress against that in the out years.

CHAIR HILLMAN: That would be a crime victimization survey of the military.

MEMBER STRAND: Right.

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CHAIR HILLMAN: A specific version of that.

MEMBER STRAND: Right.

COL SCHOLZ: Are we going to talk about the increased reporting? You mentioned that the military is seeing an increase in reporting. Do we want to get into why we think that is happening or do we have any evidence of that, in terms of the unrestricted options? Victims may be perceiving or survivors may be perceiving a more receptive environment.

COL HAM: We have all the -- I think the answer to your question, ma'am, is we have the DoD SAPRO fiscal year 2013 numbers.

COL SCHOLZ: Okay.

COL HAM: And I think it is fair to say, I think Dean Hillman heard this testimony in Role of the Commander, that they are hesitant to draw conclusions as to why there is a rise in reporting. However, they think a couple of things. They see that a lot of the reports are

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from older cases. So, they think, but they are not willing to draw a conclusion yet, they don't have all the information, that prevalence is staying the same. Is that a fair recitation, Dean Hillman?

But we have all the numbers. We can send them to you. I think they have been sent already to the Role of the Commander Subcommittee. It was in connection with one of their meetings. We can send them to you.

CHAIR HILLMAN: Yes, I have it here.

COL SCHOLZ: I was just wondering how we wanted to handle that in our report in terms of we have seen an increase in reporting. Do we want to take that on in terms of why we think that is happening or do we have evidence of why it is happening is my question. And maybe we don't. Maybe it is not enough to know.

And the other thought is you mentioned there are only three percent of the

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people change from unrestricted to restricted or restricted to unrestricted. But I thought the Air Force had seen a huge increase in people going from restricted to unrestricted, once they put the victim counsel in place.

LTCOL McGOVERN: That may be true.

COL SCHOLZ: Okay. So, I didn't know if we had that evidence on record but I think that is what they are seeing is that now that we have victim counsel, there is a big change in conversions from restricted to unrestricted reporting.

MS. JAUS: How big a change?

COL SCHOLZ: I don't remember the numbers. Maybe we just need to ask them because they have them.

MS. JAUS: Well, that is significant.

COL HAM: When I was in the November meeting, I think the answer was 50 percent.

CHAIR HILLMAN: They said their

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goal was 50 percent and they thought that was achievable. We pressed, actually, some of the civilians about the conversion rate and what that might be. Fifty percent would be an amazingly good, from what we could tell, conversion rate. But it has been really high for the Air Force, that's right.

COL HAM: It is a very small sample.

LTCOL MCGOVERN: But they were going back in time, too, to catch up to sexual assaults, now that people are being introduced to special victim counsel, that may not hold true because people may decide to go unrestricted initially.

COL SCHOLZ: That's true. That is going to change over time. That is the part that transition.

COL HAM: The bottom line, ma'am, is we have all of the latest information that SAPRO has and we can forward it to the subcommittee.

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CHAIR HILLMAN: The conversion rate that I have on the most recent, which is February 2014, the DoD roll-up for the RSP is that the rates of conversion to unrestricted have stayed stable at about 14 to 15 percent, with the exception of -- but this is service-wide so this isn't Air Force specific, with the exception of fiscal year '12, which is 16.8 percent. So, they had a higher conversion rate.

But it has been relatively steady, that conversion rate. There has been just a dramatic increase, though in reporting. I mean the increase in reporting they describe as just unprecedented. So, we do need to put that data in there.

The one thing that I am -- I think we need to hear again from the Bureau of Justice about this because the SAPRO experts vehemently disagree with the criticism of the data that they are collecting and their numbers and

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definitions.

So, while I think Colonel Morris has suggested this is a way to seize attention to create a framework that will get people to actually stay with us for a while in the report, that is absolutely right. And General Dunn wants us to be clear that we are specifying things. This is actually very contested. So, Mr. Lynch talked to us about why this was invalid, that is not without a different perspective, other perspectives on that we heard from him. So, we have to look more carefully at that, I think, as we frame that part of the report.

But mostly, I think we are going to try to walk in the center of this and just define all the terms carefully enough but frame it in a way that won't be so tedious that nobody will read it. Our risk in the statistics part, I know, is that no one will read it. But we will work hard to make that happen.

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MEMBER STRAND: Is there a possibility to bring both entities into the room and have a good discussion, instead of one person saying this and then another meeting, another person, bring them together and just have them not debate but just ask them questions and then let them discuss it?

LTCOL McGOVERN: If you go back to the June 27th transcript, you will see Lynn Addington put on her presentation first. And it was followed by General Patton, Nate Galbreath, DoD SAPRO, where they had the chance to provide rebuttal and defend their position. So, we do have that back and forth on the record.

But subsequently, I think DoD SAPRO has appeared before other subcommittees and Jim Lynch appeared at the prep session. So they weren't necessarily together but DoD, the positions have been made clear. I don't know if anything would be gained at this point by bringing them back.

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MEMBER STRAND: It is maybe just the focus? Does DoD SAPRO believe that there is a crime-based survey and not a public health survey or do they --

LTCOL McGOVERN: My understanding is they believe in their survey.

CHAIR HILLMAN: Specifically, one of the criticisms was the lack of time-bounding in the survey, was asking -- they are pulling dated trauma from beyond the time limits of the survey. And it requires follow-up surveying, investigation, interviewing, specifically, which is expensive and difficult, in order to validate the responses. And SAPRO's response was we have accounted for that and that it is actually, that is not -- that is rolled up actually in the way that it worked out.

So, it is a social science debate, ultimately that I don't think is -- I think it is a genuine difference of opinion on what would be the best practice.

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LTCOL McGOVERN: Would you see this as the introduction to our subcommittee's report to identifying the problem, laying the groundwork of the difficulty in comparison?

CHAIR HILLMAN: Yes.

LTCOL McGOVERN: And then attaching statistics and appendices.

CHAIR HILLMAN: Yes. And you know the statistics that we have, like I said, we are not going to draw conclusions from the numbers that we have but we will report all of them in there. So, everything will be available.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: So, you don't have that much written on statistics and surveys. You will see it before we adopt it finally and we will probably address it again the next time.

All right, what is next?

LTCOL McGOVERN: Colonel Morris, he briefed defense.

COL MORRIS: Okay, there are a

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whole bunch of things but the main things we spent our time on was investigators and then issues of witness production and how you square government getting an early look at defense theory through meeting the burden on witness production and what the alternatives are to try to thread that.

So, the first one is the long-debated question among us on whether defense counsel need investigators. We know that in general they are available to kind of full-sized public defenders' offices, wide consensus that it's indispensable to their competence and preparation.

So, our recommendation is yes, we say interest of fairness, maybe we would say interest of justice and efficiency. And then the question is how do you do it. And we put out a couple of models and just said test them out, figure them out. You know, one is have a CID agent be -- either way we do with TDS, you

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unplug from the parent organization for a while, plug in to defense and then unplug again and resume.

The other one is some public defenders use retired or former law enforcement who get narrow-purpose credentials issued to them. So, we are not as strong on picking one as we are in the idea of endorsing the capability.

LTCOL McGOVERN: Does anyone not think that the MCIOs should have investigators?

MEMBER STRAND: Well, it would be additional resources. You couldn't do out of hide because already the resources are stretched. So, if you make a recommendation, you are going to have to provide the authorizations, additional authorizations. Because you can't just pull from an already strained system and put them over to do that.

One of the things that I was thinking through on this particular matter for

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both the prosecutors and the defense attorneys is currently the MCIOs are working on investigations up to the point of probable cause. That is our standard for closing a case. There is maybe some consideration for increase in our standard to a preponderance of the evidence, which would give additional investigative effort towards meeting some of those burdens of proof, and we won't close a case then until preponderance of the evidence. But that would also then increase the workload on the MCIOs because we would be working the cases more, we would be working them longer.

The other potential way to approach this is that the cases aren't closed until judicial action is taken and that either the defense or the prosecutor can make a request of the MCIOs for particular follow-ups and things like that.

Right now, if they make a request, oftentimes the case is closed. And so the

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pushback is well, we are done. We are done with the case. We don't have anything else to do with it.

So, those are some options. And all of those options that I just laid out are costly because, again they take additional resources because of additional time.

So, either you put agents in the defense and prosecution offices, that is one option; two, you increase the level of criteria that we have to have before we close a case, not before we title somebody or make a case determination because that will stay the same, but we work the case until we get to a point of preponderance of the evidence; or you keep the case open and expect the MCIOs to meet defense and prosecution requests for additional work.

COL HAM: What we have heard from defense counsel is they won't request the MCIOs to investigate because they have no privilege of what you find.

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COL MORRIS: Everybody always has heard that line, sometimes sincerely uttered, I think, by the investigators that we will check out anything you tell us.

The point is, it is not. Any of that, any disclosure of information potentially limits --

MEMBER STRAND: Could you provide them privilege for a limited scope?

COL MORRIS: To prepare. And from a resource standpoint, true enough, but in a government that just hired 23 prosecutors just in the Army, it is hard to say now we are out of money.

BG COOKE: Well what if they find not just information you give them, what if they find something that is adverse to the defendant? Are they then blocked from sharing that? It becomes a real problem to wall that off completely.

MEMBER STRAND: Well, if you put

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them in the office, you have the same problem.

If you put a CID agent or an NCIS agent, or an OSI agent in a defense office, you still have the same problem.

BG DUNN: Not if you separate them the from system like the defense counsel are separate.

So, now you create a -- you have got 75 of them worldwide and they have a separate rating chain.

BG COOKE: But Larry, my question, you indicate here resource defense and they can decide if an investigator is for sexual assault. What does that say?

COL MORRIS: In other words, I think the question was should this be particular to sexual assault. And the thought was it is just a new organic capability for the defense. And you can spend it on whatever type of case you want.

BG COOKE: I agree on that. I

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don't think if we are going to defense this resource, you can't say well you can use it for sexual assault and not for a murder.

That raises a question in my mind, though, and maybe Russ has a better -- how generic are investigators? And what kind of specialties are you going to need? And so it gets more complicated as you figure out how you are going to resource this function.

LTCOL McGOVERN: You mean does it need to be a special victim investigator assigned who has had that same training?

BG COOKE: Well, let's assume we have decided we are going to give defense counsel dedicated investigative resources of some kind. So, the Army for TDS is going to have this resource. You have got to figure out how many of them there are, what range of expertises you want in the organization because there are different things that the people know well.

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So, there is a question as to -- you know a lot of more granular questions about how do you do this. I mean I think in principal it makes sense to give the defense this resource. But there is a lot of questions about that.

MEMBER STRAND: Well, in the civilian world for the defense side, if they have an investigator, it is usually a retired cop.

LTCOL McGOVERN: I don't know if that is always true, based on some of the other information we have received. A lot of times they aren't. They are private investigators but these people are committed to anti-government. And so once you are a cop, you don't usually go work for a defense attorney. So, what the JSC-SAS has reported out, is a lot of times they are private investigators.

MEMBER STRAND: So, here is a fourth option.

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COL HAM: I think it is both. You have retired cops and you have private investigators.

MEMBER STRAND: Yes, they do turn to the other side.

COL MORRIS: Do we have all that detail or are we good enough to say here are a couple of models, the main point is to do it?

LTCOL McGOVERN: Yes, sir.

MEMBER BRYANT: That is what I will agree with.

MEMBER STRAND: Well, here's another option, 1810. It is an investigator. They can get some 1810 civilian authorizations. It is a civilian investigator. They would be full-time. They can get to positions. They can hire their own investigators, keep them as long as they want.

CHAIR HILLMAN: So Russ, I think part of the distinction is you are thinking really about funding and how to ensure that our

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recommendations are implementable. I think our recommendations are capacious that we are not going to be ensure that on every one of these.

I think this is one where on principle we should say this is --

BG DUNN: Do it.

CHAIR HILLMAN: Do it.

BG DUNN: And the one thing I would add to do it is however you do it, some of them have to be deployable, period because of the military. Some of them have to be deployable. And civilians can be deployable.

So, they could be military or they could be civilian but they have to be deployable.

MEMBER STRAND: Our special agent investigators specifically for sexual assault civilian agents are all deployable.

COL MORRIS: The next issue is budget, then. Longstanding also discussion

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for as long as we have had a separate defense on whether or to what extent there should be defense -- to what extent defense should have its own budget in general. And then in particular with regard to getting experts, the old argument that the defense asked for a certain expert and gets wheedled down by the government and then is offered like the generic in-house expert and is stuck with him. The other side being any organization anywhere, including the fully-funded public defender programs still have to answer to somebody. So nobody has unconstrained budgets.

The question is, would at least a step forward be, and the recommendation is one in principle and then one further look that it should not require the defense to disclose anything substantive about its case to obtain the services of an expert. Therefore, we should look at some other way of doing that, one of which is to provide, again, just steal it

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from the civilian system, a way to approach a judge and do what is the second step in the system now, anyway, which is if the government doesn't give it to you, then you may petition it to the judge and use that as a first option.

COL HAM: Do you mean ex parte, sir, an ex parte proceeding in front of the judge, so that it is not --

COL MORRIS: Yes, right.

COL HAM: And I will tell the subcommittee, and Dean Hillman knows this, that the Role of the Commander subcommittee is looking at these issues vis-a-vis the role of the convening authority in these decisions and should there, for example, be increased authority for the military judge at earlier points in time? Should the government convening authority, agents of the convening authority, the SJA, be deciding witness requests and things like that. So, that is an issue there examining it as well. And their

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meeting tomorrow focuses primarily on.

So, there is some overlap here, which doesn't mean it is bad but there is overlap.

COL MORRIS: While we are talking, would it be worthwhile to flip the page? Because maybe the next question really should precede the one we just did. To what extent, in general, for the ordinary witness, should defense have to disclose its theory? And then how much information and what does that do to the defense? And we quoted a little from the RCM. And again, where is our language here? Whatever it says, where you give a substantive synopsis of it. Should they wait to make a request without having to expose that amount of detail?

Also recognizing, which I don't want to jump too far ahead, but these are all interwoven to some degree, then you get to the so what about a subpoena, where I think our

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recommendation was don't. You can't give unbridled subpoena right to the defense because the jerk around potential is pretty substantial there. And you still have to look at impact on the rest of the system.

So, we would look again at judicial oversight and management of that process without buying into the full judge hegemony thing that would start as early as referral.

So I think that first question there on the back side of the page might inform partly what we talked about on the front side.

BG DUNN: There has to be some check built in, is what you are saying with the defense.

COL MORRIS: Right. Just shouldn't have to be -- it shouldn't be the prosecutor or the commander.

BG DUNN: Sure but there has got to be some check because --

COL MORRIS: Yes. Right. I mean,

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no civilian public defender has a right just to like --

BG DUNN: Well, I mean but in a deployed environment with multiple witnesses, there has got to be somebody who says no, you are not going to bring everybody in the entire company back just to see if they saw something.

COL MORRIS: Yes, the example was if you have a bar fight with 25 people and now people are scattered and deployed and everything else, you need to resource the defense well enough to be able to contact and talk to those people without just saying that you can bring anything you want because nobody anywhere gets that option, which is different from the ordinary locally procured witness, where you can always go to Sergeant Anybody and talk him into coming to trial.

BG DUNN: Right. Right. Absolutely.

COL SCHOLZ: Colonel Morris, I have

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got a question. I definitely agree with the discussion on the defense counsel getting their right to an expert and maybe using the judge as that tool to make that happen. But I am concerned about the assumption that they don't have enough -- that they don't get funding for training. Because I don't think that is true in the Air Force. I do think that they have their -- in fact our TJAG goes and visits all the bases and looks at their budget and makes sure they are getting as much training as the legal office.

So, I mean --

LTCOL McGOVERN: Although the Air Force doesn't have a DCAP.

COL SCHOLZ: Well but they have conferences that they send their defense counsel. And they have TDAT. Is it called TDAT? Trial Defense Advocacy Training. So they get trained together and they go to their own -- they have defense counsel training. So

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they are trained.

BG DUNN: But doesn't this go back to what Professor Hillman said earlier today about we need to separate out the training by service? Because once we do that, we will clearly see that the Marine HQE has no travel budget; whereas, Army HQE --

COL MORRIS: And for that matter, they don't have a finding that is -- we just have a recommendation to make sure they stay or become --

COL SCHOLZ: Okay, that's better. I think that is good. I just didn't want the assumption that all services weren't providing.

BG DUNN: Right because the Army is the same. I mean, the Army makes an effort to keep it more or less even. Certainly, it is not the same testimony about the Marines.

MEMBER STRAND: Well, the big difference is the Air Force is more

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regionalized, too, as far as that or the other services.

LTCOL McGOVERN: Well, a lot of the services are regionalized, though. And just what we had heard is they felt that they didn't have the funding for resources or control over their budget.

COL MORRIS: Anything on that?

The next issue that starts at the bottom of two and runs up to three is both expert witnesses and expert consultants to the defense team.

And again the concerns that the defense commonly raises is getting the person you want in particular and then spending the money, and having to give that information to the government sooner than the government would otherwise get it. We know that there are particular disclosure rules for experts at some point then in the interests of justice so you don't slow up a trial by having to interview

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people and getting counter-experts and all, but it wouldn't be at the same stage. So, similar sentiment as the other witness procurement issues we talked about.

So the recommendation was again to be able to take it to a judge to get that person aside and then we raise and don't take a real strong view on if you ended up with some level of defense budget independence, which is not a necessary step to reach this step. Then in some ways, it becomes a proper defense burden to manage their investigative budget.

Appropriately as public defenders do as well in deciding when and who to seek to buy when they go to take a position before a judge.

BG COOKE: So you we are not taking, you are not taking, we are not taking a position on where this money comes from. Is that right?

COL MORRIS: Right. I think that is -- we would still take this position,

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regardless of whether you ended up giving some level of budget autonomy to the defense. You don't have to have that to have this.

MEMBER STRAND: But you know what an unfunded mandate is.

LTCOL McGOVERN: Well, what the previous speaker proposed was separating the issue out that an expert request could go before a judge, which wouldn't require their own budget.

COL MORRIS: Right. It is just worth also addressing the issue.

CHAIR HILLMAN: General Cooke, were you going to add something else?

BG COOKE: No, I am going away or down below, or wherever I need to be at. It raises the option, obviously, if it is coming out of the convening authority's pocket, then it is going back -- something is going back there. When the judge says give him expert X, the convening authority just gets a bill or what

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does the convening authority get.

COL MORRIS: Yes, of course if he turns you down and you appeal to the judge, similar deal with convening authority pays.

BG COOKE: Well, yes, but under the current system, the complaint is the convening authority knows you are asking for expert X right now and says I don't want to pay for expert X, the defense goes to the judge.

Under the proposal, as I understand it, the convening authority and trial counsel don't know who this is or what they are going to talk about if the defense counsel goes to the judge and says, I need expert X to talk about A, B, and C. If the judge says yes, you are right and the cost is going to be \$10,000, then how does that get back to the convening authority to pony up that money? Does he just get a blank bill for \$10,000?

MEMBER STRAND: Well, the judge can't obligate the money or it is an

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anti-deficiency act.

BG COOKE: Well, I know. There is a pot of money somewhere that that is going to come out of.

LTCOL McGOVERN: And that happens in civilian jurisdictions. Do you know if public defenders or if judges are issuing that and it comes out of a pot of money, does it mean from public defense?

COL HAM: Probably public defender.

MS. JAUS: The public defender. I think they have their own budget for experts. Sometimes court-appointed attorneys have to go through the court and there is a pot of money for that, for those experts. They have to make a showing.

But I think the public defender, like a Legal Aid Society would have their own budget for that.

CHAIR HILLMAN: Mr. Bryant, did you

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want to get in on that?

MEMBER BRYANT: Yes, the public defenders will move an expert and if the judge allows it, he will usually set an amount of money they can spend on that particular expert, including travel, et cetera.

In Virginia, that is paid for out of a general fund out of the Supreme Court Division. The Executive Secretary of the Supreme Court manages those funds. So, there is not a -- public defenders don't have a budget for experts that they use or don't use or have to keep track of, any more than the prosecutor's office has a budget for experts. So, if I want to get a million dollar expert, it goes to, pretty much what you are talking about here, it goes to the convening authority. So, the question is, I guess, in the military system, can the convening authority say I don't know what the judge is thinking, but I am not paying \$10,000.

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BG DUNN: No, he can't. Well, I don't think that --

COL HAM: Well typically, the judge -- yes, if the judge orders any production of any witness or any spending of any meeting, it is up to the convening authority to do it. And if he doesn't the judge can abate the proceedings.

COL MORRIS: Right. And that is the sense in which the judge doesn't literally obligate the money. He just orders.

BG DUNN: Right, yes.

COL MORRIS: And then implicit here, too, in response to you, partly, sir, the exorbitant expert, we would expect or wouldn't expect judges then to have their own rubric that they go through. So you don't just, when somebody asks for -- right. You work through what are the alternatives, who is closer by, and that kind of thing. Give me some comparables and why this -- So, we are trusting the system,

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other aspects of the system then to step in.

Next the issue of subpoena power, whether counsel should have it directly. There are a variety of practice. And our recommendation was no, that there is just a high potential to really skew the system there and that the interest that is at the root of the request for subpoena power could be adequately covered by some of these other measures that we are talking about and whether you then even characterize it as a limited subpoena power under the supervision of the judge or whether you have the functional equivalent by the changes we would make on the first two pages here. It seems that we would still reach that without --

COL SCHOLZ: We could probably remove that one.

COL MORRIS: -- needing that step.

COL SCHOLZ: I think we kind of addressed that.

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COL MORRIS: So maybe we would just say that if that is everybody's consensus that you adopt the other two and then we don't need this one.

COL HAM: Well, keeping subpoena power as is for the prosecution, which is unlimited.

LTCOL McGOVERN: I think there is still a finding that defense counsel have recognized or have asked for that. I think that we do want to address that at some point.

COL SCHOLZ: You mean in the context of sexual assault, specifically they have asked for that?

BG DUNN: Across the board investigators --

COL SCHOLZ: No, I was wondering if that was in context of what we are supposed to do in terms of sexual assault cases?

COL HAM: I think the testimony, mostly in site visits, the government very much

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has unlimited resources in these cases.

BG DUNN: Okay.

BG COOKE: Why not just go with the same as you have the experts and have it go to the judge?

BG DUNN: Dropping down one level

--

COL MORRIS: Leave it so that it is addressed and just make that as a recommendation.

BG DUNN: Dropping down one level, as General Cooke characterized it a few minutes ago, we are putting a significant workload on military judges now that has not existed up to this point because the defense, right now the defense will say I want this expert. And the prosecutors want to come in and say my God, that guys costs \$500,000. Here is a military substitute. Now the judge says no and then the prosecutor also says well, here is Mr. \$150,000; here is Mr. \$200,000; here or there

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they are just as equivalent to Mr. \$500,000. And if this process is being done outside of the trial counsel's knowledge, then the judge is going to have to do all of that.

CHAIR HILLMAN: No, can't the judge just direct defense counsel, give me some alternatives?

BG DUNN: But to me, that --

BG COOKE: It's a problem in the federal court.

BG DUNN: Oh, I can't find any who are equivalent of this guy. You don't have the kind of give and take now that helps keep it -- keeps the judge informed, shall we say.

BG COOKE: Federal judges in a capital case, the federal judge basically has to oversee the defense budget. And judges hate it because they have to make these kinds of judgments and they don't have any template or any real -- a lot of experience to go by. We have conducted classes for judges on this

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stuff.

So, it will be -- I mean judges will gain experience with it and most of the issues will arise often enough that they will have a pretty good feel for them. But it will put a load on the judge. There is no question about that.

MEMBER STRAND: We'll have to have additional training on the judges, of course, too.

COL HAM: I think Judge Henley said -- I'm trying to remember his thoughts a couple of meetings back. He may have been talking about some other issues, too, on the efficiency. Right now, as a judge, he was dealing with these issues way down the road and having to correct the wrong. So, it was actually inefficient and more time consuming.

BG DUNN: But that is in terms of the timing of the case. What I am talking about is right now any time one of these requests

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comes through, whether it is for a regular witness or an expert witness, you have an adversary process that unfolds in front of the judge that provides the judge the information on which to make a decision and provides him the financials of the cost of the different experts.

LTCOL McGOVERN: You know the defense counsel, though, are saying that this adversarial process is just going before the trial counsel, the SJA.

BG DUNN: Well no, at the first level. I am saying at the second level.

Well, what I am saying is by the time it gets to the judge now, because the government is informed, then you do have some -- you have information laid out that the judge can look at on both sides and come to some decision, perhaps in the middle, in terms of the cost of some of these experts is what I am saying. Whereas, if you leave it so that the defense counsel comes

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in and says I want this expert and the judge doesn't know how much experts cost and the government is not there to say whoa, whoa, whoa, whoa, whoa, whoa, whoa, whoa. Here are the three most widely recognized experts in the country and none of them cost \$600,000. Order one of them and not this one. You know, give them an expert but give him this expert that costs a lot or else you are going to lose all of that.

LTCOL McGOVERN: Would your opinion change if defense had their own budget and then they were just wasting their own money?

BG DUNN: Well, that might be one way to manage that, I suppose. That might be one way to manage it.

LTCOL McGOVERN: And so they go to the judge for the subpoena power without having -- I mean the concern that was expressed to the panel members has been that defense counsel are having to reveal their hand to make --

BG DUNN: Right, and I agree. And

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I am just saying that somehow we have to manage that, either through a defense budget or through some sort of resourcing information for the military judges so that they know how to do it.

And you know the problem giving the defense their own budget is you never know what kind of cases are going to hit you. So, this year you may not have any murder trials. Next year you may have two capital murder cases.

(Simultaneous speaking.)

BG DUNN: Yes. Well, no. Right. Right, but where does that go? How does that work? I mean so --

COL SCHOLZ: But you know maybe the process would be that the defense goes to the judge and doesn't have to reveal their hand of what their need is and why. But then the judge could always bring in the prosecution and say okay, this is what my request is. Who are you guys -- are you having an expert, prosecution?

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And if so, --

COL HAM: Well right there, you point out an issue, ma'am. The defense knows nothing. The government goes to the convening authority, gets whatever they want for how much they want to spend; whereas, the defense knows nothing. This is what the defense is saying over and over again. The government gets whatever they want, unlimited expenses. We don't know anything about it. The defense, on the other hand, has to reveal their whole strategy and still gets denied stuff.

So, I think that is the imbalance you have heard repeatedly, site visits, meetings, subcommittee meetings.

COL HAM: Well, it would be revealed during this kind of back and forth process. If the defense went to the judge to request an expert, then the judge can bring in and turn to the prosecutors and say what are you guys doing to find out what the need is here.

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Because it might be important to the judge to know whether the other side is going to have an expert or not. That could weigh into the decision-making is what I am saying. They just don't have subpoena power.

MEMBER BRYANT: Do we have any appeal for how many state systems have ex parte motions in this area? Because in Virginia the only ex parte motions for experts are in capital murder cases and they are not always granted that they will be ex parte for the very reasons that General Dunn has articulated.

And so, I am wondering about the absolute need for ex parte motions for experts in all of these cases, or these in particular.

I don't know. I don't have any idea. All I know is in the federal system there is not ex parte motions for experts in non-capital cases that I recall.

LTCOL McGOVERN: Mr. Bryant, in Virginia, do defense attorneys have subpoena

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power?

MEMBER BRYANT: Yes, they do. They do on their own. They don't have to go to the judge to subpoena their witnesses.

LTCOL McGOVERN: So for witness requests, they can do that on their own and not reveal it to prosecution. But for experts, that is brought to everyone's attention. Right?

MEMBER BRYANT: Yes, except in capital murder cases.

So, you have to file a motion. You have to go -- the defense files a motion --

LTCOL McGOVERN: We could make that distinction.

MEMBER BRYANT: -- I want a hangnail on the left pinky finger expert and that goes on the docket. And the judge hears why they think they need one.

And another reason that I think not having ex parte motions is a good idea is

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because sometimes the defense is assuming things, creating things. And they say well, we need the hangnail expert because the prosecution is going to. And then prosecutor could stand up and say we have no intention of introducing hangnail evidence whatsoever. So that they don't need a counter-expert because we don't even have a hangnail expert, for instance.

And so how does the judge know that if it is an ex parte hearing? How does he know that okay I am going to grant this expert, we are going to spend this money, and then it is not even going to be needed.

LTCOL McGOVERN: Colonel Morris, would you propose that we separate the issues between witness and expert, as we talk about this in the report then?

COL MORRIS: Yes, it is really critical at the witness stage. There is some --

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LTCOL McGOVERN: Utility.

COL MORRIS: -- on the issue,  
right.

LTCOL McGOVERN: Okay.

COL MORRIS: At what stage in the  
expert production --

MEMBER BRYANT: It sounds  
interesting that the position would be perhaps  
you should have ex parte motions for experts but  
we don't want to give the defense subpoena  
power. Thus, whoever they are subpoenaing has  
to be revealed to the prosecution. That is  
kind of interesting to me.

LTCOL McGOVERN: Mr. Bryant, I  
think --

BG DUNN: No, I think we are talking  
about the opposite right now.

LTCOL McGOVERN: I think my  
understanding of the recommendation is that  
allow subpoena power to be granted through a  
military judge, rather than having to go

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through the prosecutor.

BG DUNN: And have that be ex parte. And the judge can tell from looking at the charge sheets. And the judge can get a better idea of what regular witnesses are. Why do you need 42 people on this particular specification? I am not going to give you 42 witnesses on this specification. Tell me a little more about that.

MEMBER BRYANT: Okay, so the recommendation is giving subpoena power means blanket subpoena power. They are still going to be able, I guess maybe the word is not subpoena, they are still going to be able to subpoena, only they are going to be going through the judge. So, just find another way to do it with the judge model.

LTCOL McGOVERN: Correct.

MEMBER BRYANT: Okay.

CHAIR HILLMAN: I also think we are not actually specifying it has to be -- the form

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of this and the motions practice that it is going to take. We are saying that the judge ought be involved earlier in order to allow the defense the capacity to build a case without it being vetted through the trial counsel. I mean that is really what these recommendations will run to. So, I think we should stick through that and specify.

MEMBER BRYANT: Okay.

CHAIR HILLMAN: Is that fair?

BG DUNN: Yes. Except, I don't think we should put anything in the report that allows or indicates that we support going down the path of ex parte on experts, when no states do that and the federal government doesn't do that.

LTCOL McGOVERN: New York does it.

COL HAM: I wish Judge Jones was here. I know there is a federal statute because I had to respond to it as a prosecutor. But what I can't recall is if it only applies

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in capital cases. General Cooke, do you know?

BG COOKE: I'm not sure.

LTCOL McGOVERN: Ms. Jaus had cited that in New York, defense goes ex parte to the judge on these requests. So, that is where that model came from.

BG DUNN: But if it is not common practice, I don't think we should get started down that path.

CHAIR HILLMAN: Okay, so we will finish out the defense piece then.

COL MORRIS: The next one was again an issue we have debated a lot on whether the judge should be involved earlier, which is such a broad question. We just took it down into a couple of areas and did not endorse, though I may not represent the consensus here, but did not endorse just Judge primarily involvement from referral forward but did say judge involvement with witness production, just repeating the measures that we mentioned

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earlier.

And then to study the issue of whether you want to creep earlier in the process in general judge involvement.

LTCOL McGOVERN: Other than that, there were no other significant findings or recommendations.

COL MORRIS: Exactly.

BG COOKE: You know, I would just note that all of these changes affect far more than the sexual assault issue that we are charged with and that really have to be looked at system-wide.

LTCOL McGOVERN: And I think we can note that in the report, sir. But these are findings.

BG COOKE: And I'm not saying we couldn't look at them. I just think that is a point that needs to be kept in mind if we are going to change here. You are not going to change it for just this point in the category

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of defenses.

COL HAM: I think, sir, that is true with a lot of things that the Victim Services, in particular, are looking at, the Military Victim Rights Act, for example. It is a big example that applies all across the board.

LTCOL McGOVERN: Sexual assaults is the starting place.

COL SCHOLZ: But there is probably another committee that is working on this, reviewing all the UCMJ and changes to be made.

So, I think that these need to be -- we need to be careful about coordinating with them.

BG COOKE: I mean I just want it in there to remind me how is the theme written. When they are pushing here, they are pushing on a lot of other things.

CHAIR HILLMAN: But certainly, though, military justice is dominated by the sexual assault in such a profound way that this

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is to make it -- it makes it less bizarre that we are making decisions about the whole system based on this because the numbers are just so high right now. I mean the court-martial rate is low. The sexual assault number of cases is actually low but they are a large part of that small universe.

BG DUNN: But we have less than two hours of defense counsel talking about this and then they tell us we have a 95 percent acquittal rate. So, you seem to be doing pretty well without -- in the system in which they are operating at the moment, in terms of the witnesses and experts.

COL HAM: Well, does that say more about the cases than about the defense?

BG DUNN: Well, no, my point is that --

LTCOL McGOVERN: And that changes over time, in terms of right now there is a lot of sexual assault cases. But guess what? It

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used to be drugs, then it was child porn, and then all of a sudden that changes. It really kind of fluctuates historically.

So, I think this is the crime of the day, or whatever you want to call it. Crime du jour, I guess, but that does change.

CHAIR HILLMAN: And this is actually, it is also consistent with the role of the military judge. I mean we have continued to expand the role of the military judge. This is another step in that direction. When we get to sentencing, we will make another recommendation in that direction. I mean that feels like a part of that longer evolution, too, that is not all tied to this issue.

Okay, are we done with defense? Thank you, Colonel Morris. We are not losing a quorum are we?

COL MORRIS: I can't stay.

CHAIR HILLMAN: Okay, good. So what is next? What do you want to do then?

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Shall we do sentencing?

BG DUNN: Yes. You have this,  
Dean.

CHAIR HILLMAN: All right, we will  
do sentencing. So, we are going to end by 5:00.

Mr. Bryant is on the phone. Is that  
enough?

BG COOKE: Are you still there?

MEMBER BRYANT: Yes, I am still  
here.

CHAIR HILLMAN: We're just  
checking on the quorum, Harvey before we go on  
but we are fine, because Colonel Morris just  
left and Ms. Jaus left, too.

MEMBER BRYANT: Oh, okay.

CHAIR HILLMAN: Okay, so we are  
going to do sentencing here. And sentencing,  
mandatory, minimums, and clemency. So, since  
General Cooke is on your agenda here, but since  
he parachuted in for the afternoon, I will run  
through this. But we want your comments on

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this as we walk through it.

BG COOKE: Is there a new sheet on this?

CHAIR HILLMAN: There is a red sheet that you should have.

Okay, and Mr. Bryant, you have the sentencing one that we talked about this morning?

MEMBER BRYANT: Yes, I do.

CHAIR HILLMAN: All right. So, the first question is here about sentencing guidelines. And that is should we establish sentencing guidelines. And Dillon was capturing what we were trying to set out.

Basically, our recommendation there, let's say, is no, at this time because we don't begin to have the data that we would need in order to make effective recommendations here. And both the data on which to build a grid essentially and the administrative process to manage it, although Mr. Bryant was

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clear in pointing out that it is not clear we need a massive system to do that, but we need some system to do that, that just hasn't been worked out yet. So, we don't recommend that.

But we did find there that we just don't have enough information to do this. And we actually may not be able to get that information, given the sentencing practice in the military, which Mr. Bryant pointed out, is unheard of in civil jurisdictions, civilian jurisdictions, where you adjudicate sentences based on specific crimes, rather than on the overall set of charges that are -- that the conviction is based on at a court-martial.

So, any --

MEMBER STRAND: Do you want to change the military on that, Mr. Bryant? Do you want us to sentence by --

MEMBER BRYANT: Russ, you are throwing raw meat at me late in the day here.

(Laughter.)

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CHAIR HILLMAN: Okay, and then next are mandatory minimums. So, we said no to mandatory minimums because it is actually not clear that they would pursue the goals that we are trying to pursue with response systems. And the sex offender registration is essentially a mandatory minimum in any case that is out there for these sorts of offenses. So, this seems not an appropriate step, at this time.

Okay, acquiescence by fatigue.

(Laughter.)

CHAIR HILLMAN: Next, do the NDAA changes that require mandatory discharge for some convictions, certain convictions, create some problems? And we said yes, basically. So, we said that this is counterproductive because when we have a servicemember who is convicted of a sex offense and they have a mandatory discharge, we are eliminating the possibility of them getting treatment because

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they are being discharged. Although, if they are incarcerated, they could get treatment while they are incarcerated. But this is essentially, this is sort of a policy finding in many respects, that while it is true that we don't want to keep sex offenders in the military, we also realize they are part of the armed forces. And to send them out into civil society without the treatment programs that we actually heard about and know can be effective is through a mandatory discharge that makes them ineligible for veterans benefits is not a good practice. And so, we think there are problems that should be addressed with mandatory discharge that has been enacted in the NDAA.

So, that is a specific recommendation finding that is based on the changes in the NDAA that just passed. So, commentary on that?

BG COOKE: Can I ask a question?

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And I should know this. Does the mandatory discharge apply to all sexual assault offenses under Article 120?

COL SCHOLZ: I would have to double-check, sir.

CHAIR HILLMAN: Do you remember, Dillon?

MR. FISHMAN: I think it is specified. I could go verify it, actually.

CHAIR HILLMAN: Yes, could you check? I'm trying to remember, too. I'm just cloudy.

LTCOL McGOVERN: So, the requirement for dishonorable discharge -- or punitive discharge, does it require for penetrative offenses or all Article 120s?

DFO FRIED: I don't think it is all Article 120s but I think it is like rapes.

BG DUNN: Dillon is going to bring it back to us.

DFO FRIED: Actually, I have got it

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right here.

LTCOL McGOVERN: The prosecution team discussed this as well. You had brought up that it could impact reporting. Do you want to discuss that a little?

COL SCHOLZ: Well yes, that is right. And the other question I have is does it also impact the benefits to the family? Because sometimes the victims are the family. And so when you boot them out, they are not going to potentially have that. Again, benefits.

What was the -- I can't remember the name of the benefits we used to give -- transitional compensation.

MEMBER STRAND: They still get that if they are booted out.

COL SCHOLZ: They do? Okay, so it doesn't affect that. But it might have. And it wasn't me. It was somebody else. It was one of the briefing people that told us that maybe this would go against victims coming

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forward if they knew that they --

BG DUNN: We had the woman from Texas who spoke to us and said don't make the discharge mandatory because, in her experience, she had worked with many victims who wanted some accountability but knew the family and --

MEMBER STRAND: They didn't want to be responsible for the sentence.

BG DUNN: Right, didn't want to be responsible for such a severe.

MEMBER STRAND: I also have a significant concern because this is too early to tell but I suspect that if -- we have seen a lot of sexual assault convictions with no kick. And if they are not willing to kick, they may not be willing to do the convictions.

BG DUNN: Right, once the panel knows that there is a mandatory discharge.

MEMBER STRAND: Right, it could affect their decision on convictions.

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BG DUNN: Is the type of discharge specified? Is it just punitive or is it a DD?

COL SCHOLZ: It says involuntary.

LTCOL McGOVERN: It's a dismissal or DD, I believe.

BG DUNN: Okay, so it even removes

--

MR. FISHMAN: Would you all like me to read it --

BG DUNN: Yes.

MR. FISHMAN: -- so that we just have it in the record and everything?

So, it is Section 1705 - Discharge and dismissal for certain sex-related offenses and trial of such offenses by general courts-martial imposes mandatory minimum punishment of dismissal or dishonorable discharge for anyone convicted of rape or sexual assault under Article 120, rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts

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thereof under Article 80. It is effective 180 days after enactment of this Act, which was enacted December 19, 2013, and applies to offenses committed on or after that date, which is on or about June 19, 2014.

And so this is something created by the staff. So I didn't want you to think I am reading from the Act itself.

CHAIR HILLMAN: Maria has it actually here, too. That is the --

MEMBER STRAND: Oh, okay. Sexual assaults 120a and 120b?

CHAIR HILLMAN: 120a and 120b, right.

MEMBER STRAND: Okay, and forcible sodomy.

CHAIR HILLMAN: And forcible sodomy. I actually find the language here confusing.

BG DUNN: Do we have a UCMJ? So, 120a is rape and 120b is sexual assault of a

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child?

MEMBER STRAND: No, 120b is sexual assault. Rape is -- I can -- okay, go ahead.

BG COOKE: Well, no, I am just not sure how far it goes. You get the same problem you have with like the mandatory minimums elsewhere, you are going to sweep in somebody who deserves to be punished but may not deserve quite that much punishment. And all these other ancillary effects of treatment and deterrence to a guilty plea, things like that are factors there.

LTCOL McGOVERN: So, would that include statutory rape, young soldiers who engage in sexual relations with high school students?

MR. FISHMAN: No. I may be misreading that but that is not my understanding.

LTCOL McGOVERN: Okay.

MR. FISHMAN: It only applies to

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what is colloquially called rape or sodomy. It is much more limited in scope. And I think that is what you were asking.

BG COOKE: Yes.

CHAIR HILLMAN: Okay, we'll seek to refine that.

Okay, the next one. The next is about clemency. So the first is sentencing guidelines, mandatory minimums, and then sentencing -- or sorry -- clemency. What about clemency?

So Article 60 has already been changed. There isn't -- there are limitations on the commander's authority now under Article 60 and 120 convictions.

But this is just a finding sort of that if we roll back the clemency power of the commander, the convening authority, essentially, we want to make sure there is an adequate appellate process that is robust enough to reckon with those imperfections,

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which would previously have been dealt with through an Article 60 capacity of the convening authority to grant clemency.

So, that is why we said that we need a parallel examination of the appellate process, particularly below which the sentencing level, below which one can't get through. So, I think we need to rethink. That is where we were headed on that.

LTCOL McGOVERN: So for those cases with less than one year confinement, --

CHAIR HILLMAN: That's right.

LTCOL McGOVERN: -- which are not entitled to automatic appellate review.

CHAIR HILLMAN: Right and, therefore, can be denied review by the military appellate process. And therefore, be denied review by any civilian jurisdiction after the Supreme Court, essentially. So, that seems a problem with respect to not having clemency. So, that is the next question.

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BG DUNN: And the other piece of it is that the way the appellate process is structured now, is long. And the testimony we had from the Boards for Correction of Military Records is that they wait. And so even with someone who will go into the appellate process as a result of the sentence, the timing may be such that any clemency would be ineffective by the time they got it.

COL SCHOLZ: So maybe we should add to that, then, before it is a correction, too. The examination of the appellate process including --

BG DUNN: Including.

COL SCHOLZ: Yes, Boards for Correction of Military Records or something.

BG DUNN: Yes, because it is very -- right. You know, it was used mostly for good.

CHAIR HILLMAN: Very rarely.

BG DUNN: And was very rarely used. Exactly.

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But it also addressed issues like post-trial processing to prevent the case from being returned on appeal. I mean it addressed a lot of things up-front that prevented issues later on in the process.

BG COOKE: I think it flowed from ancient times the control the commander had over the court-martial but was retained in UCMJ as a balance because the system was still perceived to be tilted against the defendant. And this was another protection that was there for the defendant and can work only to the defendant's benefit.

Now, if we are convinced that the defendant doesn't need those anymore. Maybe it is time to go. But that is kind of the issue.

COL SCHOLZ: The pendulum is starting to swing the other way, huh?

BG COOKE: Well, at least on certain types of things.

CHAIR HILLMAN: So, the second page

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there, we will run through these questions. The next we took up as judge-alone sentencing. And that is really a recommendation there.

We recommended, we have judge-alone sentencing to enhance fairness, potentially increase consistency, maybe have a corrective effect on charging and perception of overcharging. And remove -- make the negotiation process simpler, actually. Also, limit the challenges posed by, although it would still take place in the findings space of the difficulty of members and the training they are getting right now, how it is difficult to empanel members right now.

So, just to be clear, that is a big recommendation to move to judge sentencing.

LTCOL MCGOVERN: In these types of findings, would you want to also address that the conclusion you all came to you that there was finding that defense counsel like panel sentencing.

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BG DUNN: Right. They would not change that for one moment.

BG COOKE: I am fine with the conclusion but I am a little uncomfortable with the would enhance perceptions of fairness. Because I think from the defense side --

BG DUNN: Right.

BG COOKE: -- the defense basically gets to choose. And from the defense side, oftentimes the panel is viewed as fairer or at least going to give him a better chance.

MEMBER STRAND: Would you change would to could or take it out completely?

BG COOKE: I could probably live with could.

CHAIR HILLMAN: Okay.

MR. FISHMAN: The other thing -- sorry. Just to be clear on the language here, this is obviously very inartfully worded because it was on the fly. But clearly, the military, we would not be establishing

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judge-alone sentencing. It exists. But what we would really be doing is removing or what you are considering doing is removing --

BG DUNN: Removing panel sentencing. That is exactly right and it should be phrased that way.

MR. FISHMAN: Or the phrasing should say should the military mandate judge-alone sentencing or something like that. So, I apologize. We did this on the fly. It is inartfully worded.

MEMBER STRAND: Well, also with comparative stuff, correct me if I am wrong. Is it in the United States, is it generally judges who do sentencing?

CHAIR HILLMAN: Mr. Bryant can speak to this.

MEMBER BRYANT: Yes. Once again, all but Fort Drum, all but five states, so 45 states and the federal government have judge sentencing.

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MEMBER STRAND: Okay, thank you.  
So, it would be entering the mainstream.

MEMBER BRYANT: Yes.

BG DUNN: But now also, I mean I  
would just --

MEMBER BRYANT: I agree that we  
need to do something with that word fairness.  
I agree with that. I am right now strapped to  
think what we need to replace it with but some  
things.

LTCOL McGOVERN: Well, I think  
perhaps the sentence would enhance the victim's  
perception.

BG DUNN: But maybe not the  
accused.

CHAIR HILLMAN: We'll flag it and  
come back to it.

BG COOKE: We could take it out and  
just say would increase. I think it would  
likely increase consistency in sentencing. I  
think that is a fair conclusion.

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BG DUNN: Yes but we also have the issue of all of those military crimes out there that panel members may have a very different perspective on than military judges.

I mean I think when you are dealing with your straight-up felonies, I mean a robbery is a robbery. A sexual assault is a sexual assault across the board. But when you get into desertion and AWOL cases, and time of war, deployments, all of that, boy, you know now you are taking those who must live with that conduct out of the sentencing process.

COL SCHOLZ: And that is probably why it has always been there historically.

BG DUNN: Right. I mean I think that is a pretty big step.

LTCOL MCGOVERN: On the flip side, does anyone have any concerns that we only require two-thirds to convict? And then those people are having to sentence to someone, even if they found someone not-guilty, if they were

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the one-third on the panel?

BG COOKE: I think that is background information that is important to have and hear it. Similarly, because a panel may vote down from various offenses, you could have somebody who is convinced that the guy is guilty of something way up here voting on the sentence as well.

When it is a non-unanimous verdict system, you have got people who could have been all over the lot. I think that is a factor in all of this. It is not necessarily a reason to do away with it altogether.

But I think it is fair to say that judge-alone sentencing would likely increase consistency and reduce, at least, the likelihood of what I will call outlier sentences in either direction, which I think those are unfair. I mean people look at that and say how could this happen that the guy got 20 years or the guy got nothing, without getting

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into the same fairness, per se.

BG DUNN: See, I am not sure that I am convinced on that particular point because if we have 45 states and the federal system doing judge-alone sentencing, then why are there mandatory minimums? Why are there sentencing guidelines? It is to contain the outliers amongst the judges.

BG COOKE: Well, I didn't say that it would eliminate them. I said it would reduce them.

BG DUNN: Would reduce them.

MEMBER STRAND: But I wasn't convinced with what we heard that that fixed anything. If anything, it made it worse, the mandatory minimums and the sentencing guidelines. From what I remember hearing is I had heard that before this mandatory minimum or the sentencing guidelines, if you got three years and eight years way back when, you still did about the same amount of time.

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Now, you get three years and eight years for the same offense and you are going to do significantly different time.

BG COOKE: Well, one the -- when I was mentioned at the judicial conference this morning, they wanted to talk about mandatory minimums. And one of the senators talked about there are mistakes either way. Judges are going to make mistakes from time to time or there is going to be -- and he said but there are fewer mistakes that way than there are if we have mandatory minimums, where a mistake is directed by legislation.

So and it is true. You are going got live with some uncertainty and some mistakes, whatever you do.

BG DUNN: I do think we need to -- we don't have to keep -- I don't want to keep beating this horse.

I do believe we do need to think about those military offenses. And you know

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removing commanders and those who lead in the military from sentencing on military offenses, when it is the accused's choice who he or she goes to -- the accused chooses judge alone or a panel -- I think it is something we should think about seriously.

I don't have too much trouble with the felony offenses. And I understand someone in the system could create some big issues, too. I will just throw it out there.

MEMBER STRAND: Well, if you take the military-related offenses out, sometimes these sexual assault cases include a lot of military violations as well. And so you would have a panel deciding on some of the sentencing and the judge on the other.

BG COOKE: I hear you, Malinda, but I think that you can't separate them out because there is not a way to --

BG DUNN: To go one way or the other, yes.

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BG COOKE: We are going to let these still be sentenced by a panel and these not, then ultimately, I would say it is probably better to just go judge alone entirely.

LTCOL McGOVERN: So, we can address the finding of the validity or the reasons behind having a panel that sentence to address your concerns that these people in a community are judging it. And then see if you are comfortable with that a finding but ultimately recommend judge-alone for consistency.

MEMBER STRAND: But then you have the opposite effect if it is panel on some of these sexual assault cases where they think getting drunk with some gal and taking advantage of her while she is not really paying attention is not necessarily a bad thing where the judge might see it completely different.

BG DUNN: Yes, well that is not the issue. I mean I understand that is the reason for judges sentencing what I call standard

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crimes. I am just concerned about the military. But I think Kelly is coming up with a good suggestion once in a while.

CHAIR HILLMAN: So noted. So, we are going to close this out with the last two questions that we actually have some answers to here. First is about risk assessments. This is based on the testimony we heard in our last meeting about risk assessment, processes that are comprehensive and effective. And here our finding is that these are a useful tool for sentencing and potential rehabilitation and that especially these lower level of offenses that are coming up, we should use them. So, these are -- these have potential to help us. So that is the recommendation there.

BG COOKE: I would only qualify that by saying these are complicated things to develop. And so again, it is a resource issue. We are gathering a lot of data and trying to figure out what is meaningful and what is not.

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I know one of our witnesses here made it sound like he could do it on the back of an envelope, but it is not that easy.

CHAIR HILLMAN: I think we will make it gentle -- so noted. I think we will make it gentle enough. It may also be useful and maybe we should say could be incorporated. Do you want to soften that?

BG COOKE: Yes.

CHAIR HILLMAN: So, recognizing the resource challenge with those. He did make it sound simple and we didn't hear extended testimony on this. But this is partly a sign that we see a need for alternatives here, which is the next question there. Should there be a mechanism to incorporate risk assessment and treatment as an alternative disposition mechanism in cases? And this is really a policy question that doesn't run.

LTCOL McGOVERN: But this is where Lane Borg testified in December defense counsel

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should be using or could use this early on for plea negotiations.

CHAIR HILLMAN: Right. Because part of the challenge here is what the increase and number of reports and cases, the stress on the different elements of the system and the need to manage these through an efficient process that is not always going to be a court-martial.

And then the last one is about unitary sentencing. So, we will close with, why do we use unitary sentencing? We recommended that we not do it.

So, we were searching for rationales for this.

BG COOKE: I think largely it is an efficiency matter, especially when members are doing the sentencing, they could say here is your range and figure it out. This is a lot more complicated to do. And if we did this, it is another argument for finding judge-alone

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sentencing.

MEMBER STRAND: This goes offense  
by offense?

BG COOKE: Yes.

CHAIR HILLMAN: This specific  
sentencing is the part of the trend toward  
specification in criminal law more generally  
that is a part of the modernization of criminal  
law. I mean this is, again, Mr. Bryant spoke  
most on this when we talked about it but this  
is a very unusual practice.

BG COOKE: Well, I mean part of it  
is just history. That is how it has always been  
done. But I think it has been retained --

CHAIR HILLMAN: Because it is  
easier.

BG COOKE: -- in large part because  
it is a heck of a lot simpler, yes.

BG DUNN: But if we do use the judge  
alone, then having a slightly more complicated  
process is not so much -- right --and as long

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as you clearly maintain the consecutive and concurrent discretion with the judge.

MEMBER STRAND: Well, speaking from the law enforcement perspective, if you want to get treatment, if you want to ensure treatment of our sex offenders, give them more than a year in Leavenworth. They will get the treatment.

LTCOL McGOVERN: That is sarcasm.

(Laughter.)

CHAIR HILLMAN: The kinds of treatment we were talking about there are actually ways we really just felt we have seen so many people saying that they are dealing with these lesser offenses that it feels like we need to gesture in that direction because, to be honest, what I am concerned about is a backlash. So, with very harsh punishment of relatively minor offenses on the scale of what run from minor to very serious, I am not suggesting some of those minor offenses aren't serious episodes

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for the targets of their actions, I think they are, but if we do that, I am afraid we are going to roll back the gains in reporting we have seen and misallocate our investigative resources.

So, that is, in part, trying to suggest some correctives that we can put into this report, too.

MEMBER STRAND: But other harsher punishments for those low-level offenses, I haven't seen it. I could be wrong. But I think what I am hearing from the defense counsel is they are winning a lot of them, first of all.

LTCOL McGOVERN: They are put through the process.

MEMBER STRAND: They are put through the process.

BG DUNN: And we have had a lot of -- we did have quite a bit of commentary in the context of sentence disparity and et cetera, about the harshness of some sentences.

MEMBER BRYANT: Well, the panel is

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told what they can sentence on the bigger offenses. So, I don't know why it would be a problem for them to set a sentence for all four charges that they have before them and say this is the sentence that exists here.

And we also discussed this morning how it might clarify the appellate process, too. And if I understand it on some of these appeals, an appellate court if they, in effect, throw out an offense, they can readjust the sentence themselves or send it back to be resentenced. And my question was, send it back to who? That panel is gone. A new panel imposed.

It just seems like we were straightening a lot of issues that may be simplifying, rather than complicating. Simplifying the process by having individual sentences for individual convictions.

COL SCHOLZ: We are all nodding our head in agreement.

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CHAIR HILLMAN: Okay. I think we are done. Anything else we need to do?

LTCOL McGOVERN: Not today.

CHAIR HILLMAN: All right. And I think we already have a way ahead. Thanks to everybody for coming today. I greatly appreciate it. And our staff is doing a great job. I am really grateful for them.

MEMBER STRAND: Round of applause.

CHAIR HILLMAN: We have to do something. Wait, wait.

BG DUNN: Don't go anywhere, Harvey.

CHAIR HILLMAN: This is Harvey's birthday. So, to Mr. Bryant, I think we are going to sing. Are you ready?

MEMBER BRYANT: Oh, my!

(Chorus of Happy Birthday.)

MEMBER BRYANT: Thank you so much. I wish you had warned me so I could have recorded that.

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CHAIR HILLMAN: The committee is  
closed.

(Whereupon, at 4:47 p.m., the  
foregoing matter was adjourned.)