UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

ROLE OF THE COMMANDER SUBCOMMITTEE

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PRETRIAL RESPONSIBILITIES, POLICY AND LEGISLATION ANALYSIS,
SUBCOMMITTEE REPORT DELIBERATION

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WEDNESDAY
MARCH 12, 2014

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The Subcommittee met in Conference Room 150 at One Liberty Center, 875 North Randolph Street, Arlington, Virginia, at 9:00 a.m., Barbara Jones, Chairman, presiding.

PRESENT:

Honorable Barbara Jones, Chair
Major General John Altenburg, Retired
Professor Geoffrey Corn
Joye Frost
Professor Elizabeth Hillman
Honorable Elizabeth Holtzman
Vice Admiral James Houck*
Colonel Lisa Turner

PRESENTERS:

Robert Reed, former DoD Assoc. Dep. General Counsel (Military Justice and Personnel Policy)
Colonel (Ret.) Denise K. Vowell, Chief Special Master, U.S. Court of Federal Claims

STAFF:
Colonel Patricia Ham, RSP Staff Director
Maria Fried, Designated Federal Official
Lieutenant Colonel Kyle Green, RSP Senior Attorney

* present by teleconference

C-O-N-T-E-N-T-S

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

9:06 a.m.

MS. FRIED: Good morning, everyone.

The Subcommittee meeting, the Role of Commander, is now open.

JUDGE JONES: Thank you, Maria.

Hello, Jim.

VADM HOUCK: Good morning.

JUDGE JONES: Good morning.

This is the Role of the Commander Subcommittee, and we're going to open our meeting this morning with presentations on pretrial roles of the convening authority and the responsibilities of the military judge.

And we are very happy to have Colonel -- is it Vowell?

COL VOWELL: A "vowel" like an a, i, o, and u.

(Laughter.)

JUDGE JONES: Okay. Thank you.

And Mr. Robert Reed.

Colonel, you're the Chief Special Master, U.S. Court of Federal Claims, is that right?

COL VOWELL: Yes.

JUDGE JONES: Mr. Reed, former DoD Associate Deputy

General Counsel, Military Justice and Personnel Policy, right?

MR. REED: Yes, ma'am.

JUDGE JONES: Okay. Well, thank you both again for coming.

And, Ms. Vowell, I'd love to hear from you.

COL VOWELL: Okay. I understood from Colonel Ham that what you all wanted me to talk about is some of what a committee that I effectively chaired -- the Deputy Judge Advocate General Dan Wright was the official Chair -- back in 2004.

The Committee was an outgrowth of looking at how the military justice system had not changed against how the Army had changed. And we recognized that, because it's a uniform system, we were not looking just at the Army, but we decided it would be too big a problem to involve the other Services at the initial stages of what we wanted to do or what we wanted to look at. And the idea would, then, be to go out and develop constituencies with other -- talk to other constituencies, the other Services, through whatever channels appeared appropriate at the time.

The military justice system, the Uniform Code, as you all are aware, came into being in the early 1950s, when our jurisprudence system was very different. You need only look at the military commissions that took place at the end of World War II and the military commissions that now take place to see some of those changes.

The next major change in the military justice system came with the Military Justice Act of '68. And it really started the process of civilianizing, or continued the process, I should say, of civilianizing, but, even more than that, judicializing the military justice system.

As a young prosecutor in 1980, the Brigade Commander I worked for, prosecuted cases for, had tried 250 courts-martial in the course of his career. He was not a lawyer. But in the pre-'69 manual, that was a very common occurrence. That level of expertise in the commanders had left the Army by the changes in 1984 and '85.

In 2004, we're looking at a very different Army, an Army that we recognized -- we were looking, also, at how the military justice system operated in the first Gulf War and how the role of lawyers had changed and legal advisors had changed in the first Gulf War, but how we could take a military justice system that was originally designed and predicated on that level of experience that commanders had that no longer existed, and we were not longer likely to have ever again because their jobs were so technical, they didn't have time to learn the nuances.

So, we tried to come up with a system that would also address some of the criticisms that had been leveled against the military justice system more as perception than practice, but by the Cox Commission.

And so, these were our starting points. Our charter from The Judge Advocate General was anything is on the table.

So, what did we look at? Well, we tried to figure out how to preserve the very important command role in military justice. As a former company commander, I understood that role from having experienced it. I am held responsible for what happens to my command, for what my soldiers do. But unless I have the tools to deal effectively with the problems they present in terms of military justice and military discipline, it is much more difficult for me to do that.

And recognizing that commanders play a role in the control of what is essentially a small town or medium-sized town on military installations, but also recognizing that there were problems within the system, that perhaps we thought enhancing the role of a military judge could improve because judges were trusted.

I was surprised when I became a staff judge advocate for the First Infantry Division how much the Commander of the Division and the other staff members I had worked with were impressed by the fact that I had been a Chief Circuit Judge prior to coming to that role. My colleagues in the civilian system, out in the civilian world, my friends, the people I worked with in Scouting and other organizations and churches, how much they were impressed with the fact that I had been a military judge.

So, playing on the trust and respect that judges have in the American judicial system --

COL HAM: If I could say, ma'am, Colonel Vowell rose to be the Chief Trial Judge for the Army for quite a period of time, which is the role you were

serving in when you were --

COL VOWELL: Right. Coming in, the point, I was doing the Commission role. I was, Colonel Ham says, the Chief Trial Judge. Colonel Ham was, then, Lieutenant Colonel Ham and an instructor at the JAG School.

We basically used the JAG School as part of our brain trust. The Criminal Law Division provided two of their brightest faculty members to assist us. The Committee consisted of people with a variety of experiences in the military justice system who had been staff judge advocates, who had been judges, who had been on the defense side, who had been on the prosecution side.

So, we looked at what we could change, and part of it was a practical thing. What can we sell to the Army? What could we sell to the Department of Defense? What would our constituency be interested in? How could we respond to public criticisms?

So, some of the problems appeared to be pretrial. That is, if you are the victim of a domestic assault, the soldier who assaulted you, your spouse, is in a command. To get a protective order, you have to go to that Commander. Well, if he or she who is the Commander knows that boy or girl, that may be more difficult.

So, we tried to look at putting the military judge more in the role that judges might play in civilian life. So, could you go to a military judge and get a protective order, ex parte initially, and then, with a hearing later? That seemed to

make sense.

Well, then, that changed how do you enforce that order as a judge, because, generally, as a judge, the command has to enforce your orders. If I were a trial judge and I ordered the command to produce a witness that was necessary, and the command said, the Commanding General, the convening authority for the court-martial, said no, I could not order that person to be present and enforce that order. But what I could do is say, "Commander, produce that witness or I abate the proceedings; you no longer have a court-martial."

So, building on that sort of produce-or-abate authority, we tried to build in the judges at an earlier stage, at the preferral-of-charges stage, at the time an offense had been committed, and someone needed protection from that offense.

How do we protect soldiers against unlawful pretrial punishment? We had stories of military cases where someone was locked into a cage in the supply room because no one would order him into pretrial confinement. So, how do you deal with that? You can give the soldier credit off his sentence later on if he's convicted, but how do you get him released? Well, you can go up the chain of command to a higher-level Commander, but going to a judge might be more -- the defense counsel involved might be more concerned, more willing to do that, to go to the judge for those.

So, we looked at trying to balance the needs of the Commander to maintain discipline, law, and order in a command, part of the role of the military

justice system, as well as trying to ensure that the other stakeholders in the system, the victims in the system, the accused in the system, have a place to go. And that seemed to us to be the military judge. And so, we looked at how they could play a bigger role.

I have to say that, since 2004, when we made our recommendations to The Judge Advocate General, shortly thereafter, I retired from the Army and I moved to a new job. And while the military justice system has always been a passion of mine, and I for many years chaired the National Association of Women Judges' Military Courts Committee, I am not actively involved in what the sort of sea change that we have been looking at in military justice. So, I can't answer questions about the nuances of that system any longer; the thousands of vaccine claims have taken priority.

So, that's what we tried to do. How do you balance those roles? Do you take the Commander out of the system entirely? I don't think you can and still hold him or her responsible for what happens in that command. So, how do you devise a system that allows certain things to happen?

I know that Congress has stripped commanders of some of their clemency authority. From my personal and private opinion, there are problems with that. I mean, I came to being a staff judge advocate from being a military judge.

And one of the first things I did with my Commanding General was recommend that he disapprove the findings of a court-martial. And it was a

situation that was unusual, but the kind of situation that those powers were built for. And that is, a soldier had requested assistance from her command on a number of occasions, indicating that she was stressed, she was overwhelmed, she needed helped. And what they did was pile more work on her. And eventually, there were a string of absences without leave. She was a fairly-senior noncommissioned officer, an E-7.

The military judge who heard the case, judge alone, when she pled guilty, said for the first time in his career he was adjudging a sentence of no punishment. I knew the judge. I respected the judge. And although I had not been the staff judge advocate who participated and recommended that that case go to trial -- it was my predecessor -- I asked my chief prosecutor to bring me the record of trial.

I read the entire record of trial, and I went to the Commander and said, "Sir, I think you ought to disapprove the findings. The judge was sending a message, and we rode this woman hard and put her away wet, and we should not have done that." This was a command failure as much as it was the soldier's failure.

So, we now have a system where the commanders may not have that authority. I think that's unfortunate.

I also recognize that the difficulties that have ensued from commanders who made decisions that were against the advice of their staff judge advocate. And one of the things we put in was a concern about, if you don't accept the legal advice of your staff judge advocate, then you may have to go higher to get the

approval to take care of the problem.

I welcome any questions you might have. I did not prepare more formal remarks because it's been a very long time since I had even -- I know that Colonel Green and I and Colonel Ham were trying very hard to find a copy of that study somewhere. I had lost it in several moves since I retired.

JUDGE JONES: Can you speak to what powers military judges actually have today?

COL VOWELL: Yes. A military judge's authority only comes into being when a court-martial is -- a case is referred to trial. It is the referral process that creates the entity known as the court-martial.

And at that point, the military judge has authority over the case. Now there are some limited authorities that might be exercised in terms of supervision of military magistrates to whom search authorizations or search orders are presented, and they can be presented to judges as well.

What we were doing was walking that one step backwards. When charges are preferred, when a soldier -- essentially, the indictment or the information, in civilian parlance, would be issued. And even earlier than that, should there be an offense committed and the victim of the offense needs some sort of protection or redress, and that's what we were trying to do, was to create that situation.

Because we had all seen cases where there were problems early on, and if you had the judge involved early on, you were not going to be having a

soldier who was locked into the supply cage for a week or two, because nobody wanted to put him in pretrial confinement or couldn't get him into pretrial confinement. Or who the victim of a serious criminal offense, physical assault and kidnapping and attempted murder -- one of my cases involved two soldiers married to one another.

And the husband greeted his wife at her return from a deployment by beating her up. And she did everything right. She went to the Commander and got a protective order. She went to the local judge and got a protective order, but, nevertheless, was kidnapped at knife-point and later gun-point, and driven from Newport News to a rest area in Ohio, where she finally managed to signal someone in a bathroom of her predicament. And a high-speed chase ensued.

I don't know that having a judge involved in that case earlier on would have had a different result. But she had a place to go because she was the respected soldier in that command; he was not. When it is the wife who has been or the spouse who has been sleeping around, dealing drugs, and doing other things on the side, while the other spouse is deployed, it may be less easy to get the Commander to do what the Commander did properly in this case.

He moved the soldier into the barracks. He found another place for -- the male soldier into the barracks, found another place for the female soldier to live. It still didn't protect her sufficiently.

And we're never going to have a system that protects victims

sufficiently because we're people and it's a flawed system, and we make predictions, based on what we think is going to happen.

PROF. CORN: I have two questions.

JUDGE JONES: Yes, go ahead.

COL VOWELL: Sure.

PROF. CORN: Does a military judge have contempt power?

COL VOWELL: The military judge has contempt powers.

And, Patty, did any of that that we wrote get into effect?

COL HAM: Yes. In fact, the panel members do have the study. As they review it, you can see some -- actually, quite a few -- of the recommendations have come to pass on their own.

And one of the primary recommendations was to revamp the contempt power of the military judge, which has happened. It's still not --

COL VOWELL: As robust as we wanted it?

COL HAM: -- don't believe, equivalent to a federal judge or a state judge, but it has increased.

Prior to the changes that took effect, there had to be a -- I'm trying to remember the -- there had to be a real ruckus caused in the courtroom, a disruption in the courtroom, in order to act, not just a failure to follow a judge's order. Now I believe it covers a failure to follow a judge's order.

The remedies are --

COL VOWELL: Still very difficult? Yes.

COL HAM: -- less than perhaps --

PROF. CORN: Okay.

COL VOWELL: We were looking more for creating the fine, so that you could say, "Get out your checkbook because you failed to follow my order," rather than trying to send someone to jail for contempt.

And one of the things we proposed was taking Article 98 -- no prosecutions had ever been performed under Article 98 that we could turn up. But did you guys ever turn anything else up?

COL HAM: I think there was one where it was preferred, and then, it ended up not going to trial.

But Article 98 was central in the formation of the Code, as it allowed prosecution for violating the procedures set forth in the Code. It was seen as central to the enforcement mechanism of the Code, but it has never been used.

PROF. CORN: That would not cover a civilian who was -- does a military judge have contempt power over civilians?

COL VOWELL: Yes, if the fray or disorder occurs in the presence of the court-martial, but I don't think it has ever been effectively used. And that was another reason why we wanted to be able to levy fines rather than send people to jail.

And it's one of those areas of the Code where the Code would say

not just any person subject to the Code, but any person who in the presence of a court-martial.

PROF. CORN: So -- I'm sorry.

PROF. HILLMAN: Sorry. Just to point out Article 98 -- it actually came up yesterday -- it has been used or threatened to be used at different points in time. So, it's not completely a dead letter, right?

Anyway, sorry. Go ahead, Geoff.

PROF. CORN: Two other questions. First, you touched on the clemency authority --

COL VOWELL: Right.

PROF. CORN: -- and the appeal of the clemency authority. The convening authority also has the power to order a post-trial rehearing, correct?

COL VOWELL: Could order a post-trial rehearing. I think there are some limitations on the circumstances under which that is done. But, yes, could order a post-trial.

But, if that is perceived by appellate courts as saying we're unhappy with the result of the court-martial or we're unhappy with the result of sentence, go back and do it again, I mean, that's what we were trying -- the earliest cases out of the Uniform Code really involved commanders trying to do that. "I don't like your findings. Go back and convict."

So, you can't do that. Now whether you could go back and

make the sentence lighter -- another way to perhaps look at this is, in a civilian system, you've got a small town and there is a drug ring, and you try Mr. Jones. And Mr. Jones is convicted. And Mr. Jones, then, provides information that is about a much bigger drug conspiracy or drug operation. But, in exchange for that information, he wants his sentence set aside and he wants to be put in a witness protection program.

You can't do that in the civilian system. I mean, you have to go to the judge, but there are procedures in most state codes where you can go in and file something that as part of an agreement.

You can do that any longer in the military justice system. You couldn't set aside that finding, should it be a sergeant and the heroin ring that I defended soldiers from in USAREUR Headquarters in the late eighties.

PROF. CORN: So, that surprises me. I'm not aware, I certainly wasn't aware that there are procedures in state law where a judge can set aside a finding of guilt.

COL VOWELL: A conviction. There are some states where you can do that. I don't recall right off the specifics. I know we looked at something along those lines.

But you could, and there are procedures, and it may be that you didn't even set aside the finding, but you would set aside all sentence and put the guy in the witness protection program, because he had just busted the drug cartel that had been supplying half of the West Coast.

PROF. CORN: And then, my last question, from your perspective, what justification is there for not empowering a military judge prior to referral to resolve issues related to discovery, privilege, witness production at a pretrial hearing, pretrial confinement? And I recognize that that's what you were exploring, but, from your perspective, is there any legitimate reason not to be considering expanding the role of the military judge to that?

COL VOWELL: Nothing other than history --

PROF. CORN: Okay.

COL VOWELL: -- and the way courts-martial have historically been convened. I have often said that I thought the biggest backhanded compliment to military judges was that the first military commission rules tried so hard to emasculate them.

JUDGE JONES: Yes, sorry, Liz. Go ahead.

MS. HOLTZMAN: I just wanted to follow up on that point because it occurred to me as well about creating judicial powers before the preferral. And aside from history, do you see -- which is the negative; it has never been done before, okay?

COL VOWELL: Right.

MS. HOLTZMAN: What's the positive?

COL VOWELL: I think the positive is that you get someone who has been -- military judges are selected by The Judge Advocates General of each of

the Services. That is a process that I think has worked extremely well because at least in the Army -- and let me just speak to the Army because that's what I know.

When General Tom Romig convened this panel, this study that I participated in, retired, I commented that his tenure as TJAG and my tenure as the Chief Trial Judge overlapped completely.

The only two questions he ever asked me were, "Do you have enough military judges?" and "How many courts-martial have we tried in combat theaters this year?" No effort, no effort of command influence, nothing.

I had six of my military judges at one point above the fold of the front page of The Washington Post involving high-profile cases. When President Bush ordered Abu Ghraib, commented that he thought Abu Ghraib should be torn down, Judge Jim Pohl the next week ordered it preserved as a crime scene.

The Army took many steps, and they certainly could have taken many more, but many steps to ensure the independence of military judges. And one of them was to ensure that all military judges were tenured. That is, when you were appointed as a judge, you had a three-year term. That was a compromise. It could have been a four-year; it could have been a two-year, but you knew you were going to be a judge.

And the only time -- I had one military judge that was being considered for another job, probably not a job he would want. I was contacted by our Assignments Office and asked, "How about if we move Colonel X to this place?"

And I said, "Colonel X just handed down a sentence in a very high-profile case that could be perceived as very light. Don't do it. It will be considered unlawful command influence."

And I don't think they were even aware of that sentence that he had just handed down. And they said, "Oh, okay. He's off the table."

So, military judges are military officers. They have military careers. But they are generally picked at a point in their career where they are lieutenant colonels or colonels. They're going to retire, regardless of what they do as a judge.

We tried very hard to ensure that our judges were competitive for promotion and considered for promotion. And I know there were some procedures that allowed those judges to be -- there were some proposals that would have put judges on a different track, that would have done different things.

But I felt, as the Chief Trial Judge, that it was important to bring people into the judiciary who stayed as judges for their entire career from the time they became a judge and others who went in and out. Because the experiences I had as a staff judge advocate, going from being a judge to being a staff judge advocate, doing a couple of other small -- going to school and running a claims program for a year, and then, coming back as an appellate judge, and then, becoming the Chief Trial Judge, were valuable experiences for the judiciary because I had an insight into how commanders thought and some of the problems.

And being an appellate judge after being a trial judge gave me insights into the system and what might have happened. And once I got over the concern that abuse of discretion didn't mean I wouldn't have done it that way, it meant no reasonable judge would have done it that way, and I did that very early in my appellate judge career.

But I think that having military judges involved will involve some both statutory and regulatory changes. We will have to create essentially standing courts for the military, and that's something we have never had before. We have standing circuits, for example, and again, I'll speak to the Army.

The world is divided into six judicial circuits, and there is a Chief Circuit Judge in each of those circuits, and they're responsible for a geographic area. When I was the First Circuit Chief Judge, I was responsible for Panama, Puerto Rico, and Virginia north to the Canadian border and west as far as Ohio.

So, any Army court-martial in that jurisdiction, when the charges were referred to trial, came to me. We would have to create some system by which the Commander at Letterkenny Army Depot in Fort Drum, New York, would have a place to send preferred charges, so that the military judge would be notified of them.

We might have to create more powers for the military magistrates that exist at each installation who work under the dual supervision of a military judge and their local staff judge advocate, but who cannot be disciplined for the roles they play as military magistrates.

So, they tell the Commander, "You can't put this soldier in pretrial confinement." No adverse action by regulation can be taken against the military magistrate.

MS. HOLTZMAN: Just a followup?

COL VOWELL: Sure.

MS. HOLTZMAN: Again, to be more concrete -- I don't know whether I want to take the time of my colleagues; maybe you could answer this at a subsequent point -- but I was very troubled to find that, before the court-martial itself is convened, that discovery by defense counsel has to go through the prosecutor.

So, I am just trying to get from you an analysis and a sense of how the system would be improved in terms of overall fairness and efficiency and helpfulness to the victim by having magistrates or judges involved in an earlier point. I mean, now what's happened, for example, with the Article 32 hearing, where people said, "Oh, my God, you know, this is being run by people who are not expert," well, now we have a staff judge advocate. Wouldn't it be better or would it be better to have an actual judge supervising those hearings, as exists on the civilian side?

So, I don't know whether, Barbara, we have time for this answer.

JUDGE JONES: I think so.

COL VOWELL: Let's just deal with the Article 32 first because that's the easier part. In some Services, the Article 32 officer is almost invariably a judge advocate.

MS. HOLTZMAN: Well, now it has to be by law.

COL VOWELL: Yes. Right. Yes.

And I think having a judge advocate in that role is probably adequate because what comes out of that is going to go to the judge anyway. And if the judge determines that there is a problem with it, then the judge could fix it.

Could you make that person a military magistrate? Yes, you could.

PROF. CORN: Can I tail onto your question? If Congress or the President were to empower the military judge to become involved in cases at the point of referral, what rationale is there to retain the Article 32? Why not just use the military judge at that point to do a preliminary hearing? Because the statutory change makes the Article 32 now a prelim because its only function is to assess probable cause.

And it seems to me that, once we say the judge can get involved in issues like discovery and pretrial confinement, why are we going to have a separate judge advocate do the preliminary hearing?

COL VOWELL: I think the rationale for having commanders or line officers do Article 32s from the very beginning was that they were the people who were actually going to be the jury, the panel, who was going to hear the case, and they looked a lot like those people. And that, therefore, they would bring that perspective to the case. Could it be won; could it not be won?

I think the system has changed, and that it is an appropriate change, and maybe the Article 32 should go away. The Article 32 has many advantages for an accused soldier over the grand jury investigation, not over the preliminary hearing.

PROF. CORN: Right.

COL VOWELL: It's very much like a preliminary hearing.

Part of your question was the discovery issues. Generally, usually, most of the time in the military justice system, I think having the prosecutor provide the discovery to the defense has worked. There have been very few cases where there have been concerns about the exculpatory material not getting to the defense, and there have been methods to handle those.

I spent three years as a defense counsel, a senior defense counsel, supervising four other defense counsel in an area of Germany in the late eighties. And I recall only one case where either myself or one of the officers who worked for me did not get full discovery at the beginning.

And I walked into that trial counsel's supervisor's office and said, "I'm giving you the courtesy of telling you I'm going to move to recuse her from the case. And I hate to do that because she's the best thing I've got going for me in this case."

But it didn't happen very often. But having a place where you can go, as the defense counsel, to say, "I don't think I've gotten all the discovery I'm

supposed to get," or to resolve those disputes, I think having the military judge or the magistrate involved is a great idea.

MS. HOLTZMAN: Isn't it a problem, though? Even the request for discovery can give all kinds of insights into the defense strategy and even into defense issues? I mean, it could suggest the possibility of even incriminating evidence. I don't understand why you would want to preserve a system where that is shared with prosecutor as opposed to having -- maybe I'm missing something. But, to me, it's quite extraordinary.

COL VOWELL: No. Yes, I guess it's because I've grown up in the system, and that, as a prosecutor, I was told it's open files; you give everything you have. You give everything you have to the defense. That is the culture that exists.

And if you don't get everything, then that is a place where we wanted to bring in the military judge contempt powers, to be able to sanction that trial counsel. And believe me, if you tell the trial counsel, "Get out your checkbook and write $500 to the United States Treasury," that word is going to get around to other prosecutors. It's not going to happen very often.

COL TURNER: And we're talking about a culture where there is also liberal open discovery.

COL VOWELL: Yes, it is very open. In fact, there have been places where we put everything we get into this file. We keep our notes to ourselves, as a prosecutor. Defense, you can come and make a copy of that file anytime you

want, and I will provide you -- and it's a continuing obligation.

But I think having a place to go when there are the disputes -- so, I didn't have to go to that trial counsel's supervisor; I could have gone to the military judge. Now that would have ruined her reputation, but at that point I didn't care because I had a client who I was convinced was not guilty of the offense. And all of the exculpatory material had been withheld from the Article 32 officer, who was not pleased when he learned that, either.

JUDGE JONES: Professor?

PROF. HILLMAN: Maybe I will defer and we'll hear from Mr. Reed. I can bring this point up later.

We just heard from a lot of defense counsel who have different perspectives on how the discovery process plays out through the trial counsel.

JUDGE JONES: All right. Geoff, did you have another question?

PROF. CORN: I did, if you will indulge me.

Does a military judge have broader compulsion power in discovery than a trial counsel? I have been told, for example, during the Hasan case, that in the pretrial phase the prosecutor only has the ability to demand files from Army or maybe DoD organizations, but the military judge would have authority to compel production of files held by other government agencies. Is that accurate?

COL VOWELL: I really can't answer that question. I know as

a trial counsel, sometimes when I was trying to get information, that I would be stonewalled or stymied by commanders. I think those commanders would be less likely to respond similarly to a military judge.

PROF. CORN: So, that would be --

COL VOWELL: But, in turn, if I wanted to get information, for example, from Homeland Security as a military judge -- okay, look, in my current job I have a hard time sometimes getting Kaiser Permanente to cough up individual's health records. And I've threatened to go out and hold my own hearings with subpoena duces tecum because of their recalcitrance. So, I don't know how much a military judge's order would affect trying to get documents from Homeland Security. I really can't answer that.

COL HAM: They faced those issues in the Abu Ghraib case because they had to get documents from the CIA and others. And I think they resolved it, and the judge did not have to act.

The military judge certainly has the authority to issue writs of attachment --

COL VOWELL: Right.

COL HAM: -- for both people and documents.

PROF. CORN: That a trial counsel could not?

COL HAM: Trial counsel cannot, that's right.

PROF. CORN: Right.

COL VOWELL: Whether they would be honored is another story.

PROF. CORN: I understand, but, I mean, that would be a clear benefit of allowing --

COL VOWELL: Sure.

PROF. CORN: -- a judge to make discovery orders prior to referral.

COL VOWELL: I think it would be.

PROF. CORN: And then, the other question is -- well, two more, I think, relevant questions.

No. 1, you say you think you would have to create permanent courts. And there have been discussions about it. Why couldn't a circuit military judge just detail one of the military judges to a case upon referral, the way they do upon preferral?

COL VOWELL: Upon preferral. Oh, yes, I think you could. I think you could do that.

PROF. CORN: So, it's not --

COL VOWELL: But the idea is that -- Letterkenny Army Depot does not have --

PROF. CORN: A sitting court.

COL VOWELL: -- a sitting judge. But if something happens

at Letterkenny Army Depot or Carlisle Barracks, where do they go? What do they do?

PROF. CORN: But, I mean --

COL VOWELL: You would have to say the places --

PROF. CORN: Sure.

COL VOWELL: -- that those charges would go, and you would have to do that by regulation, I would think.

PROF. CORN: But, if you were sitting as the Chief Judge at Fort Hood, and you had three judges working for you, you could also just say all pretrial issues coming out of Fort Bliss go to this judge, and all pretrial issues coming out of San Antonio go to this.

COL VOWELL: Yes.

PROF. CORN: I mean, it's not essential that you create standing courts to do this, is it?

COL VOWELL: It is not essential to create standing courts, but, effectively, you have some way to give them -- you have to do a statutory change --

PROF. CORN: Okay.

COL VOWELL: -- or a regularly change at least that would give military judges that authority early on. I think you would have to do a statutory change, then, follow it up with however the military Services divide things up.

The Air Force, for example, judiciary has three locations for their judges across the entire country.

COL TURNER: Yes, they have splintered their --

COL VOWELL: They've splintered more? They've splintered more?

We tried to consolidate the Air Force model and decided it didn't work, that we artificially impacted the caseload if we didn't have military judges.

COL TURNER: Well, that is because you have different installation sizes and locations than we do.

COL VOWELL: Yes. Yes.

COL TURNER: You present your forces differently.

COL VOWELL: Right.

MS. HOLTZMAN: I just have one question.

JUDGE JONES: Yes, Liz.

MS. HOLTZMAN: Thank you.

It is sort of a totally different subject, although you did raise it in your testimony. The selection of jurors by the Commander --

COL VOWELL: Yes.

MS. HOLTZMAN: -- could you address that? I mean, what is the benefit of that to the command, to good order and discipline? What are the problems with that you see?

COL VOWELL: The problems --

MS. HOLTZMAN: Should the system remain?

COL VOWELL: Okay.

MS. HOLTZMAN: Should it be touched?

COL VOWELL: Yes. The problems that exist, I think, are more problems of perception. But if you have a venal or an evil person in command, you can have bad results from the juror selection.

I recommended, the panel recommended, the Committee recommended that we move to a jury pool that would be screened in accordance with the criteria for selection of military judges and that, then, people could be randomly selected or that panels could be randomly selected from that to which cases could be referred.

MS. HOLTZMAN: I don't follow.

COL VOWELL: Okay.

MS. HOLTZMAN: Who selects these people?

COL VOWELL: All right. This is what we do.

MS. HOLTZMAN: How do you pick these panels?

COL VOWELL: Okay. Here are the criteria. You look at the Article 25 criteria and you say, age, training, military experience. And you say, okay, I want people who have at least three years of military experience because that's the point at which they've gone beyond their initial commitment for the most part. I want people in --

MS. HOLTZMAN: And who's saying "I want"?

COL VOWELL: Okay. Either the staff judge advocate or the Commander or you do it by regulation.

MS. HOLTZMAN: I see. Oh, okay.

COL VOWELL: You can do it any of those ways. So, every time someone is assigned to Fort Swampy, they get screened. Every person who is assigned to Fort Swampy gets screened. And if they meet the criteria -- so, for example, no court-martial records; they must have at least a secret security clearance, whatever criteria you choose to use, or you are permitted to use, that comply with the criteria in the Code.

Then, they go into a pool, and then, you draw numbers. The case referred to trial is that of a staff sergeant. Everyone who is an E-7 or above goes into the pool, and you pick however many panel members/jurors you need. And they become either a standing panel for a period of time, six months, for example, or three months, or they become a panel just for that case. And then, they hear the case.

MR. REED: Well, the majority of panels under the current rules are officer panels at the beginning, the conception of the case.

COL VOWELL: Right.

MR. REED: Unless the accused requests enlisted, and then, you get into the E-7 over the E-6 scenario.

COL VOWELL: And we would change that.

MR. REED: So, part of the problem is, when you eliminate the entire enlisted force at a military installation and start off with a limited pool of officers only, and try to put panels together with officers only, I can tell you from my experience in the Air Force that you have probably 75 percent of the people on the military installation are pilots. They're flying the line. They're gone for three weeks. They have crew rest requirements which require them to be exempted from additional duties. So, now your pool is even shrunk further of possible eligible appointments.

One of the benefits of having an ad-hoc assessment is you go out and you find out whether Major Smith, Pilot Smith, is going to be around for the next 30 days and what is his likelihood of being available for the next 30 days, so he can sit on that. So, you don't get into this turmoil of taking people off, putting other people back on.

I've worked it that way with panels. When I had a large drug bust, I worked it with panels. I've worked it individual. And I can tell you, at least from my experience in the Air Force, most of those panels are put together by the staff judge advocate's Office with the great assistance of the NCOIC of Military Justice who goes out and gets the preliminary information about the officer corps available, finds out about their personal availability, whether they've got any issues that would preclude them from being available for 30 days.

Because as the judge knows, and most people know, when you get a case preferred, it could be four months before you get to trial. Even when you

refer a case, you could go through multiple delay requests which changes that officer's availability of January to now he's got to be available February, March, April, whenever you get around to the trial itself.

So, the benefit for the Commander is not only does he use the Article -- or for really the Air Force, my experience, the judge advocate. So, he uses the Article 25 criteria to determine that, but he is really constrained by availability.

It is not like a civilian; you go pull people off the voting rolls to be the jurors. You have a limited amount of people available to do your cases. If you only have one case or two cases, you know, that's not a problem usually.

But if you have a series of cases where you've got to worry about conflicts or whether they will know too much, like on a drug bust, whether people on one jury are going to know too much about the case, so they can't sit on the next jury, things like that, you have to take that limited pool of people and make it available.

Now, when I was first starting out in this business, I can tell you the Wing commanders essentially excluded all their pilots and navigators from jury duty because of the availability problem.

And I had to go to my Wing Commander and I said, "This is unacceptable. We can't have all these jurors being empaneled with the president, the doctor at the head of the hospital, the supply squadron commander, the maintenance squadron commander, or these other people."

The other thing you try to do in a jury pool is you try to get a

spectrum of the officer corps. You don't want five-seven jurors that are all full colonels and nobody less than that. You want to get a spectrum of colonels, lieutenant colonels, majors, captains, and lieutenants that meet the Article 25 criteria, so that you get a broad spectrum of decisionmaking process that takes place during the deliberations and decisionmaking of the panel.

So, a pick-out-of-the-hat system is not going to solve this flux that you have in the jury system, because you're always going to have to change the panel. You're always going to have to have additional people.

It can be worked, because I've worked it before. But it is not going to work everywhere across the board.

And one of the things about rule changes that we all need to remember is that what's good for the Army may be terrible for the Navy and the Marines, and the Air Force is right in the middle between the two.

So, when you start making rules, and you start legislating changes which are of the magnum size, you have all these five Services that are in the room trying to argue, "Well, that won't work for me."

I mean, I don't know how many times we've come up with rules and proposed changes where the sea Services say, "That's just not going to work on a ship, even a battleship, or an aircraft carrier." And so, we have to make exceptions to the rules to accommodate the sea Services to get into the game with all the other land Services, such as the Army and the Air Force, et cetera.

So, good ideas, don't dismiss them. But when you look at an idea, look at it from the guy that's the Marine, the guy that's the Army, the guy that's flying the airplane, and the sailor that's out at sea.

And then, in addition to that criteria, look at, is it the same at Charleston Air Force Base in South Carolina as compared to somebody who is deployed to Afghanistan and Iraq at an austere location where the officer corps is even less and, if you're going to take those officers and make them available for jury duty, if you will, you're now impacting the fighting force available at the tip of the sphere. Now who makes that decision as to who is expendable at the tip of the sphere? Should it be the judge advocate? Should it be pulling the name out of the hat? Or should it be the Commander whose responsibility is to execute the war?

Those are all things that go into this equation that goes a lot more than just writing what appears to be a motherhood-and-apple-pie, bright-line rule, and then, you get beneath that veneer and you start saying, "Well, how is this going to work? How is this going to be applicable? How are the Services going to implement this uniformly, so that we maintain a Uniform Code of Military Justice?"

So, those are the factors that come into play as we get there. Individual cases, individual circumstances, you probably can do it. And I'm telling you, I've done it. But to mandate that across the field under all the circumstances and the variations that we have, people need to give second thought.

And part of the problem, historically, has been it sounds good, it

looks good; let's implement it. We'll think about how it takes place later.

And that's part of the problem with the legislative process. And I don't know how many times I've had discussions with Congress and discussions with Members of Congress to say, "Slow down. Think about what you're doing. Give us the time to give you the input from the various Services, so that you have this broader perspective before you mandate a rule."

And they say, "Well, I'm sorry, we can't do that. We have a legislative cycle. We've got to be there by March. If you don't give us the response by March, and I realize it's November, but if you don't give us the response by next March, we're going to do it anyway."

Well, how bad do you want it? That's how good you're going to get it.

(Laughter.)

COL VOWELL: I would say a couple of points here.

First off, we have to look at how cases get referred now versus how they could be referred under a different system. When I go in to my Commanding General with a case and say, "General, I recommend you refer this case to General Court-martial Panel A," there are a list of officers, as Mr. Reed has said, on Panel A.

And how did they get on Panel A? They got on Panel A because the staff judge advocate went out to all of the tenant units and all of the

commands on the installation and said, "Nominate people for service as court-martial, and I need you to give me two majors, two lieutenant colonels, three captains, and five noncommissioned officers in from this unit."

And then you go to the other units. And you take into consideration, when you go to the units, what they have available. And so, that way, the command specifies what people are available for courts-martial.

MR. REED: And I would like to piggyback with you on that because this is important. When you go out to the Commander and you say, "How many of your officers are expendable, so he can sit on the court-martial in the next couple of weeks," they say, "Geez, I'm already being asked to do more with less. Now you're taking my less and making it least." And I say, "Well, you know" -- so, now you've got the staff judge advocate arguing with the Commander about the availability of his people.

And I had that situation happen to me when I had that drug bust and had other cases. And I went up to the Numbered Air Force Commander, and I got a letter from the Numbered Air Force Commander down to every Wing Commander in his command saying, "Look, jury duty, court member duty, is an important military function. You will make your people available to serve on that."

COL VOWELL: This is a tasker, just like the tasker to produce two people to serve as --

PROF. CORN: Is that in the Code?

COL VOWELL: -- prisoner escort or --

PROF. CORN: Is that prioritization of effort in the Code or in the Manual?

COL VOWELL: Those go out under, those letters go out under the authority of the general court-martial convening court. So, it's not --

PROF. CORN: I understand, but I'm just curious. Does that --

COL VOWELL: No.

PROF. CORN: -- emphasis on priority of duty appear in the Code or in the manual, that if you are requested for court-martial duty -- because we know that that's a common admonition from convening authorities and military judges: this is the most important duty.

MR. REED: It is no more, I don't think it's any more in the Code than it is if you're called for jury duty and everybody scrambles trying to find an excuse why they're not going to pull jury duty. And they excused because "I'm a" this, "I'm a" that, "I've got this," and whatever. They try to get out of jury duty.

COL TURNER: The Code just talks in Article 25 about eligibility --

COL VOWELL: Right.

COL TURNER: -- not prioritization.

COL VOWELL: It doesn't put mandatory.

So, to get that pool of people, you put them on a panel. The case is referred to Panel A or Panel B. If the accused requests trial by enlisted members and the accused is an enlisted member, it can do so. And then, you substitute some of the officers off automatically and put enlisted members on. And there is a process by which commands do that.

The people who are actually selected are currently selected by the convening authority personally; puts a checkmark next to the name, initials. And I've had my CG come back and say, "There aren't enough women on this list. I want more women." Or "There aren't enough" -- you know, "Who put this guy on? He's got a problem." But the way you would do this --

PROF. HILLMAN: I'm sorry, that is just an example of why this process still gets challenged.

COL VOWELL: Right.

PROF. HILLMAN: Because there is such --

COL VOWELL: It's perceived --

PROF. HILLMAN: -- discretion that's embedded in the process and because the rules that govern its implementation are not in the Uniform Code of Military Justice, which we have had since 1951, not Articles for the Government and Navy and Articles of War, but that Uniform Code.

COL VOWELL: Right.

PROF. HILLMAN: So, this sort of very discretionary process,

where individuals are plucked and, then, erased and moved around, that's exactly what raises this question about whether we're getting fair process here. And what we have is a balance between the members who are a critical part of the system that Congress set up under the UCMJ, but the members have other military duties. It's absolutely right, they're not only members.

The convening authority, who also has other military duties and is deferring to the staff judge advocate about how to manage that process, because the convening authority can't spend all of her time on military justice matters, right? Clearly, she's running the Army, whatever else she's doing on the ground. You know, there are lots of other things to do. And then, the military judge.

In some ways, what we're talking about, the military judge is the one sort of decisionmaker in this system who doesn't have a conflict --

COL VOWELL: Doesn't have a --

PROF. HILLMAN: -- in terms of that role in the process, in terms of the authority.

So, we're talking about expanding that, the role of that military judge, and that's really what the questions run to. Who the members are certainly matters, but the military --

MR. REED: The judges still excuse members based upon conflicts between military duties and the court-martial duty as the trial date actually gets solidified.

COL VOWELL: Or because they appear to be prejudiced one way or the other.

PROF. CORN: But so does the convening authority.

MR. REED: Right. Right. The convening authority can do the same thing. And then, they put a panel together to get started, if you will, with the process. Because trials get delayed and circumstances change, and the members that are reasonably available in January aren't reasonably available in February, for whatever reason. Or, all of a sudden, you've got your officer that's on the thing, and you've got an inspection coming into your place the exact month of the court-martial. And this guy is the key to make sure that the military operation is displayed to the inspection team.

So, he wants to substitute another lieutenant colonel, not because he has evaluated his judicial temperament in the point that he's going favorable to the defendant or to the accused. He doesn't care about that.

COL VOWELL: Right.

MR. REED: He wants this lieutenant colonel to be there for the evaluation team that's coming in. He'll give you another lieutenant colonel which he doesn't care whether they think about the accused or the victims or anything else, either. He's looking to plug-in bodies that are available to spend two days of their time from 7:00 in the morning or 9:00 in the morning until eight o'clock at night, Friday, and sometimes on the weekend, on Saturday, to do this, in addition to his

normal job as the supply squadron commander.

I don't know whether a military judge who's living in a circuit office four states away, handling other cases, can make that same appreciation as the Commander where this guy works.

COL VOWELL: Well, he's usually doing it at the court-martial itself.

There are two points here. One is that the biggest -- I think the way the system operates generally, usually, most of the time, in fact, the vast majority of the time, is fair and impartial, and nobody is stacking the deck. But the public perception is that this is a bad system.

And you know, you do not have to refer a case to a standing panel. In other words, we could change the rules to say the case is referred to a general court-martial. That is the level of referral. It is not the specific individuals who are going to hear the case.

And that you create the specific individuals in a process or you may draw names from a hat, and people can be excluded from the hat by operational necessity, by the act of their Commander, by the fact that they're on maternity leave, by the fact that something else is happening or that they know the accused. You can work a system that will do that.

Our charter was to come up with a system you could do in a deployed environment. And I think you could do it in a deployed environment. It

may be there that everybody's name goes in the hat, and you pull out names. And if there is a reason to exclude someone, you present that reason to the military judge or to the convening authority or to the magistrate, however you work it. You still have a system where everybody with the requisite qualifications is in the hat. And then, you exercise command authority to say who can be taken out, and that a reason has to be provided.

And that reason is that the inspection team is coming or he's due to fly three missions or he just got home on compassionate leave. You can make it work.

MR. REED: Or he is going down the missile silo for the next three weeks.

COL VOWELL: The next three weeks.

You can make that work.

I will say that, as a young lieutenant, I was put on two courts-martial panels, and it's probably why I became a judge advocate.

JUDGE JONES: Go ahead.

COL TURNER: And this may be a premature question. But when we're done with this piece of the discussion on member selection, particularly for other panel members, I wonder if we could also hear from Mr. Reed on the other pretrial and post-trial aspects; reducing the convening authority, increasing a judge, for example, as Professor Corn talked about; pretrial confinement; production of

witnesses; privileged discovery, and then, the post-trial aspects of the legal sufficiency review.

I don't want to -- if there's still questions on this particular --

MR. REED: From my experience, the answer is you can do that. But after you say that word, now you say, "Well, how do we do that?" How many judges will we need to answer the midnight call for a search-and-seizure warrant? Now that, typically, is handled by the staff judge advocate Office on behalf of the Commander who has authority to authorize a search warrant there at the installation.

COL TURNER: So, you have a pragmatic concern --

MR. REED: I have pragmatic concerns. It can be done. But here we are; we're downsizing. We're cutting funds for all the military departments. People are doing without, doing more with less.

So, if you ask The Judge Advocates General, okay -- I don't know how many judges you had in the Army -- but the corps of judges, the experienced judges you have, and you make them responsible for all the issues that could possibly arise west of the Mississippi River to a segment of judges, in addition to handling those issues, usually telephonically, you would have to be doing that, obviously, for pretrial motions in every case that's handled out west of the Mississippi.

You also have to have funding because they need the increased admin support to support them. They usually only have maybe one administrative NCO or maybe two at a circuit office serving the needs of six or seven judges that might

be assigned to that office.

So, from a practical standpoint, I think you can do it, but you need to recognize that Congress in most cases wants you to take it out of current funds and your hide. They are not going to give you additional funding. They are not going to increase your manning levels, your authorizations, if you will, for this additional duty.

So, you have to decide, okay, you know, how many of these pretrial issues that a defense counsel is going to want to tap that judge for are you going to get?

COL TURNER: But what about the policy level? Should you -- not can you -- but should you at a policy level?

MR. REED: I don't have a problem with some of the pretrial motions. You could do it with discovery.

Let me answer your question, "Why do you go through the trial counsel?" You go through the trial counsel because the defense usually wants information that's in the control of the government. You need a government official to get access to that.

Not everything that you do in a discovery mode is a contest. Sometimes, if you ask, you get. Sometimes if you don't ask, you don't get because he's focusing on something else.

COL VOWELL: And sometimes it comes to you

automatically --

MR. REED: Well, when I was the SJ --

COL VOWELL: -- because it's required.

MR. REED: -- I would get the OSI Report of Investigation with a copy of all the statement witnesses. I would tell the NCOIC of Military Justice, "Make a copy of that from cover to reverse, and give it to the defense counsel with the charge sheet in this case."

If he wants something else that isn't covered in there, then it would be the responsibility for the defense counsel to let me know what it is he wants, if he couldn't get it himself. Most of the time, they can get it themselves.

PROF. HILLMAN: Mr. Reed, it's also about money, right? Defense counsel wants funding, which they don't have access to, but for going through the trial counsel, who gets the funds from the convening authority.

MR. REED: Right.

PROF. HILLMAN: So, if the military judge --

MR. REED: There's a variation of that that's been in practice for years in the Air Force. You have a centralized witness funding program. It really came into vogue after the urinalysis cases that we did in the early eighties, where you had to have all these expert witnesses for urinalysis cases.

You could have a centralized fund. Now where are they going to get the money for that? Is every Commander going to pony up a couple of

hundred thousand dollars to go into this centralized fund?

PROF. HILLMAN: But we would need to do that.

MR. REED: Yes.

PROF. HILLMAN: If we shifted this to a military judge, then there has to be -- the judge doesn't have a budget to fund this.

MR. REED: That's right.

PROF. HILLMAN: So, we have to alter that structure, and that's part of the Commanding Judge right now.

MR. REED: This is where I was trying to say, you get beneath the motherhood-and-apple veneer, and you need to drill down to how it actually is going to work, how it is going to be funded, how you're going to get the personnel to do it, division of labor. All of that stuff should be thought out in advance before you say the veneer is what we're going to mandate on everybody across the board, regardless of circumstance, CONUS or OCONUS.

COL VOWELL: I can give you an example where that is a real issue. We have a lieutenant colonel doctor who was accused of, in essence, conducting unauthorized breast exams on -- if you came in for a sore throat, you got a breast exam. If you came in with a skinned knee, you got a breast exam.

This is on the eve of a division deploying to Bosnia. He is a lieutenant colonel. That means we have to have colonels or above sitting on the panel.

I go to my boss and say, "I think we ought to try it, but it is going to be expensive." "He's abusing the wives and children of deployed soldiers," was my boss' response. "I will make the money available," because he had ownership of that court-martial.

MR. REED: He had ownership of that community.

COL VOWELL: That community as well.

MR. REED: The wives and the dependents that were there.

COL VOWELL: And I said, "We're going to have to come up with a panel." And he said, "That's why they gave me the 66th MI Brigade, because they're not deploying with us." And so, he pulled most of the senior officers out of that unit.

But he had ownership because it was his case. It was his process. He was taking care of discipline, law and order, and he was willing to expend those funds to try the case.

MR. REED: The other thing, there's a lot of tenant organizations. You know, you have a Wing Commander and he's got his wing, and all the people respond to him. But, you know, on the same installation, you've got the Air Force Inspection and Safety Center people; you've got this organization, that organization. You've got to have somebody who can broker the availability of their resources for your case at Camp Swampy or Norton Air Force Base, where I was.

A captain, a staff judge advocate can't do that. So, that's where

you've got to have command --

COL VOWELL: You have to have that source of funding.

JUDGE JONES: Liz, go ahead.

I'll be right back to you, Geoff.

MS. HOLTZMAN: I just wanted to pick up on the point you made, because this is something that troubles me. The Commander is very upset. Wives and daughters are being molested.

COL VOWELL: Uh-hum.

MS. HOLTZMAN: Suppose it's a rape case or a marital rape case, and the Commander thinks, "I'm not into this. I don't really care," in his head or her head. Okay? And then, they don't get the witnesses. What happens?

What I'm concerned about, I mean, what I'm trying to --

COL VOWELL: I don't think they don't get the witnesses.

MS. HOLTZMAN: Well, I'm just trying to say to you --

COL VOWELL: Okay.

MS. HOLTZMAN: -- that you give me a compelling case where a Commander has ownership. What I'm trying to say is, what about the case that's not as compelling, but you have serious issues of justice to be done? Should it matter about the emotional reaction of the Commander to the case or should we be trying to get a little beyond that? I just raise this issue.

COL VOWELL: I think you always, you are always going to

have emotional reactions. You know, it's the prosecutor in Arlington, Virginia, who may have an emotional reaction to a case who brings it, or maybe doesn't have an emotional reaction to another case.

But what you have to look at -- and that's where the staff judge advocate comes in as sort of the honest broker to some extent saying, "This is a case that should be tried." And the Commander doesn't want to try it. Is there a place to go? Yes, you can always go to a higher-level Commander.

COL TURNER: Ma'am, I think maybe you're, if what I hear is correct, you're asking a process question. If the convening authority denies the defense request for a witness, then --

COL VOWELL: Can you go to the judge?

COL TURNER: -- the defense goes to the judge.

MR. REED: After referral.

COL TURNER: That's right; that's after the --

COL VOWELL: But I'm not talking about, we weren't talking about witnesses in my scenario.

COL TURNER: So, there is still a judge involved in the production --

COL VOWELL: But if I say we're going to have to bring witnesses back from CONUS to try this case, because these family members have redeployed, he may decide, well, I'm not going to refer those charges; I will refer these

other charges for the witnesses who are still here.

Because it is a concern, and you can't tell me that local prosecutors don't have a concern about funding witnesses. I went to Puerto Rico to try a rape case because the local prosecutors would not take it because they were going to have to bring the victims back from wherever they had PCSed to.

But the commanders are the people who have the money, and they have to decide how they are going to spend that money. And is military justice important to them? Yes. So, if you don't come up with --

MR. REED: All right. So, then, you go to the military judge, and the military judge says, "Look, the Commander heard your request and denied it. I think it has merit. I'm going to order the Commander to do it."

And the Commander, then, has to do it. What is the remedy?

COL VOWELL: Produce or abate.

MR. REED: Produce or abate the proceedings.

So, "What's more important to you, Mr. Commander, bringing this witness from Europe or your entire case? You decide. I'll shape my remedy when I get your decision."

JUDGE JONES: So, does that exist now?

COL VOWELL: Yes.

MR. REED: Yes. Yes. It happens all the time.

COL VOWELL: As a defense counsel, I force the government to

bring --

JUDGE JONES: After referral, yes.

PROF. CORN: After referral.

COL VOWELL: Yes.

PROF. CORN: So, if I'm a defense counsel and we have a new system now that says there is a judge advocate who is going to do what is, in essence, the preliminary hearing, and I think it's very important to try to get a charge dismissed in the preliminary hearing, to get an expert or to produce a witness, I am at the total discretion of the Commander. I don't have a military judge to go to.

And I want to clear something up because, Mr. Reed, you brought up the issue of a search warrant. The question that I asked Colonel Vowell was, on issues of pretrial, preliminary trial matters, not investigatory matters, right, is there a --

MR. REED: Such as? Let's use a concrete example. What's your question?

PROF. CORN: Such as production of witnesses, funding of experts, funding of investigators to assist in the preparation of the defense before the preliminary hearing, the conduct of a preliminary hearing, discovery, compelling discovery, pretrial confinement, and competency evaluations. Okay?

Is there a compelling reason why a military judge should not be authorized to adjudicate those issues?

And I thought, as I recall, your answer was, the only reason that

we came up with, when we looked at this, was history.

So, I want to be clear that my question wasn't related to the full gamut of government investigatory practices in building a case. It was related to those functions that are traditionally brought before a judge when there is --

COL VOWELL: Or a magistrate.

PROF. CORN: -- or a magistrate, when there is a contest between the government and defense.

The issue of discovery, I don't see any issue with the defense having to submit a request to the government. That's what Brady expects defense to do.

So, my two questions focus, again, on that. Why do we presume that that is going to be an overwhelming burden? Because most cases are going to be disposed of before they ever get to the court-martial preferral phase through nonjudicial punishment or if they're minor offenses. So, we're talking about cases that are likely going to either a guilty plea or a contested trial.

And then, the other question goes to the jury selection piece. My understanding, from what I could tell from the work that you did before you retired, ma'am, was that what you're talking about is the venire. You're talking about using kind of a random selection to create the venire. Now, once the venire is created, then we revert back to the normal process of excusals and substitutions.

But I'm having a hard time understanding why creating the pool

would be so complicated, if we know, once it's created, if you get called for court-martial duty, and you're on an inspection, you submit the request for excusal, and then, we move to the next person qualified in the pool. Is that --

COL VOWELL: Yes, it is not --

MR. REED: That's not prohibited.

COL VOWELL: No. It's not. You could implement that in a way under the current rules.

COL TURNER: But, Mr. Reed, from an Air Force perspective, particularly a small base like Columbus, isn't essentially every person eligible on a small installation who's not disqualified because of Article 25 criteria already in that pool?

COL VOWELL: Right.

MR. REED: Well, they are. They give you what we call an "alpha roster".

COL VOWELL: Yes.

PROF. CORN: But, then, don't you pick the pool out of that?

MR. REED: And that is a list of eligible people according to rank and --

COL VOWELL: Yes.

MR. REED: -- NCO would go down in their colonels, lieutenant colonels, majors, and she would go down, and she would typically say, "Okay, here's a colonel. Here's a lieutenant colonel. Here's a major. Here's two captains.

That's who we have selected."

PROF. CORN: That's your venire.

MR. REED: That's your venire.

PROF. CORN: And from that venire, you draw the petit juries, to put it in civilian parlance, okay?

I think this is one of the problems I'm having, is trying to translate. So, what I understand what you suggested, ma'am, in your work was that maybe we could draw the venire from a random-generated process, and then, pulling the petit juries out of the venire would be the process we follow now?

COL VOWELL: There would be two processes. Basically, the study proposal came up with two alternatives, and we really couldn't come to a consensus. And we were trying to come to a consensus on them.

Right now, if I'm the Commander and I refer a case to a general court-martial, the panel I refer it to is already in existence. Now people can be pulled out and substituted in --

PROF. CORN: But you pick that?

COL VOWELL: The Commanding General picks that panel. You know, the Commanding General indicated that these people are Panel A and these people are Panel B and these people are Panel C.

MS. HOLTZMAN: When you say "Commanding Generals," that's the convening authority?

COL VOWELL: The convening authority. Generally, the convening authority.

And it is that process where it appears that the Commander handpicks individuals. So, what we did was say, "Okay, give us criteria" -- the Commanding General, under the current system, you would have the Commanding General say, "These are the criteria I want in the people who are going to sit on my panels." And we would apply that criteria to the alpha roster and we would create a big pool. And then, from that pool, names would be pulled randomly to create Panel A, Panel B, Panel C, rather than the convening authority making individual specific picks for those panels. That's one process.

The other process would require a change, a statutory change. And that would say, when you refer a case to trial, you don't refer it to court-martial Panel A which consists of Colonel Jones, lieutenant colonel Smith, and so on down. You refer it to a general court-martial. And then, the panel is picked at the time you're getting the case ready to go to trial, not just at the time it's referred, the people who are actually going to sit that day.

And a week or two beforehand, you pull names from -- the IT people give you a process by which names are pulled. Those people sit unless they are, then, excused by the military judge.

JUDGE JONES: Isn't that more efficient, too? You don't have to realize that people that you thought were available aren't anymore. I know you

said it takes a statutory change, but --

COL VOWELL: Yes. I don't know that it's more efficient. I really don't. I think the current system is probably more efficient because, when you are told you have been selected for court-martial duty, you are told you're on this panel generally for three months or six months or a period of time, and that this is your highest priority. Absent some other compelling reason, you will sit; you will show up.

So, if your wife goes into labor the night before the court-martial panel, you may call up the staff judge advocate and say, "Denise, I need to be excused from the court-martial because my wife is in labor."

PROF. CORN: But you're also instructed that you can request excusal, correct?

COL VOWELL: Right, you can. You can. And this is the process by which you do it: you call up the Chief of Military Justice or the staff judge advocate or the Chief of Administrative Law to get excused. And then, when that person doesn't show up for court-martial duty, there is either a process by which the convening authority has delegated or the military judge excuses. There are two ways you can work that.

MS. HOLTZMAN: In the second example you had, on the second alternative, what's the Commander's role in the selection of the pool?

COL VOWELL: The Commander's role may say, "I want

everybody on the military installation." You could change it however you wanted.

We envisioned the Commander saying, "Here are the criteria I would like applied to the court-martial, the general courts-martial in my command."

PROF. CORN: Wouldn't you have to change, though, Article 25 to eliminate judicial temperament if you're going to have some type of computer or random-generated? I mean, that is a factor now.

COL VOWELL: It is. It is.

PROF. CORN: And I don't see how you can do that through a computer-generated jury venire.

COL VOWELL: Well, one of the ways you could do that is you could apply Article 25 at the court-martial level. That is, when you go in and you conduct voir dire, and you determine that this Commander says adultery is always conduct prejudicial to --

PROF. CORN: But we've got that already.

COL VOWELL: Yes, but you excuse him because he lacks the judicial temperament there.

PROF. CORN: But you would agree --

MR. REED: I think you presumed, I think most people are presumed to have an appropriate temperament, but you'll have cases in which commanders will say, "You know, this guy flies off the handle every time he doesn't get his way. You know, he's ill-tempered," if you will, "too often."

PROF. CORN: When you say "commanders will say," you mean the convening authority selecting the panel?

MR. REED: Convening authorities. They may know that somebody has garnished a reputation for being --

COL VOWELL: A hothead. A hothead.

PROF. CORN: But you would have to eliminate that criteria if you did it randomly or by a computer.

COL VOWELL: Not necessarily.

MR. REED: Unless you limited them upfront, so they don't get into that pool.

COL TURNER: Doesn't that also include if they have their own misconduct --

MR. REED: Yes.

COL TURNER: -- not necessarily related to this particular charge?

COL VOWELL: But when I, as a military judge, I excuse someone during voir dire, I can excuse him because he lacks the appropriate judicial temperament --

PROF. CORN: Yes, I understand that --

COL VOWELL: -- at that point. They don't sit.

PROF. CORN: -- at the empaneling of the actual, what we

would call, the trial -- in civilian practice, there is going to be extensive opportunity for questioning the jurors and exercising challenges.

But I'm just still struggling with the notion of how the existing statutory element of judicial temperament can be implemented if we move away from the convening authority personally selecting the jury venire.

COL VOWELL: I think it's the exclusion criteria. Because I can't recall any time in which the Commanding General is selecting people, the convening authority is selecting people that he knows every person he's selecting individually.

MR. REED: No, but they --

COL VOWELL: I mean, I had ten branch offices in Germany plus Bosnia. And when we selected panels, there was no way the two-star Commander I worked for knew Sergeant First Class Freeman had judicial temperament. He had to rely on the other commanders who nominated them saying that she did.

MR. REED: Another factor that goes into this -- and I don't know if it falls under the label of judicial temperament or not -- but the commanders at military installations, they are aware of ongoing investigations that are not public. They're aware of IG investigations that have officers who are the subjects of them that aren't public. They have access to the police blotter as to what people got DUI last night or are accused of stealing something from the PX, shoplifting last night.

So, when that list goes before the Commander, he has information about people within his command that is not publicly known to anybody except the law enforcement community and him, and he --

PROF. CORN: And not the SJ?

COL VOWELL: Probably the SJ.

MR. REED: Yes, the SJ should.

COL TURNER: But how about the unit climate inspection, unit climate assessments? He would also know those.

MR. REED: Right.

COL TURNER: Okay.

MR. REED: So, what I am saying is that, when the Commander gets it, he may have that type of information, or the SJ has. I'm not sure the military judge --

COL VOWELL: Would have that, no.

MR. REED: -- would have that --

COL VOWELL: Would not.

MR. REED: -- have access to that information.

They may have that and they'll say, "You know, he's under investigation. He's got three IG complaints against him. I'm not really sure he's going to have the right judicial temperament to sit on the court-martial of this guy. So, I'm not selecting him for the panel."

COL VOWELL: And it could be --

MR. REED: You lose that. You lose that when you take somebody outside that doesn't know anything about it and you do the randomness thing. You can lose that.

And I'm not sure how you would raise that to the judge, to say, "Well, this person is the subject of IG complaints. So, I think you ought to excuse him for cause."

PROF. CORN: Why wouldn't you -- I don't want to get into --

MR. REED: I'm just saying you want to eliminate those issues upfront.

MS. HOLTZMAN: I think it's doable.

MR. REED: Right.

MS. HOLTZMAN: I don't think this is so hard. If you put the Commander back into the process --

JUDGE JONES: To exclude.

MS. HOLTZMAN: -- to exclude at any point. Maybe the Commander gets a list of all the people who are in the pool and says, "Oh, no, I don't like this pool."

JUDGE JONES: As long as it's random, and then, you have for-cause challenges.

MS. HOLTZMAN: Yes.

JUDGE JONES: And you go in the order, in the random order, then you have sort of some transparency, and it's not just him preselecting.

COL VOWELL: And that's really what we thought the public perception was the problem, the handpicked jury, to achieve a desired result. But handpicking juries is not necessarily a bad idea, the Blue Ribbon Panel, if you will; the picking people who you know will do a good job. But it's the perception that you are picking people who will convict or who will slam.

COL HAM: May I ask a question? I mean, that was the outgrowth of the Cox Commission. I'm turning to Mr. Reed. There has not been recent outcry over this because, well, perhaps because it was a perception and not reality. Having reviewed, not being the staff judge advocate, but reviewing selection documents for panels, they're pretty random. I mean, they're pretty random because there's hundreds of people that have gone before the convening authority to select and make his little checkmarks. You know, he doesn't know most of those people.

But, anyway, so these were outgrowths of a Commission that we asked Mr. Reed to discuss and other commissions from the mid- to late nineties, and then, the Cox Commission. There doesn't seem to be much of an outcry over this, again, perhaps because it's perception; it's not reality.

I mean, you have heard, the panel members have heard on site visits, despite the intense political interest in sexual assault, there are a number of acquittals. I mean, perhaps it's my opinion, as a senior judge advocate, it seems to

work. Despite the perception, it's fair. People who don't sit on panels are excused, like for cause or preemptorily by the military judge. The right result is generally reached based on the evidence, competent legal evidence presented to the panel.

PROF. CORN: But if you're saying that in practice it is, in effect, random -- and by the way, I would agree with that. I think in my experience, when the GCMA looks at the alpha roster, there's nothing really -- as you say, he doesn't know Sergeant First Class Jones from anybody. It's just kind of going through and saying, "I need five sergeant first classes. Here are five."

But if that's the way it's working now, and it creates a perception of maybe bias, then why not just go to a random venire --

COL HAM: Well, can I throw one idea at them? I don't have a position either way on this, other than it really kind of cycled up as a subject of interest and it has kind of cycled down, except, you know, you're looking at it again.

But you get that, when somebody is selected by the Commanding General, you know; you've seen the letters. Everybody has seen the letter. The letter goes to that Sergeant First Class and it says, "I have personally selected you and this is your primary duty above all others." Again, what the panel has heard. "This is important to me. This is important to this unit. This is important to good order and discipline."

However, you know, he is not telling them how to decide. He doesn't know what they're going to decide. But it is the imprimatur of "This is

important." You are not going to be excused for leave and TDY. You are not going to be excused except for a compelling reason.

I don't know. I'm wondering if that has some impact.

MR. REED: Well, I know it does on the selected members, the designated members, because, invariably, they always have something more important than jury duty. And so, invariably, you need some way to tell them, "No, the fact that you've got a baseball game this afternoon is not more important." "The fact that your boy is going off to Boy Scout camp is not important." "The fact that you want to take leave because you want to go see Disneyland is not more important."

So, when you have that type of command emphasis that this is important, this is a military duty/function that you are expected to appear at and perform appropriately, all of those little -- a guy comes up, and he says, "Well, put it in writing and I will forward it to the general officer that you don't want to serve on this jury because you've got a Cub Scout meeting."

PROF. CORN: Although you could -- and that's why I asked the question whether this was in the Code or the Manual. I mean, the change to the Article 32 says a judge advocate will serve as an Article 32 officer whenever practicable.

I mean, you could amend just the Manual, not even the Code, and say, "If you are selected for court-martial duty, you will serve in that capacity whenever practicable, and only the general court-martial convening authority or his delegee, the staff judge advocate, is authorized to excuse you."

So, I think you could get that same imprimatur of prioritization; you could actually elevate it.

MR. REED: Emphasis of importance, there's nothing wrong with that. Emphasis of performing military duties appropriately, there's nothing wrong with that. You could put that in either the analysis to the rule or you could put it in the rule.

The problem, the main issue you have is, once you make that recommendation, then the Congress is going to say, "Oh, we'll legislate." And you say, "Well, no, we've got it covered by an executive order. We're going to send up to the President of the United States."

And I can tell you from my experience, when I have presented that saying, "Hey, you don't need to create a victim privilege in the military. We're doing that. We've got it pen to paper and it's on its way to the President to sign."

And the Congressman looked right at me and he said, "Well, Mr. Reed, can you promise me the President is going to sign that executive order?"

And I said, "Well, I can't promise you. I can't guarantee you, but they have followed our recommendations for the last 50 years. I don't see why the President wouldn't now."

"But you can't guarantee me that, can you, Mr. Reed?"

I said, "No, I can't guarantee you that."

He says, "Well, that's why we're here. If we don't legislate, we

don't get credit for fixing the problem."

I go, whoa, okay. So, this is all about credit. Okay.

But we beat them at the punch because we were able to get the executive order signed by the President and created the privilege before Congress could get its act together to formulate a privilege by legislation.

So, that's what you're up against. I mean, that is what the military is up against. You will give a great idea. They'll run with it with a bit between their teeth, and you won't have enough time to flesh it out and get beneath the venire and figure out how this thing is really going to work.

PROF. CORN: Just briefly, I think what we're up against is a requirement to ask whether or not a change is warranted and, if so, what form it ought to take. And so, if we say we think a change is warranted, then we have to ask, one, do we just leave it to custom? Do we propose that it become part of regulation? Or do we propose that it become part of -- well, am I off on that, Patty?

MR. REED: Well, I would say, to the extent that you could foot-stomp that and emphasize that, and somehow make your case why allowing the military to address this issue through rules, regulations, and executive order changes to the manual, which is basically rule -- that would be helpful.

But I can tell you, if you just give the bright-line point without giving some guidelines, they are going to want to legislate. Now, once they legislate, what goes in doesn't necessarily come out the same way, and you're stuck with fixing

the problem.

PROF. CORN: I understand.

MS. HOLTZMAN: Mr. Reed, I wouldn't overestimate our capacity to control what happens on the Hill.

(Laughter.)

JUDGE JONES: Well said.

MR. REED: I've been there. I know what you're saying.

PROF. HILLMAN: I wonder if I could ask you about, are we going to stick to the pretrial rule here? Is that what you wanted to do this morning?

JUDGE JONES: It doesn't have to be.

PROF. HILLMAN: I just wondered because we're talking about military judges and you both have a lot of experience there.

COL VOWELL: Right.

PROF. HILLMAN: I wondered what you think about judge sentencing. What if, even if we had a court-martial with members, what if we had judges do sentencing?

One of the issues that we're addressing in another Subcommittee is a question about this. And this runs to not the convening authority, which is the general focus here. So, I apologize --

JUDGE JONES: No, go ahead.

PROF. HILLMAN: -- Your Honor, for diverting you here.

But what about an accused can opt for a judge-alone trial, of course. But, even if they don't, what if the judges did the sentencing?

MR. REED: That's been a proposal that's been around for years. The Joint Services Committee on Military Justice has studied that. They have issued a report which is the collective views, if you will, at that time anyway, of the Services.

The people on the Joint Services Committee are representative of The Judge Advocates General. So, when you see a proposal that comes out of the Joint Services Committee, it's really a proposal that The Judge Advocates General of the various Services support.

For various reasons that we talked about, one of the main concerns about sentencing or taking them out at sentencing is the thought that we are losing in some fashion a sense of the community, a community input to the trial. It now becomes this process that is totally separated and removed from the installation, and the community, the sense of the community involvement in this thing is being sacrificed as a result of that.

And when we have looked at the cases -- and it may be different now -- but when we have looked at the cases judged against the suggested improvement recommendation, we don't see necessarily the sentences to be skewed between judge-alone and jury anyway.

So, we're benefitting the military person who serves as a member

on the trial by educating him about the military justice system, about the difficulty of making decision about people, bringing in the culture of the community, the military community, into the courtroom, rather than the judge who is flying a circuit around the West Coast.

So, that's primarily the reason why the military, at least up to this point, has favored keeping the members in there. Because it shapes their military career. These court members who are majors and lieutenant colonels are going to be your Commanding Generals down the road or Wing Commanders down the road. They need to wrestle with this problem as part of their career, get the maturation, get the experience, and be able to take that into their position as a Commander to make the discretionary decisionmaking process that we're talking about.

If we don't, the only place they get exposed to it is maybe an hour course at squadron officers' school or Air Command and Staff School by some lawyer up there speaking for a one-hour block during their annual curriculum.

PROF. HILLMAN: Those are great points, sir. But they would still be in the findings phase of the court-martial.

MR. REED: Right, they would still be, and that's difficult. But, you know, determining whether somebody did something or not is entirely different than saying, what is an appropriate disposition for what they did?

You know, parents have to struggle with how to deal with their children who have misbehaved. They can determine the child violated the rule, but

parents have to decide how best, under all the family circumstances involved, to discipline that child in a measured, appropriate way for what they did and for what the lasting impact is going to be on them and their siblings.

Well, if you would make that translation to a military community, we have those same interests and concerns. You'll give some of that up, and are you gaining that much as a result of it? I don't think you are.

PROF. CORN: I would like to follow up on that because I had that same question. It seems to me that the all-or-nothing election of an accused in a military court, that either you elect a panel for the entire process or you elect a judge alone for the entire process, is the one aspect of the system that is inconsistent with an overall approach that gives the accused a lot of autonomy and influence on the structure of the court that's going to hold him or her accountable.

I think the participation-of-the-community argument would be more compelling if we didn't know that, as a matter of practice, about 90 percent of cases are resolved by pleas, and in almost all of them the government is going to put as a condition to the plea agreement that the accused waive a panel for sentencing. So, most sentencing is done by military judges sitting alone, unless my numbers are way off.

COL TURNER: Now do we have that information from all the Services?

PROF. CORN: Well, okay, anecdotally, okay?

MR. REED: Yes, I would ask you to drill-down on that, because from my experience --

PROF. CORN: Well, no, I was going to ask you.

MR. REED: My experience is, you know, the statistics of guilty pleas and judge-alones and the mechanism by which you extract a judge-alone request in return for a guilty plea, they're not large numbers. I would be surprised -- and maybe the other Services --

PROF. CORN: Well, are there statistics on the number of the percentage of general court-martials that are resolved by guilty plea and the percentage of them that are judge alone?

MR. REED: Depending on the sophistication of the Service recordkeeping system.

COL VOWELL: I know you can pull that from the Army.

MR. REED: The Air Force, you can do it.

COL VOWELL: You could pull it from the Army court-martial records.

PROF. CORN: So, a very direct question: if one of the perception concerns of fairness of the system is the role of the convening authority in influencing the panel composition -- now whether or not perception matches reality, as Colonel Vowell said, when they did their study, that was the conclusion, that there was a perception. Wouldn't giving the accused the option of opting for a judge-alone

sentencing mitigate the impact of that perception?

MR. REED: I don't know. I don't know how you necessarily overcome perceptions. I'm not sure that necessarily does it. But that's something for you all to consider.

But I always just caution that, when you're dealing with a system of justice, don't build your foundation on feeding the perceptions.

PROF. CORN: No, no.

MR. REED: Because those perceptions are always going to be there. Once you've knocked down one, it's like Whack-a-Mole, once you knock down one perception, there is another perception that is going to come up over here. Before you know it, you've got this hodge-podge of perception-defeating provisions that make your system quite awkward to work with on an actual basis.

PROF. CORN: And one followup.

MR. REED: Yes.

PROF. CORN: Do you think that the government should be authorized to compel an accused to have a panel? Should the government have to concur in a request for a judge-alone trial?

MR. REED: Well, first of all, if the accused wants to plead guilty and save the government the time and expense of trial, now the accused isn't doing it out of the goodness of his heart; he's looking for something in return.

So, when you keep that in mind, then the question is, you know,

the government says, look, part of the time and expense of this trial is not having nine court members sitting here for an extra day or two trying to figure out what an appropriate sentence is.

So, maybe "compelling" is too hard a word, but, essentially, it is a factor from the government's perspective.

PROF. CORN: But the accused election --

MR. REED: Right.

PROF. CORN: -- under current law, as I understand it, the accused has absolute authority to elect judge-alone trial, correct? The prosecutor can't object to that.

MR. REED: I've seen cases where the judge says, "Well, we're not going to go there." Yes, I've seen cases where the judge has basically said, "No, this is going to remain" --

COL VOWELL: The accused selects the forum.

PROF. CORN: Right, and the prosecution can't object to that?

COL VOWELL: Correct.

PROF. CORN: Do you think the prosecutor should have, the government should have the ability to block an accused from having a judge-alone trial?

COL VOWELL: No, I think this is a right that we give the accused in a system that is often seen as stacked against the accused.

PROF. CORN: Okay.

COL TURNER: But should a victim have input into the forum or only the accused?

COL VOWELL: I think only the accused. And I understand that may not be the politically-correct answer, but that is --

MR. REED: I mean, over the years we have struggled with proposals where we would take rights and entitlements away from the accuseds. Now we operated in most cases under the assumption that, since Congress only created the UCMJ because they were concerned about an overbearing military against the accused, that throwing an option up there that would in any way -- and I'm not saying this one -- but in any way take away something that is a right of the accused or an entitlement of the accused would be a dead letter. So, that is somewhat of a deterrent.

So, when you look at this area, there could probably be a rule established that that is not a criteria that can be extracted in return for a guilty plea, I mean if you wanted to.

MS. FROST: So, to follow up on the question, how does the implementation of the CVRA in military justice proceedings, and the right of victims to confer with prosecutor -- I mean, I think that is a very valid question -- how is that going to play out?

MR. REED: I don't think we are the right witnesses for that

because you're asking how is it currently happening under legislation that passed and decisions that were made as we exited or left the federal service and passed the issue onto our successors. So, you know, that's another issue.

And I want to mention something else on that. Give it time to mature. And give it time to develop and be implemented correctly.

All too often in the last ten years in this area particularly, we would get the legislation, and before we could even implement it, we were being hauled back up to the Hill to answer that question. "Well, how's it going?"

Well, we've got it here, but we've got to get it all the way out to the field. We've got to train them. We've got to educate them.

It's like you gave us a seed. We planted the seed, pursuant to your legislation. And now, you want to plow over the field again and plant a different seed before we even have a chance to assess whether it's good.

MS. FROST: Well, I think my question was --

MR. REED: So, we're not the right people. You've got to give it time, so that there's at least a database or a backlook that you can say and assess, well, how's it coming? I don't know.

MS. FROST: Well, let me rephrase that because I think that is, along with the Special Victims' Counsel and the CVRA, and the -- I always get the name wrong -- the previous decision by the Appeals Court of the Armed Forces giving victims legal standing, in theory, how do you think that might play out in terms of the issue

that we were just talking about, in terms of the defendant's right?

Again, plea bargains are a huge issue for crime victims in the civilian sector.

COL VOWELL: And they are in the military sector as well. In the civilian system, the accused gets the sentence he or she bargained for. In the military, it's the cap.

I don't know how you would resolve, what happens when the prosecutor wants trial by judge alone and the accused wants trial by a panel. Who decides? So, I think you have to decide who you give that right to and we have given, historically --

MR. REED: What if you have five victims in the same case?

COL VOWELL: Exactly.

PROF. CORN: Well, I mean, just for background, as I recall, the Supreme Court has held that it is constitutionally permissible for a prosecutor to demand a jury trial because in that case you're getting exactly what the Constitution gives you. So, conceptually, the idea that if a staff judge advocate and a prosecutor concluded that the interest of justice would be served by having a panel, I don't think there is a constitutional bar to that. But I agree with you, Mr. Reed, that it would be perceived as inconsistent with the tenor of the Code, which is to give the accused --

COL HAM: And these are not Article III courts. These are Article I courts.

COL VOWELL: I think the convening authority can say, "I'm not going to give you a deal unless you agree to go in front of a panel," just as the convening authority can say, "I'm not going to sign up to this deal unless you're going to judge alone."

I don't think, as a practical matter, that most convening authorities do that in most cases. In fact, as a defense counsel, I threw in "I'll go judge alone" to sweeten the deal, because they knew that that meant I saved the command lots of time, money, and expense.

PROF. CORN: So, that is a bargaining chip.

COL VOWELL: It was a bargaining chip.

COL HAM: I have seen the opposite, Professor Corn, of the government saying, "Part of this deal is you go by panel," because they didn't like the sentencing philosophy of the judge on a specific issue.

PROF. CORN: Right.

MR. REED: To show you how far we've come, when I was trying cases and I tried to negotiate a pretrial agreement, it required me to get the approval -- and I was a defense counsel in Japan -- of The Judge Advocate General of the Air Force to even negotiate a pretrial agreement.

COL VOWELL: Right.

MR. REED: So, the fact that you have a lot of pretrial agreements now that are done at the local level, and you're dealing with the terms and

stuff, it's a sea change in the military justice process.

COL VOWELL: But we put that into the Manual

COL HAM: It was until the early nineties the defense had to initiate negotiations; the government was not permitted to, and requiring, as a pretrial agreement, terms that the military judge alone decide the sentence was not permitted until the early nineties. It's not that old.

COL VOWELL: It is why our pretrial inquiry of an accused who pleads guilty is so extensive. After practicing or watching military courts for a number of years, both as a court member and as former MP, and then, as an intern while I was in law school, when I practiced in a Texas court, I was just astounded, you know, "Hearing your plea of guilty, I find you guilty. Does the State have a recommendation as to sentence?", thinking, where's the inquiry? There wasn't one.

But we have it because we were concerned about command pressure on accused soldiers to plead guilty, when we didn't have an independent defense service; the Army has had for a number of years, and other Services have had in other forums.

MR. REED: I would like to just go back to her question, if I can. I think that most of these proposals that you're talking about, the military, the Department of Defense has supported to expand the benefits and the entitlements of victims of sexual assault and other things. So, I think they're good.

And I think having a counsel or a person the victim can talk to,

whether it be a professional clinician, if you will, or an attorney, is fine and benefits the victim.

Where I get into problems, I guess, is, how does that appear -- what role does that counsel for the victim play in the actual court-martial itself? You know, "I object to that question, Your Honor."

"Well, who are you?"

"Well, I'm the lawyer for that victim you've got sitting up on the stand," from the gallery.

That's the type of thing that I think, after you get through the pretrial and a lot of the support structure, if you will, for the victims, pretrial and post-trial, then the question is, well, what role is this lawyer going to have in the actual trial itself? Because the victim is really not a party to the trial. It's the United States versus Sergeant Jones. She's a witness.

MS. FROST: Yes, but that's why the legal standing is so important.

MR. REED: And that's why, when you have legal standing, what does that entitle you to do in the court-martial? Do you get to cross-examine witnesses? Do you just protect the victim's right? All of that?

JUDGE JONES: Go head, colonel.

COL TURNER: So, that's what I wanted to go over a little bit more, if you don't mind. We have talked a lot about the rights of the accused. And

there are a number of people who would say that the system swung too far in the protection of the rights of the accused.

So, as we think about the victim's rights, giving them legal standing, if we transition these pretrial matters particularly to a judge, let me ask Colonel Vowell, if you have, as a military judge, a case in front of you or the cases that you have tried in front of you, and there's no clear answer in the law, either way you decide an issue, you might be appealed. There's no case law to guide you or clear statutory or regulatory direction.

Are you going to err on the side or defer on the side of the accused or on the victim when making that decision?

COL VOWELL: And I would say it is a very case-specific call. If you look at what rights are being infringed, are we infringing the right of cross-examination when I permit a victim to testify behind a screen?

COL TURNER: So, that is on the right of the accused.

COL VOWELL: The accused.

COL TURNER: All right. Can you give me an example of when you might have made a decision of that kind of nature where you would have not been concerned or thought about being overturned on appeal for an accused right, but thought about a victim right?

COL VOWELL: You know, I spent a lot of time training military judges for all the military Services the five years I was the Chief Trial Judge. I always

said you can't worry about what happens on appeal. Your goal is to make the call, the best call you can in front of you. And your goal should be no inadvertent or unnecessary reversals. Sometimes you make the tough call, and the appellate court sees it differently.

COL TURNER: And so, what part of your analysis would consider the victim as opposed to the accused?

COL VOWELL: Well, you look at the hierarchy of rights, the competing rights, and what does the law say and how did the law get enacted? What was the legislature trying to do when this law was enacted?

You look at, is this trial going to be fair for the accused if I do this? On the other hand, all of us have had 412 motions. Everyone who is a military judge has dealt with 412 motions.

You require the accused to indicate why he is seeking to go into the past sexual history of the victim or "Are you going to offer 412 evidence?" And the defense says no.

And then, you get the first question out of the defense counsel's mouth is a 412 issue, and you stop. You send the jury out. And you say, "Counsel, do you want to tell me why I shouldn't hold you in contempt for that?"

And sometimes that's what you do. I've used the word "contempt" in a court-martial exactly twice, ten years apart, in front of the same defense counsel for essentially the same issue, not doing what he was legally obligated

to do, and to protect that victim.

So, you make the calls based on what guidance the appellate courts have given you because they tell you what the law means. You have to determine it as an issue of first impression, if you're a trial judge. But, if the appellate courts have spoken, you do the best you can, and if you think they were wrong, you may have to swing and say, "I'm going to rule this way. And, Government, Defense, take me up on appeal." And I've been there.

COL HAM: I can give you a recent example, Colonel Turner, on 412. The rule had written into it, as a result of some case law, that the victim's privacy right had to be considered. And some judges were interpreting that to trump any right of the accused.

So, as that worked its way up using the hierarchy of authority, the Constitution, of course, trumps. And what may sometimes invade a victim's privacy right is trumped by the Constitution. So, that would be Constitution. And our Military Rules of Evidence are executive order; they're not statutes. So, they would fall below statute. So, Constitution, statute, executive order, case law is in there, and regulation is way down.

I mean, I have been put on the spot by the Court of Appeals of the Armed Forces for citing regulations. "And, Major Ham, where does that regulation...?", and it was the Judge's Benchbook, which is our pattern jury instructions. "Major Ham, where does that fall on the hierarchy of judicial authority?" And he

took me down. "Is it the Constitution?"

"No, Your Honor."

"Is it a statute?"

"No, Your Honor."

(Laughter.)

I knew where it was going and it was below the table.

(Laughter.)

And he said, "So, what do you cite, then, for authority?"

So, there's a live example.

COL VOWELL: On the other hand, Judge Cox has cited me citing the Military Judge's Benchbook, when he was the Chief Judge of the Court of Appeals for the Armed Forces.

COL HAM: The Constitution always trumps.

COL VOWELL: Yes.

JUDGE JONES: Are there any other questions for this panel?

(No response.)

This has been a great discussion. Thank you very much. We really appreciate your coming in.

COL VOWELL: We appreciate being invited.

JUDGE JONES: So, we are adjourned for 10 minutes now.

(Whereupon, the foregoing matter went off the record at 11:00

a.m. and went back on the record at 11:27 a.m.)

MS. FRIED: The meeting is now open.

JUDGE JONES: All right, thank you. What is to occur next for the record are deliberations, discussion on the current and proposed legislation modifying the commander's role in military justice administration and sexual assault response.

And Shannon Green, our legislative liaison and expert is going to tee this up for us.

And I should say there's also been and I hope everyone had a chance to read it. We have a legislative update that was prepared by the staff which just lists all of it for us which is a terrific outline. Go ahead, Shannon.

MS. GREEN: I hope everyone has looked at the document -- at the top it's entitled "Enacted Legislation and Policy" --that Kyle sent out yesterday or so.

What I was thinking for this period of deliberations is that we could, however you all want to proceed, but just thinking about the time constraints if we could deliberate on sort of the high points of the '14 NDAA and then move onto the three pending pieces of legislation, the Military Justice Improvement Act, the Victims Protection Act and the STOP Act which we haven't talked about much in the Panel.

Judge Jones, if that sounds good to you?

JUDGE JONES: Why don't you go ahead and tell us what under the National Defense Authorization Act I guess of 2014 are we mandated to do.

MS. GREEN: Well, we're not mandated to specifically opine on any of the 36 provisions. So that's sort of discretionary on our part.

JUDGE JONES: The 36 provisions of the NDAA '14.

MS. GREEN: That's right.

JUDGE JONES: All right.

MS. GREEN: I would recommend that we speak to the major changes such as the Article 60 and the Article 32 and any others that you think. They start on --

JUDGE JONES: And I guess we would do that actually pursuant to our mandate, our own mandate in our charter from Congress from NDAA '13 which asks us to assess legislative initiatives.

MS. GREEN: The strengths and weaknesses of current and proposed legislative initiatives.

JUDGE JONES: Right.

MS. GREEN: To modify the role of the commander in the administration of military justice and the investigation, prosecution and adjudication of adult sexual assault crimes.

LT COL GREEN: And Judge Jones, let me just -- what we provided the Subcommittee members last night is Shannon's pulled and we've tried to provide a written summary of all of the provisions from the NDAA from 2012, 2013, 2014 as well as DoD policy initiatives and then the three principal pieces of pending

legislation being the STOP Act, the MJIA and then the Victim Protection Act.

So, what you have before you in terms of a draft is a summary of what we believe are the provisions of those pieces of legislation or policy that impact or -- that impact the role of the commander in the military justice process, or are affected by a change, or would affect the role of the commander in the process.

And so this is really a summary of those provisions and then I think it's the Subcommittee's determination as to whether there are specific parts of that past legislation or pending legislation that you want to opine on or provide recommendations for.

PROF. CORN: Can I ask two just clarification questions?

JUDGE JONES: Yes, go ahead, Geoff.

PROF. CORN: First is in the FY '14 change to Article 32 the summary indicates, "Finally, victims are not required to testify and shall be declared unavailable if they decline to participate."

Is that limited to sexual assault offenses or all crimes?

MS. GREEN: All crimes I believe, yes.

PROF. CORN: All crimes.

MS. GREEN: That's my understanding.

PROF. CORN: So it's a uniform rule across the board.

MS. GREEN: Yes, sir.

PROF. CORN: And the second question is related to the

subject matter of this morning's presentation. Do any of the pending changes address the pretrial function of the military judge? Seek to expand that in any way?

MS. GREEN: No.

PROF. CORN: No, okay.

MS. FROST: And I had I think three very minor questions.

JUDGE JONES: Please, go ahead, Joye.

MS. FROST: On page 5 the first bullet when it talks about the establishment of the special victims unit capability. But then the very last sentence says, "This policy was codified at Section 573 of the Fiscal Year '13 NDAA." I thought that was the Fiscal Year '14.

MS. GREEN: In '14 it was the special victims counsel.

MS. FROST: Oh, I'm conflating special victims unit capability. Okay, that explains it. Okay.

And then the next-to-last bullet on that page where it talks requiring a record of the outcome of disciplinary and administrative proceedings. It says that -- requires that copies of those records be centrally retained. Was there any language by which entity or where? I mean, was it -- that's -- on the same page.

JUDGE JONES: I don't know anything about that provision.

MS. GREEN: I would think if it specified I would have put it in there but I'll have to look at the legislation and see if it does.

MS. FROST: It seems awfully vague.

LT COL GREEN: And that's not legislation, that's just DoD policy.

MS. FROST: Yes, that's what I mean. It's a policy so it really doesn't --

COL TURNER: I think that's the requirement that the convening authority notify the investigative organization of the decision what the outcome was. And then the investigative agencies maintain their -- does that sound right? I think that's what that is.

MS. FROST: And then on page 7. Again, policy directives. It says at the very top of the page evaluation of the Air Force Special Victims Counsel Program by the General Counsel. Where are the findings? Who's doing the evaluation?

And then the next bullet. Was there any time-line associated with the General Counsel development of the methodology for integrating the CVRA into military justice?

MS. GREEN: I don't know the answer to either of those questions. Does anyone else know the answer?

MS. FRIED: The Joint Services Committee would be tasked by the general Counsel to look at the Special Victims Counsel program. Maybe you want to check with the office and see if they have that information.

MS. FROST: I just wonder because these are policy directives

and it seems like there would -- that a little more detail would be really helpful.

MS. GREEN: I can follow up on them and get back to you.

MS. FROST: Okay, great. Thank you.

MS. HOLTZMAN: I have -- I'm going back to the same point that Professor Corn raised but I have a different issue with it.

Which is that in the Fiscal Year '14 NDAA the accused may refuse to testify in -- I mean, sorry, the victim may refuse to testify in a probable cause hearing.

Well, suppose the victim is the only evidence that you have. I mean, so the victim can -- I mean under this rule -- I just wonder whether Congress thought this through. I mean, I don't mean to suggest Congress doesn't think things through. I want to make that very clear.

But you know, the consequences of this is that the victim can forestall the prosecution completely, or defeat a prosecution completely.

JUDGE JONES: Well, it seems to me though that unless they allow hearsay then there wouldn't be a case because there would be no probable cause.

MS. HOLTZMAN: Well, but you could -- what you could do is of course you could, the prosecutor could request, subpoena the victim to attend which we have done in a couple of cases.

I mean, it's not common practice and it is a very debatable practice, but I think I mentioned one time where we had a case in which the victim was

begging us not to proceed. I think it was her husband. And we proceeded and she then was ecstatic when he was convicted.

So, I don't know whether this gives -- whether they thought through the possibility of the intimidation of the victim here and the consequence of that. And to remove from the prosecutor all power to bring a case. I just wonder what kind of thought was given to this process.

COL HAM: Ma'am, there was a change, a statutory change to Article 32 several years ago that empowered -- there was no subpoena power at all at the Article 32 level.

Congress several years ago legislated subpoena duces tecum power only, very specifically not empowering the 32 officer to subpoena the personal attendance of witnesses, perhaps thinking that it would be used to mandate victims to appear.

So right now there is no authority to require any witness to -- any civilian witness to appear, or by this legislation any victim to appear -- witness can be ordered by the command to appear. That's the empowerment there if that addresses the issues you're raising.

There is no -- and we learned on a site visit that the judge, Colonel McGovern, myself and Russ Strand went on. Philadelphia, for example, has a preliminary hearing system where every victim is required to testify for preliminary hearing and be cross-examined unless there is a showing of intimidation in which case

they can go through a grand jury. Is that your recollection as well, Judge Jones?

JUDGE JONES: Yes, that's what they said. So in other words, there was never a system where the prosecutor could compel the witness to testify.

COL HAM: There was no subpoena power.

MS. HOLTZMAN: That's for the prosecutor. But you're saying from the commander.

JUDGE JONES: Could the prosecutor go to the commander and ask the commander to order the victim witness to testify?

COL HAM: Not under this legislation.

JUDGE JONES: No, no, but before then. Previously he could.

MS. HOLTZMAN: So my question then, really just to follow up on that. I'm sorry, Professor Corn. It's just, can we find out whether Congress considered this.

And if they didn't could we ask for -- should we suggest or recommend that the impact of this be examined? I don't know if we have the time to do it.

MS. GREEN: I think it's a really good point.

PROF. CORN: I think you have to consider it within the broader context of the Article 32.

So, the Article 32 prior to this change, the Rules for Court-Martial gave the investigating officer the authority to determine reasonable availability.

It gave the accused the right to request that reasonably available evidence and witnesses be produced. So if I'm defending a soldier accused of sexual assault I can essentially demand that the victim be present for live confrontation at the preliminary hearing.

If the investigating officer determines that a witness is not reasonably available then the rule authorizes the use of alternate forms of evidence including sworn statements.

So I think what the statute has done is it's taken away the discretion of the investigating officer to require the victim of a sexual assault to be subjected to confrontation prior to trial and automatically trigger the rule that says the prosecutor is permitted to use not a deposition, a sworn statement as an adequate alternative.

Now, we would assume that if there is an unrestricted report that's going to go to the point of an Article 32 at some point that alleged victim has executed a sworn statement as part of the police investigation.

So, I mean I don't think the -- as I read it in broader context I don't think it's giving the victim the ability to torpedo a prosecution. I think what it's doing is allowing the government to shield the victim from confrontation until the actual trial.

MS. HOLTZMAN: Okay, as long as we are confident about that.

MS. GREEN: I have heard judge advocates talk about --

PROF. CORN: Which troubles me, but that's a different issue.

MG ALTENBURG: There's still an argument that it goes too far to shield the victims. And that it's unfair to the accused.

PROF. CORN: But I have another question related to that. Can't a victim --

PROF. HILLMAN: Can I just hear Shannon's response to that? I just missed what you said. You said you've heard judge advocates and what was the --

MS. GREEN: Say in response to the new probable cause hearing that they will ask the judge to order deposition of the witness, of the victim.

PROF. CORN: But if it's an Article 32 the judge has no authority to order a deposition because it's prior to referral.

PROF. HILLMAN: But that is what we heard.

MS. GREEN: I think that's an issue out there.

PROF. HILLMAN: We've heard that in site visits where they've told us that's their anticipated corrective to the process, that the deposition process will substitute for the discovery process that was in the prior Article 32. That's their guess.

PROF. CORN: Well, I mean, I don't think a judge orders a deposition unless there's a reasonable likelihood that the witness will be unavailable at the time of trial.

COL HAM: We also saw on a site visit to Bremerton, Washington State, for example, has a system where either side can move the judge I think ex parte to depose a material witness. And the other side is not entitled to be present to cross-examine. So it's really not a deposition, it's an interview under oath by one side to the other.

JUDGE JONES: For the purpose of establishing probable cause?

COL HAM: For the purpose of investigating their case.

JUDGE JONES: For the discovery aspect.

PROF. HILLMAN: That's right, discovery, specifically.

COL TURNER: I have a question on 1705. It's page 3, the second major bullet. It may be just the wording of this but I know there is some discussion about this at least out in the field and I'm told perhaps at the Joint Service Committee.

Where -- no, that's not the right section. I'm sorry. As it modifies -- yes. As it modifies Article 18.

So here, the second-to-last sentence says, "And any allegation warranting trial must be forwarded to the GCMCA for referral."

So, that combined with Section 1744 where -- I think it's being perhaps interpreted in the field. I'm not sure we fully understand the intent of Congress here. And maybe somebody else has more information that can clarify

that.

Here's what I'm trying to describe, the scenario. So, because of the IDA authority an O-6 gets the allegation. An O-6, special court-martial convening authority, gets the allegation of the sexual assault as initial disposition authority.

Now, if he and his SJA decide with his SJA's recommendation, they decide that that will not -- that he doesn't believe that it warrants trial, then he does not have to forward it to the general court-martial convening authority for the series of reviews that go to the Service Secretary or the superior convening authority.

But, if one of those two at the special court-martial convening level, if say the SJA recommends it not go forward but the special court-martial convening authority says yes, I think it should, I'm going to send it up to the next level, both of those people -- whatever happens at the GCM level, now that mandates the next level of review at minimum.

So, I guess I'm just trying to get to this point here where it -- from the way I think some people are interpreting it in the field there is still this level of authority at the special court-martial convening authority if it's in concurrence with the SJA that we're not going to forward this to a general court-martial convening authority and it dies there without any higher-level review, except for those policy-level reviews that we always do a superior convening authority.

PROF. CORN: And that's the difference between amending

Article 18 to restrict referral versus disposition. Correct? So there's no amendment that withholds disposition authority on sexual assault allegations to the general court-martial convening authority, only referral. Is that correct?

COL TURNER: Well, it's the interplay of all those things, of 1744, Article 18 as well as initial disposition authority.

MS. HOLTZMAN: So what are you recommending?

COL TURNER: So, I guess I'm wondering is that really what Congress intended? Or did they want everything to go up at least to the general court-martial convening authority or to the Service Secretary for review.

PROF. HILLMAN: Can I ask a procedural question, Judge Jones?

JUDGE JONES: Yes.

PROF. HILLMAN: Do we want to figure out what Congress intended or what we think is a good idea?

JUDGE JONES: Well, I guess part of the first question though is to try to figure -- I mean we just have descriptions of what's in these sections.

So it may be that we do need to delve more deeply into what was said, not just what they may have intended. But I think now we're competent to talk about what we think is a good idea.

PROF. HILLMAN: It's a live question for me. I'm not sure whether we should be assisting the branches of service in implementing what was the

-- what these proposals were intended to do, or if we should be assessing their effectiveness. Those are -- it's not clear to me from our mandate which one of those we ought to put the most pressure on. In some ways --

JUDGE JONES: Oh, I think it's the latter. I'm not suggesting that we can be here telling the Services what these mean. I'm trying to figure out what they mean as I sit here I guess so that we can comment on them.

PROF. CORN: If we think they're underinclusive or overbroad we could at least point that out even if it's been enacted already.

JUDGE JONES: Right.

MS. GREEN: Because that would be consistent with the term of reference to assess the strengths and weaknesses.

PROF. CORN: Right. But I think that does require us to try and at least see if we can figure out what they intended.

MS. GREEN: The way you described it, Colonel Turner, is how I understand those. But I think that's a good question to maybe ask.

PROF. HILLMAN: So, can you -- what's the difference then? I mean, you're saying if Congress really wanted everything to go up then we'd have to alter the disposition authority in addition to the referral authority.

COL TURNER: I'm not suggesting a particular way to solve that. But rather highlighting the fact that there is this level at the O-6 level that it can end the discussion.

PROF. CORN: And I don't think on that issue we have to even think about what Congress intended. What we know is that the amendment they made leaves some ambiguity. And I think then we have to make a recommendation on whether we think it should be tightened by regulation, or --

COL TURNER: It can be a policy.

PROF. CORN: Right. Or that that makes perfect sense.

MG ALTENBURG: In that context then it would make sense to find out what DoD is doing. Because they can interpret it the way they think it ought to be and then there's a policy and that's the way it's going to be. If Congress wants to change it you have to go back and change the statute.

MS. HOLTZMAN: Or if we don't like it we can say to Congress we don't like it. DoD is -- how they're interpreting this.

MG ALTENBURG: Right.

COL HAM: I'm looking at the statute. The plain language of the statute appears to be --

JUDGE JONES: Which provision now, 17 --

COL HAM: This is 1705 which is titled "Discharge or Dismissal for Certain Sexual-Related Offenses and Trial of Such Offenses by General Court-martial."

The plain language seems to indicate that what Congress is doing is saying if these certain offenses are going to a court-martial they are going to a

general court-martial. Not that they must go to a court-martial and it must be a general court-martial. Does that make sense?

PROF. CORN: Or not that the decision on where they're going must be made by a general court-martial convening authority. That's Lisa's point, that under that interpretation the special court-martial convening authority could dismiss the change before it ever gets up to the GCMCA.

COL TURNER: That's right. So, for example, a victim on the advice of his or her special victims counsel maybe decides to prefer charges. So bring the charges. Well, the O-6 can kill at that level. And if that's okay, that's okay.

MS. HOLTZMAN: And they can kill it when they both -- when the --

COL TURNER: SJA and the -- but if one of the two of them disagree then it has to go to the general court-martial convening authority and his boss. It has to go up two levels at minimum.

MS. HOLTZMAN: But why would the special victims counsel bring it to somebody who's only got special court-martial convening authority?

COL TURNER: Well, because once you prefer charges that goes automatically to your special court-martial convening authority.

MS. HOLTZMAN: First.

COL HAM: Doesn't it just as likely envision the scenario where the special court-martial convening authority orders the Article 32 investigation. It

comes back no probable cause and it's done.

COL TURNER: That's right.

COL HAM: There's no requirement to forward it to the general court-martial convening authority? Looking at the language of the statute.

COL TURNER: Yes. I think that's a more typical scenario.

MG ALTENBURG: Well, more typical is the decision is not to prosecute.

COL TURNER: Correct. Well, I don't even know if we've ever had -- if we've as of yet had a special victims counsel with their client bring charges themselves instead of just going through the typical process of the unit commander preferring charges.

MG ALTENBURG: I've sworn victims to charges.

COL TURNER: Yes, sir, I have too, but I'm just saying from the SVC program I don't know if we're exercising that option.

MG ALTENBURG: Right. That's one of those things that it's there and you can say we have this capability but the fact is most people in the military don't realize that they can prefer charges against anybody. They don't have to wait for the commander to do it. But in practice it's not done very often.

PROF. HILLMAN: I think maybe we're at a degree of technicality that won't be reflected in our recommendations.

JUDGE JONES: I think that's probably right. Are there --

MS. HOLTZMAN: Okay, I'm going to the prior bullet because this is an area that I think needs -- I want to make a recommendation with regard to it. And that is that -- page 3, first bullet, 1706.

A victim gets an opportunity to submit matters for consideration by the convening authority prior to the convening authority's taking action on the findings or sentence of a court-martial that involved the victim.

Does that mean that -- I want to make it clear that the victim has the right to be heard vis-a-vis the convening authority on whether or not to prefer charges.

MG ALTENBURG: That provision right there is after the trial is completed.

MS. HOLTZMAN: That's right. And I'm talking about I want to see something done before if the commander makes the decision -- the convening authority makes the decision yes or no. That that victim should have the right to be heard in connection with the decision whether or not to refer the matter.

And that would also apply to the special court-martial convening authority. I don't know where that goes, whether it goes in 1706 or it goes someplace else.

JUDGE JONES: I think we discuss that in the Victims Services Committee.

MS. HOLTZMAN: Okay. So we don't have to do it.

JUDGE JONES: Well, only to say that I think the sense of that committee was that that was certainly a stage where a victim should be heard. And I would be very surprised if there wasn't a recommendation for legislation or action on that. But it's not here now, you're right.

MG ALTENBURG: Arguably legislation on that specific issue would be a belt-and-suspenders approach.

I would say it's contemplated that the special victim advocate is not doing his or her job if they don't get this information to the special court-martial convening authority.

MS. HOLTZMAN: But there's no requirement the special court-martial convening authority pay any attention to it. That's the point.

PROF. CORN: You could --

MS. HOLTZMAN: I just want to make sure that they consider that the convening authority, whether it's special or general court-martial convening authority have the -- be required to consider any application that's made by the victim or the victim's counsel with regard to whether or not this had -- whether charges should be preferred.

MS. GREEN: What you're saying, actually there's a piece of legislation that passed the Senate last week. The Victims Protection Act has a provision in there requiring the special victims counsel to advise a victim on the pros and cons of civilian prosecution versus a court-martial. And that

preference that's obtained from the victim is supposed to be given great weight in the determination of which forum. It's a related --

MG ALTENBURG: Ms. Holtzman's pointing out that even if the victim makes a statement there's not a requirement. I mean, it's hard for most of us who have been in the service to imagine the convening authority, the special convening authority not considering everything that's brought to him or her.

But it's not mandated and that's your point, I think. Is that he doesn't have to consider that.

JUDGE JONES: Well, the part of it that looks, as Professor Hillman just pointed out in this Victims Protection Act is it says a process must be established by which victims of sexual assault are consulted regarding their preference on prosecution.

Actually, I don't understand why the emphasis is on their preference between one or the other as opposed to their preference overall as to whether to go forward. So that seems to me to be something the Victims Services Committee will pick right up on.

PROF. CORN: Well, and just connected to Ms. Holtzman's point. When you think about the change to the Article 32 where the victim doesn't have to testify, if the report of the Article 32 is provided to the special court-martial convening authority and then to the general court-martial convening authority, and the victim is never testifying, right, then we don't -- at best you're going to have a sworn

statement.

So it wouldn't be too complicated, I don't think, to have a requirement that when the report of investigation is presented to the convening authorities that the victim be given the opportunity to contribute.

JUDGE JONES: And that's exactly what the Special Victims Committee talked about and I think is intending to recommend.

PROF. HILLMAN: Can I zero us in on the convening authority part of the legislative proposals here?

JUDGE JONES: Okay.

PROF. HILLMAN: But you've already pointed at that. So the question really, do we want to make a recommendation with respect to the elevation of decision-making based on what we've just talked about with disposition and referral authority there?

COL TURNER: And what you review and/or disposition.

PROF. HILLMAN: That's right. So there has been already this elevation of authority that moves the control of the prosecution essentially -- to move away from those terms of art -- away from -- closer to the action and further. With the idea that this will encourage more aggressive prosecution.

So, part of what I feel like we should say is does this address a problem that we've seen and is this an appropriate fix. That would be assessing the

--

JUDGE JONES: It's not just more aggressive prosecution though. I think I've always also thought the point was to make it less susceptible to any bias because of the elevation.

MG ALTENBURG: And to encourage reporting also.

PROF. CORN: Well, from my perspective we have heard over and over again that one of the reasons to retain the existing role of the general court-martial convening authority is because of the level of maturity, the extent of the relationship with the SJA, the attenuation from the general military population.

So, I would be strongly in favor of extending that requirement to say that even if the special court-martial convening authority thinks that after the 32 the case should be dismissed, that should be a recommendation made to the general court convening authority, that disposition authority is retained at the GCMCA level.

COL HAM: The analogy would be -- I mean, there are some areas where the general court-martial convening authority retains initial disposition authority. For example, it is very typical that all officer misconduct is reserved to the general court-martial convening authority. All senior NCO misconduct.

But that doesn't mean that the general court-martial convening authority has to keep it. In other words, he receives the report. He analyzes it. He can say this does not need to be handled at my level. I return it to you for whatever disposition you deem appropriate. Is that what you're talking about?

PROF. CORN: I think that Congress has foreclosed some of

that. Because they've said if the general thinks it should be tried by a court-martial it's got to go to a general court-martial.

But I certainly think -- what I'm suggesting is that before a special court-martial convening authority dismisses an allegation of an offense that would trigger a mandatory dismissal or dishonorable discharge the question I think on the table is should that authority to terminate that case be plenary in the special court convening authority or should it be vested in the general court convening authority.

COL TURNER: So, I think there are two issues at play there. If you address it that way you're missing those cases that are allegations but aren't ever preferred. What happens to those that never go to a 32?

I think the other issue there is the way you phrased that is now you're removing that authority from the special court-martial to make a decision. As opposed to what the structure they've imposed now is make your decision and then a superior reviews the appropriateness of that decision.

And part of this whole discussion has been how important it is to keep the real commander who is the convening authority involved in the process.

And so what I think I hear you saying is you would elevate and remove that piece of that command from sexual assault cases. As opposed to saying any case where there is an allegation of a sexual assault or covered offense, the special court-martial convening authority makes a decision. Am I going -- is somebody going to prefer to send him to a 32?

He makes his decision. But then have somebody else higher review it if it doesn't go forward to -- if he doesn't formally forward it to the general court-martial convening authority.

PROF. CORN: Which is required now if there's dissent between her and her SJA, correct? So if the SJA says I think it should go to court-martial and the special court convening authority says I disagree --

COL TURNER: Or vice versa.

PROF. CORN: Then it has to be elevated.

COL TURNER: Then it goes up to the GCM. But you never have to -- that's correct, you have to go up for a review but not a different decision, unless that review says no, I do believe it needs to go forward and I will take that action.

PROF. CORN: Well, I mean I guess the simple question is then do we feel that a special court-martial convening authority should be vested with the power to terminate an allegation of serious sexual violence.

COL TURNER: But it's a two-part question. Should they be vested with that power? And even if they are, which DoD has said they should be --

PROF. CORN: Should there be a check on it?

COL TURNER: Should there be a review or a second -- that's right.

COL HAM: What's the incentive to -- I'm thinking historically. Maybe I shouldn't.

One of the problems before the UCMJ is the panel would sentence somebody to the max and just then let the general set the sentence that he wanted because he could cut it. So what's the incentive then to ever -- just forward it? If the CG is going to get it anyway why would I ever, the special court-martial convening authority say no, this shouldn't go forward?

PROF. CORN: Well, I think one of the -- my reaction to that would be one of the advantages is there's a professional development element.

So if a colonel gets a case and he wants to terminate it, and there's a requirement that he report that to the general court convening authority, then there's the opportunity for the interaction between these two senior-level commanders and discussion of the merits of it. But I get your point.

MG ALTENBURG: The only case you're talking about is the case where the SJA and the commander, special court convening authority, both agree the case should not be prosecuted. That's the only case that's going to happen. All the other cases are otherwise provided for. One of them disagrees, it goes to the general --

PROF. CORN: Is it the SJA or is it the special court convening authority servicing JAG? Because I think that's a difference too.

MG ALTENBURG: Yes.

PROF. CORN: Because when I was a captain with one year of experience in military justice I was giving advice to a special court convening authority.

But it was you who was giving the advice to the GCMCA.

COL TURNER: That's a good question. I didn't pay attention to that because we don't have that issue in the Air Force.

LT COL GREEN: And I believe 1744 provides specifically that if there's a disagreement or if there's an agreement between the Article 34 advice of the staff judge advocate to the convening authority then it must be elevated to the GCM convening authority. It does not contemplate advice outside of Article 34 advice from a staff judge advocate.

COL HAM: -- advice in general court-martial. The staff judge advocate is a term of art that is the legal advisor to the general court-martial convening authority.

PROF. HILLMAN: Can I come back to what Judge Jones said? So, the goal here is to -- Congress' goal and our goal essentially is not all these other things, but to remove the impression and the reality of bias in the decision about prosecution, right? To create a structure that would more effectively ensure that if a case ought to go forward it will.

So, the question is does a further elevation, is a further elevation required in this case. Just to go right to that issue I'd say no, in large part because of how broad the definition of sexual assault is.

Now, you said if it's a serious sexual assault, but that's not what's happening. It's all of these offenses that constitutes sexual assaults under Article

120.

And what we're seeing in site visits is that many, many cases that are not penetrative offenses that would be considered rape or sexual assault even in civilian jurisdictions are getting elevated for the sort of scrutiny that doesn't seem appropriate to the severity of the offense. So I would be disinclined to make any recommendation that we increase, elevate further the authority.

PROF. CORN: Would you be inclined to do it if it was linked to the offenses that trigger a mandatory punitive discharge?

PROF. HILLMAN: Yes, because those are the ones that actually have raised -- those are the ones that caught Congress' attention, that have been the devastating stories that have been out there, that have triggered the impetus for reform. So that would make more sense.

But am I wrong in saying that's not how it's written? That's not what we -- it's not written that way right now. Because that's not how it's being implemented on the ground there. It's all of these cases.

COL TURNER: I think there is that sense that it's very important to keep that special court-martial convening authority commander involved in decision-making. As opposed to review. So distinguishing those two.

MS. HOLTZMAN: The other option here is to note this as an issue and suggest that the military review how it's been working in another year or two.

PROF. CORN: Because it might be -- I mean it might, you

might have overbreadth on both ends. As you say, you might have over-review of minor offenses that are really appropriate for a special court-martial convening authority and potentially under-review of serious offenses that you would want GCMCA involvement.

PROF. HILLMAN: My concern for our objective here which is to improve responses to sexual assault is that this, the overbreadth actually risks a significant backlash. And that significant backlash can happen very quickly. So, I'm less inclined to sort of wait for that to happen.

But that would be the reason for noting that right now rather than waiting for a review down the road. Because this is changing. I mean, this is already implemented. Well, some of these provisions are timed out so not everything is in effect right now. But some of the changes are already in effect.

MG ALTENBURG: I agree. There's also an efficiency issue here. I mean, that's not to be the driving force, but if everything goes up to the general court-martial convening authority then you raise issues that have been raised by others.

Plus it's just inefficient as hell. I mean, you know, there's only so many hours in a day and so many pieces of paper and all the rest of it. And we've already got -- and we're talking again about a case where a staff judge advocate and a senior commander agree this is not a case that we should prosecute.

PROF. CORN: So -- because I was confused. The

amendment to Article 18 does not restrict the mandatory GCM referral to the serious sexual offenses? It's any sexual offense?

LT COL GREEN: It's any of the offenses under the first part of that provision of the NDAA which are offenses in violation of Article 120(a) or (b).

PROF. CORN: So rape.

COL HAM: Rape and sexual -- what's called sexual assault which has specific statutory definitions. Forcible sodomy I think and --

LT COL GREEN: Right, forcible sodomy and then rape and sexual assault of a child under 120(b).

PROF. HILLMAN: So those are the penetrative offenses.

LT COL GREEN: But 120(a) includes more broadly.

PROF. HILLMAN: Yes, that's my concern.

LT COL GREEN: It encompasses more.

COL HAM: Article 120 bowlegs (a). Not to confuse anybody any more there is a 120. There's Article 120 which has Subsections (a), (b), blah blah. Then there's Article 120A which is stalking. They're not talking about stalking. Then there's Article 120B which is rape and sexual assault of a child which is included in these offenses, I believe.

So what they're including is Article 120(a) which is rape and Article 120(b) which is sexual assault which is very broad. Sexual assault is very broad.

PROF. HILLMAN: So it does include that.

COL HAM: It does not include (c) aggravated sexual contact or (d) which is abusive sexual contact which are even lesser offenses.

PROF. HILLMAN: And that's different than the mandatory dismissal or dishonorable discharge which only applies --

MS. GREEN: To rape, sexual assault of a child and forcible sodomy.

PROF. HILLMAN: Which does not include the other sexual assaults that constitute violations of 120(a).

MS. GREEN: Right.

PROF. HILLMAN: Is that right?

LT COL GREEN: But the mandatory discharge provision is triggered for the offenses Colonel Ham just listed.

The GCM jurisdiction limitation is also triggered for those offenses that -- it's the same for both of those.

PROF. HILLMAN: So there's mandatory dismissal for everything that constitutes 120(a). Shannon, is that right?

MS. GREEN: It's 120(a) and (b).

COL HAM: (a) parentheses which is rape and (b) parentheses which is sexual assault, which includes a wide range of conduct.

PROF. CORN: But not offensive touching.

PROF. HILLMAN: So, the way that 1705 is listed here I just want to -- I'm not looking at the statute itself. It looks like it doesn't include that 120(b).

MS. GREEN: You're right and it should. I'm looking at the statutory language right now.

LT COL GREEN: Professor Hillman, you're right. This needs to be clarified. This is --

PROF. HILLMAN: Okay, so that means that we actually have mandatory dismissal and discharge for everything that would constitute the sexual assault which includes the wrongful touching sorts of --

COL HAM: It doesn't. It includes sexual acts which are contact -- I'll read it -- contact between the penis and vulva or anus or mouth and penetration, however slight, or the penetration, however slight, of a vulva, anus, or mouth of another by any part of the body -- that's the broad part.

Penetration of the anus, vulva, or mouth of another by any part of the body or by any object with an intent to abuse, humiliate, harass, or degrade any person, or gratify the sexual desires of any person.

PROF. HILLMAN: So that's why the judge advocate who reviewed the Article 120 with us when we were in Austin talked about a finger in the mouth potentially being a sexual assault --

COL HAM: That's right.

PROF. HILLMAN: -- that would be a violation of 120(b) that could lead to in this case mandatory discharge or dishonorable -- dismissal or dishonorable discharge.

But the --

PROF. CORN: If he can prove the scienter.

COL TURNER: It's to humiliate even, not even sexually.

PROF. HILLMAN: So it's not quite -- anyway, it's quite broad, but it's not quite as broad as what I was thinking. So the cases, those are lesser offenses, the ones that have been described to us in the field. They would not trigger this elevation. Okay. The offensive touching. Okay, now that we've got that settled.

(Laughter)

PROF. CORN: Who should have dismissal authority over those offenses. That's I think the question.

PROF. HILLMAN: I think unless we recommend a change to 120 that we shouldn't disrupt what Congress did on this right now. Because it does not include then those extra -- the offensive touching cases that I was talking about.

So, Representative Holtzman, I defer. What you said I think makes sense to me as a recommendation which is that we wait rather than recommend any kind of change in this for right now. I wouldn't recommend a further elevation of authority.

MS. HOLTZMAN: I'm not in favor of that either. But the question is whether we want anyone to take a look at this. Maybe that's -- I'm agnostic.

JUDGE JONES: Well, I agree we shouldn't change this.

MG ALTENBURG: Actually, I feel strongly both ways.

(Laughter)

MG ALTENBURG: Or I think we should all carry a prayer book and a .45 and pray to God we do the right thing.

COL TURNER: I had one other question and that's on page 6. It talks about --

MS. HOLTZMAN: Do we need a vote? Madam Chair?

JUDGE JONES: Well, I guess I don't think we should change anything. And I'm also not sure we should ask anybody to take a look at it. Let's -- it's all new. Let's just -- we can all see what happens.

PROF. HILLMAN: Well, should we make a finding that says this elevation of authority will, you know, increases the seniority and experience of the persons who make decisions with respect to -- I mean I think we should acknowledge this is a one-way ratchet. It only goes up, right, if there's a decision not to go forward. That's a part of the big picture of this bill. Just like a part of the big picture of the bill is giving victims more of a say in the process.

PROF. CORN: I'm lost. It only goes up if there's a decision

not to prosecute? I thought that's when it doesn't go up. I thought it only goes up when there's a decision to prosecute in which case it must be prosecuted by a GCMCA.

PROF. HILLMAN: If the staff judge advocate recommends charges and the convening authority decides not to refer the charges the convening authority must forward the case file up.

PROF. CORN: Okay, but it only goes up when there's a conflict between the SJA and the special convening. And that assumes that that language applies to that relationship, right?

See, that's one of the things I'm struggling with. A lot of times a special court-martial convening authority is not being advised by the staff judge advocate. He's being advised by his legal advisor or her legal advisor.

COL TURNER: In the Army.

PROF. CORN: Okay. Fair enough.

PROF. HILLMAN: So we could then say it should be the staff judge advocate?

PROF. CORN: If a special court-martial convening authority decides to no-bill a case there has to be consultation with the actual staff judge advocate.

COL HAM: Oy.

PROF. HILLMAN: For those offenses. I mean for that list of offenses, right?

JUDGE JONES: Well, who's the special court-martial authority talking to now?

MG ALTENBURG: Usually a major.

JUDGE JONES: But it's a JAG.

MG ALTENBURG: Usually a JAG major. Oh, it's always a JAG.

MS. GREEN: Not necessarily a staff judge advocate though.

JUDGE JONES: Right.

MG ALTENBURG: Term-of-art staff judge advocate is almost always a lieutenant colonel or a colonel.

JUDGE JONES: Right. And we're assuming that most special court-martials convening authorities are not being advised by a staff judge advocate.

LT COL GREEN: That's different across the Services. The Air Force has appointed staff judge advocates to special courts-martial convening authorities.

However, the advice that they provide to their convening authority does not come in the form of Article 34 advice on a particular case necessarily. I mean it can but that's not required.

So it is a more informal advice that if there is an agreement informally with that, that case isn't elevated under the statute.

MG ALTENBURG: Are they mostly majors or mostly lieutenant

colonels?

COL TURNER: Mostly lieutenant colonels.

PROF. HILLMAN: I find it ironic that when they're empaneling members they actually want junior members, that is, prosecutors, the trial counsel, because they're the ones who've been trained in the ways the Services are reckoning with sexual assault now. And they have the mind-set that will result in the outcomes that the sexual assault prevention program wants.

And yet we're elevating the disposition authority further and further up. I just don't know that we're not running at cross purposes.

PROF. CORN: Well, I think whatever effect this has should be relatively uniform across the Services.

I think that the notion that a conflict between the special court-martial convening authority and her legal advisor elevates the issue to the general court-martial convening authority suggests to me that the legal advisor that advises the GCMCA should be involved in that.

Now, I think in practice we would expect that if you're a major or a captain advising a special court convening authority and there's a conflict between your advice and the commander that you are going to bring that to your -- just you'd bring that to your supervisor.

I don't know why we couldn't just say that -- well, I mean there are a lot of reasons why we couldn't say it.

My concern is that, a specific concern. You're deployed. You're in Iraq. There's an allegation that one of your soldiers sexually assaulted a civilian contractor.

You're the brigade judge advocate, Army. You're a captain or a major. You're in the middle of operations. You're very wired into the battle command staff.

You go to the commander. You say I think we should do something. Commander says I don't think we should do it. How is that formalized?

COL TURNER: But that, under that scenario, correct me if I'm wrong, under that scenario it has to go to the Service Secretary.

PROF. CORN: Do you agree?

COL HAM: The statutory language is staff judge advocate. So we turn to the Manual for what is a staff judge advocate. I mean, there's all these steps.

And the staff judge advocate is a judge advocate so designated by the Services. So, in the Army the definition of a -- and I have looked this up. Unless it's changed the definition of a staff judge advocate is the legal advisor to the general court-martial convening authority. For the Air Force it may be different.

So that term "staff judge advocate" may mean different things in different Services. As I read the statute with all that in mind this trigger to go up

because there are not staff judge advocates to special court-martial convening authorities in the Army does not apply. This is the problem.

MS. HOLTZMAN: That's the problem with the statute is that they wrote it in a way that doesn't comport with reality because special court-martial convening authorities don't have a special -- or generally don't have staff judge advocates.

MG ALTENBURG: In the Army.

MS. HOLTZMAN: Well, not only the Army. What about the Navy or the Marine Corps?

COL HAM: It's up to how they define the term "staff judge advocate."

MS. HOLTZMAN: Well, so we don't know whether it comports with reality, okay? That's all I'm saying. So maybe there is an ambiguity here and maybe it needs to be corrected. Or maybe we should find out how it works in the other Services.

But I'm sort of changing my mind now. If it's not uniform I don't know why it shouldn't be uniform.

LT COL GREEN: Well, I think 1744 does limit it because it's advice provided in the context of Article 34. So, it does -- it's saying if there's a formal difference with advice provided under Article 34 and a GCMCA or a convening authority's determination that has to be elevated to the Service Secretary.

Advice outside of Article 34 if there's a disagreement does not have to be elevated under the statute.

PROF. CORN: And only a staff judge advocate can be giving Article 34 advice.

COL HAM: Only the general court-martial convening authority.

PROF. CORN: Right. So that means that if the special court-martial convening authority disagrees with her legal advisor it triggers no further review.

MG ALTENBURG: And that 34 is the statutory requirement the SJA writes out there is jurisdiction, there is an offense under the Code, there is evidence and I make this recommendation to you. And that's the statutory mandate that exists. So, regardless of the difference in the Services of the staff judge advocate as a practical matter it's going to be the advisor to the general court-martial convening authority.

MS. HOLTZMAN: But what happens on the lower level?

PROF. CORN: But what I'm saying, sir, is what -- as I understand it if a brigade -- a special court convening authority gets an Article 32 back and says I don't want this to go forward. And the legal advisor who is not the SJA, who is not writing a pretrial advice says I disagree there is no requirement that it be elevated.

Now, in practice it probably would be.

MG ALTENBURG: In practice it will be, period.

PROF. CORN: Of course. But you know, if we know that, if we know that in practice I'm going to go back to you and say, sir, we've got to do something about this, then is it something that should be incorporated into the process?

MG ALTENBURG: Well, I think the way the statute is written the brigade commander has got to go to the SJA. He's got to get an opinion of the SJA. His legal advisor is not good enough given the way the statute is written. He's going to have to seek the advice of the SJA whether he's on another continent or not.

PROF. CORN: To dismiss it?

MG ALTENBURG: I don't think he can dismiss it. You can't dismiss it unless an SJA and a colonel and a special court convening authority agree.

PROF. CORN: Where is that provision? I thought that was exactly the point that Colonel Turner raised, that this statutory change says if you want it to go to trial it must go to the general court-martial convening authority.

But if you don't want it to go to trial there's no statutory or regulatory requirement that it be referred or even discussed with the GCMCA.

MG ALTENBURG: I think you can infer from the statute you can't dismiss it at that level unless your lawyer agrees. And your lawyer has to be a staff judge advocate. So you've got to talk to him or her.

PROF. CORN: So, my question is do we leave that to inference? Or do we make a recommendation that it would be wise to look at that issuance?

COL TURNER: Why don't we ask the Joint Service Committee or somebody for what they're doing or how they're viewing that?

JUDGE JONES: Because I got the impression from a briefing when we went to Fort Hood that even at the special court-martial level whatever the statute may or may not say that they were consulting with the general court-martial authority.

COL TURNER: Absolutely as a matter of practice.

JUDGE JONES: As a matter of practice that was absolutely what I was briefed on there.

But looking at this I don't see it saying that at the special court-martial level if a decision is made no prosecution that there's any obligation at least in this statute to go up.

MS. HOLTZMAN: Not only not to go up, but there's not a question as to who you're consulting with. Because when you're consulting with a staff judge advocate according to Mr. Altenburg you have to go through a list of analyses and respond to certain questions. That process is not part of the process for a special court-martial.

Now, maybe it doesn't need to be because his view probably is

that these aren't as serious cases. But they might be serious cases.

PROF. CORN: There's also in my view, and that's all it is, I think there's some value -- when you put a judge advocate in a very contentious position with a commander where the judge advocate might say, sir, I disagree with your decision, to arm that individual with some kind of regulatory top cover that says sir, if you want to dismiss this case and I disagree with it we have to bring it to the SJA. Not because I think it's a good idea.

COL HAM: So I'm asking, the system that you're thinking about then in effect requires every case to go to the SJA. Because if it's going to court-martial it's got to go through the SJA.

And if it's baseless, completely baseless, assume hypothetically. The initial disposition authority, the special court-martial convening authority, if he says this is completely baseless it has to go to the SJA. So is that the recommendation you're thinking?

PROF. CORN: I'm not saying I'm recommending it. I'm suggesting that it seems to me -- I agree with General Altenburg that the inference to be derived from the provision that amends Article 18 is that high-level adjudicative judgment will be applied to the disposition of these very serious sexual violence offenses.

And I think we all agree in practice that's what's happening. I see very little downside in having a rule that says before a special court-martial

convening authority may dismiss an allegation that falls in this category there must be consultation not just with a JAG but with the staff judge advocate.

COL HAM: Then why have the special court-martial convening authority be the initial disposition authority at all?

PROF. CORN: I'm not changing that function. I'm just saying that the level of legal advice you get in the exercise of that judgment is elevated beyond just what may be an officer that is at risk of being potentially too close.

Look, you know we've had situations not necessarily with sexual violence where, maybe not in the Air Force, but certainly in the Army where the inclusion of the brigade judge advocate into the battle staff has diluted that lawyer's ability to be sufficiently impartial in the dealings. That's my concern.

So, if I'm going to do it anyway and we would expect that major or that lieutenant colonel to go to the colonel and say this is -- I agree with what the commander is doing but I just want you to look at it to get your blessing, what's the downside of that? That's my question. Of elevating the role of the legal advisor.

PROF. HILLMAN: Judge Jones, we have Admiral Houck on the phone.

JUDGE JONES: Admiral, are you on the phone? Jim?

VADM HOUCK: Hi, I am.

JUDGE JONES: Do you have any thoughts about this? You've been nominated by Professor Hillman. And me of course.

VADM HOUCK: No, please, please ask the question again.

JUDGE JONES: We're talking about the special courts-martial disposition authority and the fact that in practice I was under the impression from briefings that basically when it's one of the serious sexual offenses the special courts-martial convening authority or disposition authority is always in consultation with the general court-martial convening authority. You know, for the offenses that are automatically elevated to the O-6 or above.

And we have a statute that doesn't seem to require if you read it that that consultation or if there's a decision at the lower level not to go forward that there's any requirement to run that by, for lack of a better term, the general court-martial convening authority.

PROF. CORN: Or the SJA potentially.

MS. HOLTZMAN: The problem, Admiral, in a nutshell is that the special court-martial convening authority, if he or she agrees with his or her legal advisor as to drop the charges they get dropped without review.

There are two concerns here. One is that the legal advisor is not at the staff judge advocate level. And two, there may be some serious charges here and should they be reviewed at a higher level?

And one solution is the higher level of having a staff judge advocate review it, or to require that the general convening authority review it. I think those are the two options. Do nothing is the third.

VADM HOUCK: Yes, and the problem I think is a potential -- at least traditionally the problem has been command influence.

And through the years I think -- and I think Geoff Corn and others who -- and John Altenburg and others who have practiced in the area would allow as how there's always a certain risk in having consultation up and down the chain of command in light of command influence.

It seems to me, and I profess to not have really well thought-out thoughts on this, but it strikes me that a model -- if the choice is do we have the staff judge advocate review it for the general court-martial convening authority, or the general court-martial convening authority him- or herself, it's not clear to me how we get around command influence. Unless you're just going to give the problem then to the general court-martial convening authority.

Am I at all in the ballpark of the problem here? Or not?

JUDGE JONES: No, I think you are.

PROF. CORN: Sir, this is Geoff Corn. Wouldn't -- and I agree there's always that risk. But doesn't this also ensure that the staff judge advocate has the opportunity to go to the general court-martial convening authority and say you can't tell the special court-martial convening authority what to do, but I think you ought to withdraw this case to your level.

VADM HOUCK: As a mechanism for ensuring the right kind of oversight. Yes.

And is the thought that this would be unique to sexual assault cases? Or would this be put in across the board for any kind of charge?

PROF. CORN: Only sexual assault offenses that trigger the mandatory punitive discharge.

VADM HOUCK: And the question is whether I think -- which one I think is a good idea? Or if I thought either one of them would be workable?

PROF. HILLMAN: Admiral Houck, this is Beth. One reason that I wanted to ask you was because you're the Navy guy.

And we've heard there's real differences. And part of our concern is not only about transparency and fairness in the system but also uniformity.

Congress has enacted language here that honestly means something a little different on the ground in each of the branches because of how things work out.

So I'm curious, would the special convening authority's legal advice in the Navy generally come -- I also wonder about the Marine Corps -- generally come from somebody at the level of a staff judge advocate as in the Air Force? Or could it come from somebody really pretty junior as Geoff described could happen in the Army?

VADM HOUCK: Yes, I don't think it's going to be that junior. I think that the way, and you'd do well to ask somebody who's actually practicing and current right now because this has been such a dynamic area with so much change.

But as of a year and a half ago when I left, the advice of a special court-martial convening authority who would be an O-6 in the Navy as things were at that point for a sexual assault case would be coming from the region legal service office.

And the senior officer in the region legal service office -- well, in all likelihood would be coming from a staff member in that office.

So, I don't think it's going to be a real junior lawyer. I don't think it's going to be what you're sort of holding up and describing as the Army.

But the better course here would be to ask exactly who it does come from today. Because this has been in flux over the past 18 to 24 months. So, that's kind of an answer but it's not a completely satisfactory answer.

PROF. HILLMAN: There is no completely satisfactory answer on this because this statute is being interpreted and it's out there right now.

Shannon, I wonder about the Marine Corps.

MS. GREEN: It's definitely not always an SJA. Similar to the Army.

MG ALTENBURG: Usually a major, sometimes a lieutenant colonel.

MS. GREEN: Right.

VADM HOUCK: If I could jump in again to just clarify a little bit the situation in the Navy.

A special court-martial convening authority in many cases is not going to have an indigenous assigned SJA.

What they will do is turn to this region legal service office. And an officer, and this is how it was when I left. An officer designated to provide this kind of advice who was usually going to be an O-5 would be the one providing that advice.

But again, my caveat to you is that I'm not sure if that's exactly how they're doing it right now. And I think you'd want to follow up to get the fact-specific and accurate answer. But it's not going to be a lieutenant or somebody of that level in these kind of cases.

PROF. HILLMAN: Thank you.

JUDGE JONES: Well, I do think we need to know what instructions are out there in each of the Services with respect to what they're doing. And maybe once we have that we can take a look at the actual statute and we can discuss it again after we've had the opportunity to really look at everything.

MS. GREEN: Is it fair to say though that across all of the Services the special court-martial convening authority isn't always advised by an SJA? I mean, isn't that -- so that's really what we need to know in terms of --

MG ALTENBURG: I think the Air Force is the only one where it almost always is an SJA.

COL HAM: And again, the statute talks in terms of not only

staff judge advocates but as Colonel Green pointed out Article 34 which again is only going to be given to a general court-martial convening authority by statute.

COL TURNER: That's an important point. I'm glad you clarified that, Colonel, because I misspoke on that.

COL HAM: Yes, and that makes your point, Professor Corn. Which I think corroborates Professor Corn's concern that there is no requirement for this review at the special court-martial convening authority level. So, I guess it comes full circle if that's the -- you would like to consider.

JUDGE JONES: Right. I don't know what recommendation I would make but I think it is -- it doesn't look to me like there is any review at the special courts-martial level.

And I was under the impression that in practice at least there was a lot of going up to the convening authority and the staff advocate. So I'd like to know what the practice is as well. And then we could discuss a recommendation.

Because if we think it's being elevated we need to know where the authority is being elevated to and exactly how it's being handled.

MS. GREEN: You know, we have so many other items that we were hoping to cover in this period of time. And I wish I could spend the entire like week discussing all of these. I actually have to leave right now.

JUDGE JONES: It's 12:38 if any -- do we want to break for lunch at this point? Why don't we break for lunch. You have to leave period

though is what you're saying?

MS. GREEN: I actually -- yes.

JUDGE JONES: Okay. Well, thank you very much, Shannon.

MS. GREEN: We'll have to revisit all of this very soon.

LT COL GREEN: You can continue, I mean, if you wanted to talk about the proposed legislation and what the Subcommittee -- we can take that up today, or we can let -- take it up in a telephone conference down the road.

JUDGE JONES: We'll keep going after lunch, sure.

LT COL GREEN: Yes, ma'am.

MS. GREEN: And one thing, with the Victims Protection Act we're going to get DoD's perspective on that here in the next couple of weeks. So that may be something that we can defer until that time.

JUDGE JONES: All right, thanks.

(Whereupon, the foregoing matter went off the record at 12:39 p.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:30 p.m.)

MS. FRIED: The meeting is open.

JUDGE JONES: All right. I thought what we would try to do -- Jim, are you still there?

LT COL GREEN: He may or may not be there.

JUDGE JONES: Okay.

VADM HOUCK: I am but I am having to start another call, which is going to distract me for about a half an hour.

JUDGE JONES: Okay, then we will surprise you with a question in about a half an hour.

VADM HOUCK: Okay.

JUDGE JONES: What we should do, I think, for the rest of the afternoon is go through these outlines that have been prepared by the staff and, in particular, talk about what we believe we would like to see in our final report and begin to talk about findings and then, obviously, also any recommendations that we might want to come up with.

I think with respect to the pending legislation that hasn't been passed yet, we probably want to talk about that some more. Maybe we can get back to it after we get through these outlines.

LT COL GREEN: Can I clarify one point?

JUDGE JONES: Yes, go ahead.

LT COL GREEN: Because I think the Panel members are aware but I'm not sure if all the Subcommittee members are necessarily aware that the Panel's next meeting has been pushed back formally now to the 5th and 6th of May. So, the goal for the Subcommittee is to complete our report and present it to the Panel on the 5th and 6th of May. And then the Panel intends to deliberate and make its final determinations on the 29th and 30th of May.

Internally, our staff goal --

(Telephone interference.)

JUDGE JONES: I'm sorry, Kyle, go ahead.

LT COL GREEN: So, Colonel Ham has requested us and sort of set a goal for the subcommittees to complete our writings to present to the panel by the 18th of April. So, Easter is the 20th, so we have a strong goal to get that done --

JUDGE JONES: It's Good Friday.

LT COL GREEN: -- Good Friday. That is sort of where we are trying to head. So, our goal is to take these outlines and this is the material we think that we have heard, add any other material that you want added to the outlines. We will start that and then, just as we did with the convening authority discussion, any substantive findings, sense of the Subcommittee recommendations, those types of things, we can start to weave those into the report, if you see fit.

JUDGE JONES: All right. So, the first one we didn't actually

talk about pretrial and trial convening authority duties, -- am I right about that? Right -- which was actually the topic of our presenters. No, I guess it wasn't.

PROF. HILLMAN: Sure it was. We had the pretrial --

JUDGE JONES: Oh, right. Here we got. Right. Well, we can certainly start with that one. It is a one-page assessment outline, Pretrial and Trial Convening Authority Duties.

PROF. HILLMAN: So, I will --

JUDGE JONES: Go ahead, Beth. Thank you.

PROF. HILLMAN: Thanks, Judge Jones. I just wanted to say that Comparative Systems Subcommittee is looking at comparing the processes in the military to civilian jurisdictions and the distinctive roles of the convening authority and the absence of a military judge in the pretrial process have caught our attention on that subcommittee. And we will be making a finding and recommendation related to the role of the military judge, too, in that pretrial process, based on our discussions and comparative analysis.

JUDGE JONES: Maybe you could just -- I know I listened in and participated in a very small part of that discussion. But could you tell me now, are there any in (a) through (i) of Section I, any issues that you are not considering? Whether you intend to write or make recommendations is a different matter but that you might be considering.

PROF. HILLMAN: We are not talking about (a), (b), (c), (d), or

(e). I don't think -- I mean we are not talking about pretrial agreement. We are setting out the differences but we are not going to make a finding.

So, we are covering some of this, --

JUDGE JONES: Got you.

PROF. HILLMAN: -- the distinctiveness between the processes. So, I don't think that -- some of that we overlap in the subcommittee reports here, but I don't think we are making a recommendation on those. We are not done.

JUDGE JONES: Right.

PROF. HILLMAN: And then my --

COL HAM: You have fully discussed where you believe the military judge should have additional authority. You have started to discuss that, I think. But one of the potential areas is in pretrial confinement and pretrial restrictions, I think as Judge Vowell was discussing, just an area for you to decide whether you want to talk about overlaps with this Subcommittee because it appears there are several ways to do it. One which would impact the current authority of commanders and convening authority and one which wouldn't.

PROF. HILLMAN: That's right. It is not necessarily tied -- that is exactly right -- to the role of the convening authority because the convening authority could have the military judge manage much of this process effectively.

But I think that the CSS will likely recommend that the judge be involved at an earlier point in the process. And so all these things could be affected.

The court-martial panel members though the selection is not on the radar. I mean we will recognize the distinction but it is not on the radar of the comparative system.

JUDGE JONES: And I don't know if anyone disagrees but I don't think we should get involved in that topic, either. Just based on the presentation we had this morning, I don't think we really want to talk about that issue.

PROF. CORN: That issue being panel member selection?

JUDGE JONES: Yes. I just don't think we know enough.

PROF. CORN: I mean that seems more relevant to the Comparative Systems, doesn't it?

JUDGE JONES: Well, they may or may not pick it up. But I guess my suggestion is we not pick it up.

PROF. CORN: Yes, I would agree. It seems to me that the other committee may be looking at what the judge should do. I think our function is what a convening authority probably ought not do. And my view would be we have talked about that. The convening authority probably is not best suited to be making pretrial decisions that are normally associated, discovery, witness production, resolving privilege issues. And that could dovetail, if they are saying that is something a judge should do.

JUDGE JONES: Well from my sitting in, it sounds to me like while there is certainly, I don't believe, a finding at all, there is a lot of interest in having the military judge get involved earlier and get involved in terms of motions that could

be made by the accused for witnesses, for other types of experts, evidentiary motions, all of that which they would do later but maybe we would have them do it earlier.

So, the bottom line is I think that we may or may not -- we would look at it as well, is there a problem with the military judge doing it at this time, in terms of some encroachment on the role of the commander or from the standpoint of anything, efficiency, the orderly, the good order of handling -- the money, what have you.

But I think I would be content to see what your subcommittee comes up with, Beth. And then we from that take, we might be able to refine it or discuss it with you better.

PROF. CORN: Do you think there are certain pretrial functions that right now we would have consensus really are not appropriate for a GCMCA? I mean for me, compelling discovery would be one.

So, I guess my question is, would it make sense to kind of articulate the ones that don't seem central to a commander's role from our end, while they are -- or just wait for their report?

JUDGE JONES: I tell you what. I would suggest we wait.

PROF. CORN: Okay.

JUDGE JONES: To the extent that I listened in and participated in the other subcommittee's discussions, I think they learned a lot more and it was much more detailed.

PROF. CORN: Okay.

JUDGE JONES: So, I think I would like to see what they have to say. And I think we will benefit from that.

MS. HOLTZMAN: Judge Jones, I am just recalling a conversation I had with a member of Congress, who is on the House of Representatives and on the Armed Services Committee, very recently. And one of the concerns that she expressed, I believe if my memory serves, is the issue about the convening authority selection of jurors or panel members.

I don't know that we heard enough today to a make a final decision but I mean my own personal view after this morning is, obviously subject to change, that there is information that the convening authority has about the character of certain potential jurors and experience with them, which would be very important in the selection process but that there is an appearance issue and maybe an actual fairness issue that could be addressed. I don't know.

So, you are saying we shouldn't do it at all? I'm not sure I necessarily 100 percent agree.

JUDGE JONES: Well just to follow up on your thought, it sounded to me like there is a system that could be much more transparent. It could be random. And the commander, who certainly does have information that would disqualify a juror or a panel member, civilian or military system, should have the ability, after they have this big group of people as the person comes up randomly, should have

the ability to strike.

And I think it is an appearance problem. I don't know that it is, in actuality, a huge problem, in terms of selection.

I guess what I am saying is I don't know enough about how things are done right now or have I given any thought to exactly what we would want the military to do.

In terms of a general statement, General, did you want to say something?

MG ALTENBURG: I just wanted to agree with what all three of you said, all four of you, as a reason for let's just hold fast for now, and that is that a lot of the things that Geoff talked about taking away from the commander and putting with the judge, I agree with intellectually it makes sense that the judge would rule on all kinds of these things.

But there is a resource issue there, too, and there is an efficiency issue. And when we make judgments about these things in a vacuum and just what looks right intellectually or even academically, we forget what drives a lot of the UCMJ is combat and deployments, and efficiency of the service, and all the rest of it. And there is going to be resource implications to judgments like that as to well are we going to beef up the judiciary at a time when we are taking 100,000 people out in one Service and things like that. And as a practical matter, what happens with regard to those pretrial matters is the SJA is making those calls.

And so if the SJA is unfair or trying to orchestrate an advantage for the prosecution, then we kind of have a bad problem and it would be better to have the judge. But if most of the times the SJAs or almost all the time the SJAs are fair, then that is not the problem.

The other thing is by the SJA actually doing that, as a practical matter again for the commander and advising the commander on how to rule, they screen out a lot of what would be garbage for a judge because it is frivolous on the part of the defense.

And so on the good side, it is efficient and it is economical and it keeps the frivolous stuff played out easily. On the dark side or the down side is a bad SJA could misuse that authority. But what happens then is that the judge gets a crack at it later anyway. So, I guess that is less efficient.

With regard to the selection of court members, I think that is a perception issue only and it is a large perception issue. But if it were a real issue, then the conviction rates in the military would differ from the conviction rates in the civilian sector, I think.

And so my view has always been if the commanders are exercising unlawful command influence and picking juries to convict, they are doing a pretty lousy job of it because the juries convict and acquit on about the same percentage basis as they do in the civilian sector. And that feeds in -- it just happens I have watched this happen a lot and more than most of my peers, just

because of the jurisdictions I worked and the number of years I did it.

So, I saw General Franks and General Griffith, and General Shelton, and General **1:44:54** pick juries every three months, I saw how they did it and I saw what they brought to that exercise and what kind of considerations they made.

And again, if they are trying to select to get convictions, they are not doing a very good job of it.

PROF. CORN: There is another important, I think, statutory distinction between a military panel and a civilian jury that we cannot overlook. When members are detailed to a court-martial, they are on the court. Now, they can be removed for cause or one peremptory but they are detailed to the court at the moment they are selected by the commander, based on those Article 25 criteria.

One of those Article 25 criteria is judicial temperament. So, the statutory structure that exists makes the assessment of their quality as a voting panel member a factor in the initial decision to put them in what we would normally call the venire.

In a civilian court, the venire is called and then juries are pulled out of it. Okay? So, they are not on the court until the judge empanels that vetted jury.

And to say this is one of the problems I have with the random selection concept, is that the random selection concept makes sense if what you are

choosing is a venire from which you then select a jury out of. But the way the statute is structured, the selection of the venire is a detail to the court. And then there are exceptions if, during the voir dire, it is established that there is some disqualification.

And that's why I think if we were going to recommend going to some computer-generated jury venire, we would have to recommend an amendment to Article 25. You would have to eliminate the judicial temperament element of selecting members because they are detailed to the court with that selection.

JUDGE JONES: Well, I don't think we are in any position to start making a recommendation. I do think the issue is one of perception and that there is probably a way to make the whole thing either be explained better or look more transparent. But I don't think we are ready to say anything about it.

MG ALTENBURG: I agree with you. It should be more transparent and people should know more about how it works.

LT COL GREEN: So Judge Jones, one other point, I mean it is within the Subcommittee's terms of reference to examine the roles and effectiveness. And one of the things to remember, the Military Justice Review Committee has been empaneled by the Secretary of Defense to review considerations and changes to the UCMJ. And they are going to be looking to the RSP and the subcommittee reports for particular areas to focus on.

So, one thing to think about is whether or not the Subcommittee needs to come to a final recommendation or can establish somewhat of a sense of

areas that they may recommend either be particular areas of focus for change or recommendations against change, maybe without a formal finding based on fact but actually recommending additional study.

PROF. HILLMAN: Judge Jones, may I speak to that?

JUDGE JONES: Sure.

PROF. HILLMAN: I think that is a great point and it helps us integrate our work with what else is happening. I don't think we have time to look deeply into this issue right now but I don't think we should fail to flag it as the Role of the Commander Subcommittee because the convening authority's role in the selection of members has long been one of the major criticisms and continues to be one of criticism, which I understand is seen as not substantive but rather procedural.

That is, it is not the reason for bad outcomes but I don't think we should -- I think leaving it right here and just maybe a finding that says it is an issue that is a major distinction from -- it is a major difference in the way the Article I courts work in the military justice system, as compared to Article III courts and it is worth further consideration.

I would be comfortable with that and I think saying more, we don't really have time or the resources we need to say much more on that.

JUDGE JONES: I don't have a problem flagging it for your group.

PROF. HILLMAN: Okay, great.

COL HAM: Ma'am, one other area of overlap between this Subcommittee and Dean Hillman's Comparative Systems Subcommittee is a point with the Article 32 process.

Dean Hillman, I don't know if you want to -- it has come up in your subcommittee. It came up today, too, again. There is so much overlap because the commander is in these things. So, should the judge do the 32?

PROF. HILLMAN: That's right. So with all of this, I think the primary focus of the recommendations that the Comparative Systems Committee make will go to these last few, (g), (h), and (i), which is about discovery, essentially.

But you are right, all of these things have something to do with that and they all do affect the role of the convening authority in this. So, because Article 32 has changed, it has to be a judge advocate now. It could be a military judge. I mean if there is a military judge there, that is certainly possible. And that is something that came up, so that is right.

MG ALTENBURG: And frequently it has been a judge in the more serious cases, the Services, going back even five and ten years, has been appointing a judge or a reserve judge to be the 32 Officer.

The greatest of ironies is that at the time when the victims lobby was complaining about Article 32s and especially the one at the Naval Academy, that it was a judge who did all that and allowed all that. That kind of beggars the imagination.

PROF. CORN: Well, I do feel that there is a question mark. If the main committee is going to recommend expanding the role of the military judge to the pre-referral phase of a case, that the military judge becomes involved at the preferral stage, I have a big question mark at that point of why we then need a 32 Officer, a distinct 32 Officer.

If you are going to empower a military judge to decide issues such as discovery, witness production, et cetera, then why retain a distinct pretrial hearing, when you -- I don't know how to articulate it. It just, that to me, seems inefficient.

COL HAM: It may even be a pre-preferral, if the recommendation is to deal with confinement issues.

PROF. CORN: But I don't know if that is anything that we bring up or we leave to Comparative Systems.

JUDGE JONES: Well, it is not like we are not going to have any input in what Comparative Systems is doing. So, I think we ought to see what their report out is to the full Panel and we can discuss it.

PROF. HILLMAN: I mean where we directed our resources is ongoing to -- hearing from the Services specifically on what, that is Comparative Systems, earing from the Services on what they are doing and then visiting and talking to people who are aware of how this is working out right now on the ground. I mean that is it. And we have been to all the different branches.

Hardly have we -- we do not have a comprehensive look but we have a reasonably good look into what the current issues are that will help us assess how the changes that are already in the NDAA are going to play out and how we might want to alter some other things to make them more, better, actually going forward.

Also just to be clear, there is a sense that we need some balancing with respect to defense with all the emphasis on prosecution resources. So, there is a fairness issue that Comparative Systems is definitely reckoning with.

PROF. CORN: And I have another specific question on the role of the commander. I don't know if it has ever been addressed. Has there been any discussion of whether or why a commander should be able to override a no-probable-cause decision by a 32 Officer? I mean that is still advisory, correct?

COL HAM: Yes. That came up in Dean Hillman's subcommittee, again, with this notion of should judges just do work with 32s and if the judge says there is no probable cause, then done.

PROF. CORN: I mean on this issue -- oh! So, you guys are looking at that, on this issue of being careful that we don't over-stack the deck in favor of the --

PROF. HILLMAN: That's right. That is part of the balancing if you do have a judge in that.

JUDGE JONES: And this Subcommittee has heard a lot about fairness issues in some of our site visits. And I think that we can add to the

discussion, once we see Professor Hillman's subcommittee statements about it.

I mean just to respond to your notion, of course if we had enough military judges and they were doing the Article 32s, then that would be efficient and I mean not my thought, but again, it is just from the civilian world, that would be the end if that judge decided there was no probable cause.

In any event, I don't know that any of us have explored that enough.

PROF. CORN: Okay.

JUDGE JONES: On this one Kyle, Colonel, anything else?

LT COL GREEN: No, ma'am. So, I guess what I am hearing is that we will provide some documentation of what these roles are, and then maybe return it to you for potential findings any possible recommendations that you may want to --

JUDGE JONES: Well, I think we clearly may want to say something to flag the court-martial panel member selection. And I would like to see what Comparative Systems has done. I can tell you now they have gone into more depth than we have with respect to (g), certainly (g) and (h).

And I think one other issue that is all out there is whether or not if we do have more military -- we will need more military judges and whether there is any -- if this is even practical to recommend it because of the funding issues.

But I am not in a position to -- this committee isn't in a position to

speak to that right now, I don't believe.

COL HAM: Ma'am?

JUDGE JONES: I think I have seen something that indicates that there would not be enough military judges.

COL HAM: Ma'am --

JUDGE JONES: Yes.

COL HAM: -- and Maria, Designated Federal Official, if the Subcommittees' reports comply with the hopefully more than aspirational deadline of 18 April, would you want and, Maria as the Designated Federal Official, is it okay if the Subcommittees share their reports with other subcommittees?

So, in these areas where there is overlap, a subcommittee would have the opportunity to submit its comments to the full Panel.

JUDGE JONES: Not to put you on the spot, Maria.

MS. FRIED: I'm inclined to say yes, because they are available to the public.

JUDGE JONES: All we need is the time for the various subcommittee reports that will be reported out publicly at the panel to come out. And I think it is a great idea.

Does anyone want to say anything else with respect to that particular outline?

Okay, the next one is commander oversight of sexual assault

prevention. And here, our goal was to assess the roles and effectiveness of commanders in terms of preventing sexual assault; their effectiveness at all levels in the investigation, and prosecution, and adjudication of sexual assault; and assess the strengths and weaknesses of current and proposed legislative initiatives.

I guess, to some extent, again, Professor Hillman, there is a little bit of overlap in the sense that I think you have done a lot of work comparing training levels and the experience of prosecutors.

PROF. HILLMAN: Right. Yes, on the training of prosecutors and all the different investigators right through the adjudication piece, we have talked about that. We haven't focused there so much on I think what you are aiming at here, which are the commander's efforts outside of the criminal justice process, which is set up in the outline, I think appropriately, as a public health approach to sexual assault prevention.

So, I actually think in terms of our work on the comparative systems, we will focus on the statistics and surveys related to the criminal assessment of what constitutes criminal incident rates of sexual assault within the military.

And we will mention some of this other piece but really, I consider this, the Role of the Commander Committee talking more about the public health approach to sexual assault prevention, the presentations on violence prevention, and education efforts, all those sorts of things. So, that is what rests here.

Whereas, the statistical criminal justice side of things, criminal

incident rate, that goes over there, I think.

JUDGE JONES: Okay.

PROF. HILLMAN: Can I make a comment on that?

JUDGE JONES: Yes, please.

PROF. HILLMAN: So, some of the NDAA specifically raises -- this one sort of runs into command climate assessment in some ways. We have a separate outline on command climate assessment. And yet, in some ways this feels maybe you could articulate that command climate assessment refers only to the climate assessments, which seem to me a tool of the metrics that help us know if commander oversight of sexual assault is working. Is there a reason you want them separate? Is it just a feature --

LT COL GREEN: We separated these out, ma'am, just solely so that we could make sure that we captured all of the material in each of them.

Again, these are not going to be -- I don't envision these as finite reports. These are all pieces of the same subcommittee report. So, certainly there is going to be integration across each of these topics. But these are each of the sort of separate topics that we dealt with. I mean obviously they are -- and commander accountability and command climate, obviously, have great interaction as well. So, I think you are right.

PROF. HILLMAN: So, thank you. That is what I figured. Just along those lines, the bills that are out there mention -- the NDAA mentions

command climate assessments have to be annual. Right. So, that is out there. That seems appropriate. Right?

And then there is performance evaluations that commanding officers have to include the command climate assessments. So that is great. Right? I mean that is a positive step towards the -- that also runs to accountability, another outline, right, in terms of holding commanders accountable.

JUDGE JONES: And I think the Victim Protection Act gets even more specific about letting commanders know that and meaning that, that poor performance in the area of setting and creating a good command climate can result in your not being promoted, which has, I think, long been a theme and a discussion point for this Subcommittee. So, we would certainly look at that proposal.

PROF. HILLMAN: Right, that performance appraisal piece in the Victims Protection Act, right, of --

COL HAM: There is an issue, anecdotal perhaps, you may want to consider on how military judges, defense counsel in particular, face on those performance appraisals that, depending on the language is, helps eradicate -- if it helps eradicate sexual assault, that is causing issues for military judges, defense counsel again --

PROF. HILLMAN: Because of command --

COL HAM: -- is there anything to discuss in that -- sensitivities?

PROF. HILLMAN: Because of command influence. Because of the possibility of unlawful command influence. Is that what you mean?

COL HAM: Or just if a military judge is being rated on, as everyone else says, on their -- I don't know what the right word is -- efforts.

PROF. HILLMAN: Their effectiveness in eradicating.

COL HAM: Yes, if they can eradicate sexual assault. I know it has come up in courts-martial. Just anecdotally, it hasn't been in effect long enough to say that is a real issue but I have been told by others in the Army that it is an issue and the judges are having to address it on the record. And that defense are concerned how will that affect me.

PROF. CORN: Right. And I think, of course, the real elephant in the room is that defense counsel know that based on existing standards of proving unlawful command influence, you are unlikely to be able to meet that burden. And yet, it is the general climate that they are concerned about.

How do you -- because the response from the government is always going to be the same. If you think there is unlawful command influence, make your motion and litigate it. But how do you substantiate it? How many times are you going to get a juror to come in and say no, I can't be fair because of this process?

PROF. HILLMAN: You know, I think we should probably be explicit about the unlawful command influence being a part of commander oversight,

of prevention. That seems like that belongs in here because commanding officers can't set that stage without being aware of the possibility of this being at issue, not only for the commander but for all of the people who are in positions of authority because that command influence motion can be brought against anybody.

But to be honest, what it seems like is happening out there right now is the oversight of sexual assault prevention, in other words, all of these educational efforts, is actually making it difficult to empanel members who are free of the taint that would enable them to be impartial with respect to the -- they are finding the voir dire is lasting forever in some of these cases or lasting much longer than in the past.

So, part of the problem is that there is an impact on the trial process to all the prevention efforts that are out there and that really what some of the prosecutors have said to us is that they can only convict. There are acquittals. I mean, they are winning acquittals in a lot of these. Defense counsel are winning acquittals for their clients in some of these cases, at a very high rate, actually, it appears right now on the ground. So, the charges are going forward but this prevention effort has created a hard time empaneling members and then they say that they are getting convictions when they have unlikeable perpetrators. If it is an unlikeable perpetrator and it is a likeable victim, then they can get a conviction. And otherwise, they are not, on some of the cases that they are taking forward, which is anecdotal. And I appreciate Colonel Ham's sense that we don't have a comprehensive look at

what is happening out there.

But to not talk about that part of the process when we are talking about the commander's role in creating an environment for prevention, the commander also has to create an environment where you get fair trials and we are going far in that other direction.

PROF. CORN: Well, maybe that is a direction we can go. The emphasis on prevention and reporting is all very positive but there has been an inadequate integrated emphasis on the presumption of innocence and the protection of an accused's right to a fair trial.

PROF. HILLMAN: I agree with that, yes.

MS. FROST: I need to understand better. When you say the prevention is tied to difficulties in paneling members.

PROF. HILLMAN: Specifically, for instance, most of these cases are alcohol-facilitated sexual assaults that are going forward that involve peer-age offenses. That is a large number of the courts that are being prosecuted. And in the questions they are asking, have you been trained that one drink constitutes an inability to consent? And have you been trained that consent must be manifested orally? And those sorts of -- when that issue in fact pattern, that is disqualifying potential members.

MS. FROST: Okay.

JUDGE JONES: Yes, and they do implicate the issue of

somebody telling them what the law is before there is an opportunity for the court to do it.

MG ALTENBURG: Is the problem with the courts this new basis for analysis or basis of assessment and so a judge or a defense counsel -- can't that be handled by a policy? Can't the Service Secretary say when you are evaluating someone's support for whatever, however they are characterizing that, what is the word on the OAR? It supports -- is against sexual assault. Is that what it says or something like that?

Whatever the term of art is, you know, why don't you just say those evaluations have nothing to do with the defense of a client or the judgment in a case, period. It has to do with how they treat their subordinates and how they treat other people around them. And just knock that completely out of the box right there. I mean, that could be handled with something from the Chief Trial Judge or something, The Judge Advocate General, couldn't it?

JUDGE JONES: I actually think that is an easier problem to deal with --

MG ALTENBURG: Right.

JUDGE JONES: -- because it is like saying by the way, murdering somebody is a bad thing. I mean you can deal with that. Everybody knows that.

I think the other issue that you just started talking about is a

larger one. Maybe, though, the answer is it is getting handled in voir dire, although I gather it is a really tough ordeal. And maybe we could look at some of the training materials. But you know, at the end of the day, I think maybe the process has to work it out.

I don't think -- I'm not against commenting on it but, as I said, the first one I think is very easily cured.

PROF. CORN: I think, my personal opinion is what I have heard about the emphasis on reporting, training, response has overall failed to periodically emphasize the protection of the rights of an individual who might be accused. And I will speak anecdotally. I have a son in the Air Force Academy and it really scares me that the kind of atmosphere of swift, decisive, unquestioned response to an allegation of sexual misconduct could put him in a position where, God forbid, like any other servicemember, he may be accused of something he didn't do. And because there is all this emphasis on the response -- and I just think -- I hadn't thought of it from Professor Hillman's point of view, but I think in any policy where you are trying to eradicate a problem, it is not a bad idea to periodically remind people that there are interests here that also have to be protected and that a process, as you say, just emphasize that. When there is an allegation, we have to vigilantly guard the integrity of the process that is designed to work through these allegations, which means you have to keep an open mind if you are a juror, which means you cannot treat someone as if they are guilty until they have been adjudicated guilty.

And the other thing about that is -- I was talking about this at lunch. Take the example of a reassignment. So, a soldier gets reassigned because there has been an accusation of sexual assault. There has to be an emphasis to the rest of the members of that unit. That does not mean he is guilty of a crime yet. Because if that soldier then wants to ask some of those former colleague to be character witnesses on his behalf, for whatever reason, their objective perception is accusation, get rid of him. What is the message from that?

And having offsets to that is feasible, and it is important, and I think it has generally been overlooked. And I think that has been the general frustration of the defense bar.

COL HAM: That came up in the site visit to Bremerton -- I'm sorry, Joint Base Lewis McChord. The defense gave a specific example of asking for character witnesses, now, for a good soldier defense, which may disappear. But of course we understand there are character witnesses for all other kinds of things and for sentencing purposes as well.

And I am trying to remember her exact words but it was basically words to the effect that when she told him it was an Article 120 case, he said sorry, I can't get near that. I can't be a witness for you.

PROF. CORN: Commanders have a role in that process as well, in manifesting to their subordinates that an individual who is suspected of criminal misconduct is to be treated in accordance with the law and not in a way that deprives

that individual's right.

JUDGE JONES: So, it would seem to me that commanders have to be careful to be balanced in the training programs. So, what I am hearing is that there isn't any. I mean to the extent that we have looked at training scripts, et cetera, I don't know that they have enough or any balance in them. And that is a good idea.

And I guess the other thing is a court can go a long way and are usually relied upon. And jurors are relied upon to follow the court's statements. So, courts should be made more aware or we should mention to them that there is a heightened obligation right now to let the people, to let the jury, the voir dire, whatever you want to call them, know. And I don't think those are --

Because I do worry about the fairness issue. And I don't think those are possible, again, issues to flag.

You were trying to say something, Beth. No?

PROF. HILLMAN: No. Right on. I just would add that I think the corrective measures here, it helps that we can point out that commanders need to keep this in mind and that this public health approach, this is about violence prevention and these are programs that can go forward.

But we do have a risk in the military of the perception of direct orders to achieve a particular outcome. So, we actually have, I think, a heightened risk that the training will be perceived as an order to reach a certain result. So, we have to roll that back to the extent we can.

And I just wanted to add, too, the reason I think this is important, given what our objective in this panel is, in this subcommittee, which is improve response to sexual assault, I think this will erode the effectiveness of response to sexual assault, if we don't maintain that fair process because victims will not come forward if there is such a -- there is a perception that it is dooming somebody, never has a chance.

I just think the overall fairness is an essential part of improving victims' confidence and protecting their rights in the process, too. So, it is not all about the rights of the accused. It is actually about that and the overall system.

JUDGE JONES: Well, and there is nothing to be gained by having prosecutions that should never have been brought because of an overreaction on conduct that probably shouldn't have gone to courts-martial. And that is not going to help victims.

PROF. HILLMAN: You know, I can't tell, based on what we have heard if we are getting prosecutions that should not have been brought. I really wouldn't say that.

JUDGE JONES: No, I don't know whether we have or not either.

PROF. HILLMAN: But they are bringing very tough cases that will result in acquittals in some instances and also, is resulting in nullification, I think, according to what they are telling us.

The prosecutors believe they are proving all of the elements of the offenses and the panel members are not convicting. So, there is a push and pull that is happening in that process.

PROF. CORN: Well, the defense bar would have a different reaction to that, right? That they are getting the right outcome on cases that --

PROF. HILLMAN: Except that what defense counsel tell us is that the point at which they get the acquittal is too late to actually protect the rights of their client --

PROF. CORN: Exactly.

PROF. HILLMAN: -- because they have gone through this process.

PROF. CORN: It is an inevitable result of the system. I don't think we can solve that. What we can do is tell commanders to remember that the interests of the accused --

PROF. HILLMAN: Can I --

JUDGE JONES: Yes, Beth.

PROF. HILLMAN: -- say one more thing? I was just thinking about how to structure -- this is really for Kyle's team here -- how to structure the findings and recommendations in this commander oversight. You know you actually already have a lot of findings in the outline here. Like for instance, I think that we want to identify best practices in the findings. So, the things that are already in the

outline that relate to what we see as best practices or what we see as standards in the field, like the common principles of prevention strategy, whatever, those things should end up, I think, in our findings, as what we are finding to be the best practices. So, I think actually quite a bit of that is already in there.

Correct me if -- this is one way I thought we might be able to structure what we say there. It seems to me that commanders have to show leadership in the process, whatever that might mean. They have to show leadership in the prevention environment.

They have to take advantage of training because the military is an environment where training is much more available and practiced than in other environments.

And then I think they also have to take advantage of the selectivity they have with respect to who is in the military and what positions they hold in order to advance these goals.

So, to me those are the three big things we want to recommend with respect to the commanders, that they show leadership, the training, they make sure the training is right, and that they take advantage of the military's distinctive ability to control accessions and assignments, which is much more than civil sector.

To me, those are the things that we want to make sure commanders are doing for prevention.

COL HAM: Do you want to comment at all on the information

you heard from the CDC and SAPRO on prevention efforts? SAPRO's role being to kind of set what commanders then have to carry out or implement for prevention strategies. In particular, a couple of areas I will throw out, what CDC thought was effective as compared to or in concert with what DoD SAPRO indicated they were doing and the notion, I think Kyle sent out some articles, whether or not and if they are, is it the correct approach, this serial perpetrator approach to prevention and response. Is there anything to comment on those areas?

If you believe the CDC had the right approach, do you have any thoughts on whether DoD SAPRO is actually using that approach or not? I think Kyle laid out the two main areas the CDC found effective, alcohol prevention and bystander intervention. I guess those particular areas of prevention, do you have any recommendations or findings on those and how DoD is handling them?

MS. FROST: Well, I want to be cautious in how I say this but there were a couple of comments made by SAPRO -- and maybe I should go back and look at the transcript first -- that seemed to indicate that serial rapists were typically your traditional stranger rapist. And I don't think that is what the CDC was saying at all.

But I guess I would like to look more closely --

COL TURNER: There was a disconnect.

MS. FROST: Pardon?

COL TURNER: There was a disconnect in that.

MS. FROST: Yes, there was a disconnect.

And what I see is this overwhelming focus that every rapist is a serial rapist. I, personally, think a pretty sizeable percentage are but they are certainly not your classic stranger rapist. I think the comment, the rapist with the ski mask, those are the guys that are out there raping serially.

I have some concerns about that.

PROF. HILLMAN: I agree that there is a disconnect. But to me, it was less that it was set up as the stranger serial rapist as the serial rapist who exploits vulnerable situations repeatedly over a period of time, and that that sector of the offender population is responsible for a huge majority of sexual assaults.

And I think the counterpoint we got from the CDC presentations and others, that is specifically those who are treating sex offenders, was that serial perpetrator is not the majority of offenders but in fact the majority of offenders are unlikely to reoffend, once they are caught. And that they are much more -- it is a product not of a predatory orientation to the world but, instead, a product of some maladjustment that is possible to correct through the actions that they recommended.

So, I think there is that disconnect there.

MS. FROST: But there is also the longstanding issue that when you are looking at reoffending behavior, you are looking at reoffending behavior in the sense they have been caught and convicted again. So, I certainly found what the CDC had to say very interesting and very informative. I still think that a greater focus

on who the perpetrators are would be extremely helpful.

MG ALTENBURG: Certainly the focus of SAPRO and the military generally on alcohol and bystander is to be reinforced. I mean, we should say that that is good. I mean that is positive, in terms of an approach to training. And they are doing that.

So, while we ought to address, as everybody is talking about, these disconnects between CDC and SAPRO, I mean to the extent that there is agreement on that, we ought to make sure that we reinforce that.

MS. HOLTZMAN: Madam Chair?

JUDGE JONES: Liz.

MS. HOLTZMAN: One of the issues, and I have raised this in the Victims Services Subcommittee, one of the issues that concerns me very much and it is also raised by the question of perpetrators, has to do with sort of an analysis of some of both the perpetrator and the victim here.

One of the things that we heard a number of witnesses testify to the fact that 45 percent of the rape victims, sexual survivors, have been previously victimized. I didn't hear any programs to help identify people who have been victims of sexual assault when they enter the military, nor have I had heard of any programs to provide any kind of tools to the victim to help strengthen their ability to deal with these circumstances.

That is a huge -- if that statistic is true, I have no way of knowing

it. Let's say it is off by even 50 percent, you are still talking about a very large group of people who are likely to be victimized. And I think that is great to talk about bystanders and it is also very important to talk about alcohol. But giving people the tools to protect themselves when you know that they are a target, seems to me to be something that is very, very important to address.

So, I just raise it because you are talking about that.

The other issue about perpetrators is one of the statistics that also came up was that perpetrators generally can be associated with having themselves been victims of physical assault in childhood. What is the significance of that? Is the military looking at this in any way? What should we be doing about it? I mean, it is a very interesting statistic.

The other area, by the way, that I don't know that we have focused on at all, is what is to be done about male on male sexual assault, which seems to be slipping under the radar altogether.

Those are my comments.

PROF. CORN: There may be, just to consider, a potential unintended consequence of gathering that information from incoming members of the Service. I think that becomes discoverable information if there is ever an allegation of sexual assault against a servicemember. Because one of the things the defense lawyer is going to do is try and see if there is any way to raise an issue of displaced anger or hostility. And will that make it less likely that someone who is victimized

while they are in the Service is going to report? I don't know. I am just throwing that out.

I will tell you when I defended these cases, if I had had access to that information, I'd have wanted.

JUDGE JONES: You know, I did hear testimony about, and maybe it was on a different subcommittee, about a rise in the number of -- maybe it was in the Air Force, actually -- a rise of number of the female recruits, new recruits, who were at some stage early on self-reporting previous incidents of sexual abuse. So, I know that we have seen that.

And then I don't recall -- well, I guess I do recall that the treatment, if you want to call it that, or the attention that was paid to it, was an offer of services, mental health or whatever else the person might want to engage in.

I think it's something that ought to be talked about. And it is clearly a great idea in terms of prevention if, as you say, Liz, these are the main targets for while they are in the service.

MS. HOLTZMAN: Well they are not the main but 45 percent, assuming that figure is true.

JUDGE JONES: Well, that is pretty substantial.

MS. HOLTZMAN: I don't want to put words in her mouth so that is why I didn't say that. But I know that is an issue that has attracted the attention of Colonel Turner as well.

MS. FROST: But I think this really -- the whole point of expecting or thinking that male or females who have been previously victimized at the point of entry into the military are going to disclose, that is just not going to happen. And I think that is what is so important about the command climate and the training programs and making sure that people, that there is access to services.

I mean I think it is getting to the same goal. I just don't know that formalizing some kind of assessment at the entry point --

JUDGE JONES: Yes, I don't think anybody was suggesting that as you come in that you are asked and you fill out a questionnaire. I think the point of what we have heard was that because there was an emphasis on this, that the climate was starting to change and that victims were aware of services, that reporting of prior incidents is going up.

MS. FROST: Right. And then in the training, I think if people -- as you say, everyone is a potential victim. And if people are educated on at-risk situations, I get very concerned when you start talking about victim behavior but at-risk situations.

PROF. HILLMAN: I think that is real important.

I'm sorry. Were you going to --

MS. HOLTZMAN: Yes, I am going to respectfully disagree. Because I am saying that we don't know enough to have the right program. So that when you say well no one is suggesting X, that is only because maybe we should

suggest X but we don't know enough to do that and nobody is really focused on this issue.

And if I am using the wrong language, I apologize. I am not meaning in any way to re-victimize victims.

I am trying to say we need to figure out ways of giving people tools to protect themselves. Maybe there is something in that experience of having been a victim that predisposes you in some way or makes you vulnerable in a way that either can be identified by perpetrators or just makes you more vulnerable. And so what can we do to address that?

And maybe part of the solution is -- I am only suggesting this because I don't know enough. Maybe you do tell people when they first come in that you are going to be in a situation of greater risk. And so you may want to think about services.

But not to ignore -- we have this fact. And I just think --

MS. FROST: I think we are actually saying the same thing.

MS. HOLTZMAN: Okay. And I just think we need to somehow, the military needs to be looking at that as a way of trying to help protect people, or give them tools to protect themselves.

PROF. HILLMAN: I think that the victim-centered response, which is what we want across the board, encompasses that, which includes giving them tools. And then the offender-centric investigation and process is what we want

to do, once the report surfaces.

I think also that actually preparing them might be -- I mean I think there are really two kinds of sexual assault that we are seeing in the military that are versions of what happened in the civil sector, the peer-age sexual assault that is related to the demographics of the military, and the away-from-home freedom, and challenge, and alcohol, and all the things that come with military service. And that demographic, which is like a college campus demographic, that is one type. And I think we should educate servicemembers as they come in, as we are starting to with alcohol policies and other things, that this is a risk environment. I mean this is a high-risk environment you enter. Whatever your profile is in the past, this is a high-risk environment for sexual assault.

And then the other thing that is distinctively military is the disparity of rank issue. And I think that we need to educate those who are in positions of authority, as we are now, as well as those who are in subordinate positions. That is the other risk factor. And that is the deep betrayal that we hear from victims who have been assaulted by those in the chain of command, of more senior rank, of drill sergeants, or military training instructors, or whatever. That is the distinctive military piece.

And that is where the commander's oversight of sexual assault prevention really matters, I think, because that is the other place where they are at distinctive risk. And that is different in the military than what it is.

COL. TURNER: I completely agree that if this panel can produce something, or Subcommittee can produce something that talks about the need for DoD to address ways to identify heightened vulnerability sections of the population or environments and allow DoD to talk about those. It has to be in a victim-sensitive method. For example, once you have a victim who's been sexually abused in the military or identified from before the military then we can train psychiatrists or psychologists, mental health workers on this particular issue because I have no information right now that they are trained to know that the person they're counseling is at heightened risk, much less teach them privately, confidentiality, how to protect themselves in the future. So, by having the Subcommittee address this issue and help do the —- have a discussion that's sensitive to not being victim warning but still allowed to have the conversation I think would be helpful.

JUDGE JONES: I don't think we have any information about a program that would address that. Is my recollection right?

COL. TURNER: I never heard anything —-

JUDGE JONES: So, we need to —-

COL. HAM: Joye, do you have any thoughts about that? You make some —- and I think Colonel Turner is saying the same thing. Where is the line between the heightened vulnerability discussion and the victim warning discussion?

MS. FROST: I think the best approach would be to talk to the White House Task Force on Campus Sexual Assault because that's really the only other

really comparable situation, I think, to see if there are specific programs. And there are, I don't want to say too much, but there are training programs both for males and females about giving verbal consent, you know, every step of the way and that sort of thing, but I think Ms. Holtzman is talking about something far more comprehensive. I mean, you're talking about, I believe, some way of specifically maybe not identifying on an individual basis but somehow specifically getting information to those individuals who are at highest risk. And it's not just individuals who have been victimized before, there are other vulnerabilities, as well.

MS. HOLTZMAN: Right, but I was specifically talking about this because this was brought to my attention. And, obviously, there are other vulnerabilities, too. I just think that if we don't know enough to address it, this is an important area for the military to explore, whether it's assigning people to do studies or whatever, but just not to ignore this problem. I mean, because we focused on the other things. I think people have paid a lot of attention to, and rightfully so, bystander, alcohol, you know, so forth, and educating potential victims about these risks. Encouraging people who we know, somehow developing programs that address this.

(Simultaneous speech.)

MS. FROST: Identifying what potential perpetrator behavior looks like.

MS. HOLTZMAN: Well, that's another thing.

MS. FROST: I think that's incredibly important because for serial

rapists they groom their victims. And I don't know that —- I'm not familiar enough with the military training to know how well that's addressed.

MS. HOLTZMAN: I asked this question of one of the panelists early on, and one of the possibilities here is that because of the pain of prior victimization someone may be more prone to use alcohol in these circumstances. So, one just doesn't —- I don't know. I didn't hear them knowing, so we need to know —- I think that more research has to be done and try to address this population, help this population help themselves, whatever those programs are in a way that's sensitive and effective.

PROF. CORN: There is an issue or a measure that's not addressed here which I think is worth considering, and that is publication of court-martial results. I mean, if we know now that all these efforts to insure that serious —- allegations of serious sexual misconduct are tried by General Court-Martial and the penalties have been stiffened, I think as a general proposition, again anecdotally, maybe you think I'm wrong, certainly it's hard when you're in one installation to know what the results of courts-martial in other installations are, much less other Services. And I think DoD could do a better job of leveraging the deterrent effect of criminal sanction if they came up with a better method of publicizing outcomes.

MG ALTENBURG: Are you going to publicize acquittals?

PROF. CORN: You could.

MG ALTENBURG: I mean, that's a two-edged sword. That's all I

mean. You've got to be fair.

PROF. CORN: Well, we know that —- well, I think —- I don't think it's necessarily required, and this is why. Because what you're publishing is a sentence, and we know that in the sentencing process a military jury is instructed that general deterrence is one of the functions of the sentencing deliberation. So, when there is a conviction and a sentence it's a matter of law that one of the purposes of that sentence is to have a general deterrent effect, and yet most of those outcomes may be known within the JAG community, but they're very rarely known beyond a very small circle.

MG ALTENBURG: Right. No, I agree. Just that I've seen that used by prosecutors in the civilian sector and the military, you know, where they play games with publicizing certain results but not other results.

PROF. CORN: Well, maybe that's a question we could propose to be looked at. I personally don't think there's anything legally infirm about publicizing only convictions and sentences.

MG ALTENBURG: And I agree with that.

MS. FROST: Which raises another question just for my personal information. If someone in the military is convicted of rape or sexual assault, where —- how do they get into a sex offender registry?

PROF. CORN: It's through the —- go ahead, Lisa.

COL. TURNER: I'm sorry. Could I just put a clarification before we turn to that? Your issue is service-specific. The Air Force for about a year now has been

publishing on an open-source web page that we send to all the commanders, and many commanders put in their base newspapers for their troops, the convictions.

PROF. CORN: I think that's awesome but what I would love to see is some method where that could be consolidated at the DoD level so that —-

COL. HAM: The Navy is doing that, as well.

PROF. CORN: —- Army personnel are finding out about an Air Force drill sergeant who gets sent to jail for —-

COL. HAM: Our's is a public web page, anybody can —-

JUDGE JONES: But no one is publishing the acquittal results?

COL. HAM: I think the Navy is publishing results of all trials, as I recall. We can check to be sure but I think they are just publishing U.S. v. Smith, found not guilty; U.S. v. Jones, 10 years, sentencing and whatever, so I think they're publishing everything.

COL. TURNER: I think the Air Force decided, I have to double-check for the most recent, the last administration I think had decided not to, to respect —- even though it was a public trial, it was acquittal, to still respect the fact that somebody is found not guilty and not broadly advertise that they went through that.

VADM HOUCK: I'm a little dated on this, but we in the Navy —- I certainly was pushing for as much transparency and openness on this as we could, and I think we were going to do acquittals without people's names in some way, that I bet you could get a quick answer from the Navy if you ask.

MS. HOLTZMAN: Well, normally, and I don't know if this is what you're talking about but our conviction rate when I was District Attorney was a matter of public record, and the conviction rate implies an acquittal rate of necessity, so I don't think you can hide that. I don't know whether what you're talking about, Professor Corn, is publicizing the names and the nature of the cases, or are you just —-

PROF. CORN: I think if there is a conviction and a sentence, Staff Sergeant Jones was convicted or rape and sentenced to 20 years' confinement and a dishonorable discharge. In my view —-

MS. HOLTZMAN: I see. Okay. I didn't quite understand what you were saying.

PROF. CORN: In my view, DoD could potentially consider doing a better job of consolidating and publicizing this information if we want —- we're putting people in jail to have a deterrent effect.

MS. HOLTZMAN: Are you talking about all cases or just sexual assault?

PROF. CORN: Ideally, I think it would be all cases but I think for this specific issue we could at least raise the question on sexual assault.

COL. HAM: Ms. Frost, you asked a question about sex offender registration? There are several levels of ensuring —- I think this is DoD-wide, but to be certain I'll only speak to the Army. There's a report of results of trial immediately prepared after the trial. First of all, during the trial if somebody pleads guilty to a sex

offense, the judge is required to ask them do you understand one of the collateral consequences is you will have to register as a sex offender. And, defense counsel, have you advised him of the legal effect of that registration? So, that's on the record.

Then there's an immediate form prepared afterwards and it checks whether DNA has to be processed in accordance with federal law, and whether sex offender registration is required. The individual defendant or accused is, of course, responsible for complying with the laws of sex offender registration, but they're fully advised all the way. And, of course, if they don't, they're subject to federal law for failing to register.

MS. FROST: So, if they are registered or are supposed to be registered but there's a mandatory discharge from the Service then —-

COL. HAM: The discharge does not take effect until after all the appeals have run, so the person may or may not still be in confinement at that time. If they're not in confinement —- let's say he gets two years and a dishonorable discharge, and it takes five years because it's a particularly complicated appeal to get through the appellate process, so that person will be released from confinement and he is still attached or assigned to a personnel control facility for purposes of the military. He's on involuntary excess leave. He's not getting paid but he's still a member of the military until his appeals have run, say it goes to the Supreme Court, until his appeals are over and then the discharge is executed and he is actually discharged. So, the question you might —- that might remain from that is okay, in the interim period what is the military

doing to ensure he is registered. I should know the answer to that, but I don't.

PROF. CORN: We'd have to probably get that from the correctional people.

PROF. HILLMAN: Defense counsel had raised to us that they need additional training on this because of the complexity of requirements in all the states that their clients need to understand the consequences of not registering.

COL. HAM: Like with reversal —- my last job we won a reversal of a plea at our highest court because the defense did not advise the appellant of the registration requirement and the judge didn't cover it on the record because it was kidnaping, it had no sexual component, and nobody understood that that was a registerable offense, reversed the plea. It's such a significant collateral consequence, as you've heard.

JUDGE JONES: Liz, you raised another issue which is the really lack of information on male-on-male sexual assaults. And I think every opportunity we've had this panel has asked a question and we've gotten no information, so I don't know. I'm open to suggestions about what, if anything else, we could do. We know a statistic and that's about it.

We have heard that, you know, the treatment, I think, is separate but not necessarily different. I'm trying to remember that testimony now, and that's about it.

COL. HAM: That was the Philadelphia site visit?

JUDGE JONES: That, obviously, males were treated —- if there was groups it was males, and then there would be a female group.

COL. HAM: And then a new group, transgender.

JUDGE JONES: Pardon me? Oh, yes, and transgender. Right.

COL. HAM: And the differences in response to treatment that men, if they went, were more likely to continue. But it's kind of the same thing that you've heard from witnesses, very low reporting rate, a lot —-

JUDGE JONES: Incredibly low reporting rate. I mean, all the reporting rates for this crime, male, female are low.

COL. HAM: More likely to have physical injury.

JUDGE JONES: Yes.

COL. HAM: We did hear that.

JUDGE JONES: And main reason for not reporting, stigma. But I think that's all we have. I mean, actually, I'm not sure that that's part of the Role of the Commander Subcommittee but except to say that, you know, the Commander shouldn't forget this activity, this sexual assault conduct, but we don't know much about it other than what I've just said.

COL. HAM: Well, you did hear, ma'am, Representative Holtzman's Victim Services Subcommittee because there —- we have an acting civilian defense counsel who represents military accused, some of the —- again, it's anecdotal but some of the convictions and accusations are more in the hazing type. He spoke of, I

don't want to use the words, he described in detail the kind of joking around, I'll just say with penises and stuff that are sexual assaults. He described, again if you'll excuse my description, it's on the record in the Victim Services Subcommittee, you know, when someone is sleeping, someone placing a penis on his face, and that's a sexual assault. So, again, those are anecdotes but perhaps there's something to that, that understanding the exact nature of what these sexual assaults are. It's not necessarily the forcible sodomy, but it's more in the hazing, I think, type area, if that's maybe what it could be construed as. And is there somewhere to go with that? I don't know.

JUDGE JONES: There may be some breakdown now that I think of it in the original survey as to —- the same way there's a difference between rape and an unwanted touching, you know, the hair, or the buttocks, or whatever. I think there is a breakdown in the DoD survey with respect to the different types of activity. And we could take another look at that, because I do recall seeing that a lot of the activities that get reported tend to, as opposed to sodomy, to incredibly demeaning, bullying, and hazing. So, I mean, yes, we can take a look —- I think we have at least those statistics. I may have just missed the other testimony.

COL. HAM: And the point I think that was being discussed, and you just reminded me of, ma'am, and Representative Holtzman may recall, as well, was that as part of the prevention effort men, as well as women, didn't understand that these were sexual assaults under the law. For them it was horseplay or whatever, hazing, maybe intentional demeaning, humiliating behavior but we heard from the OSI

at Lackland this locker room behavior, for lack of a better word. And, again, they didn't realize that these were sexual assaults, so perhaps there's something in the prevention effort that they may be doing already, that hey, this type of what you think of as locker room initiation-type behavior are sexual assaults, and you're going to be subject to punishment as a sex offender for these. I don't know, ma'am, if you recall any of that conversation.

MS. HOLTZMAN: Not at the moment, but —-

PROF. HILLMAN: Judge Jones, can

I --

JUDGE JONES: Yes, please.

PROF. HILLMAN: I think this is right. I put this third on that list of distinctive areas that we actually should make —- commanders should make sure they're focusing on, the alcohol-facilitated periods ones, the disparities of rank and exploitation of authority, and then the male-male sexual assaults because we know the numbers are so high. So, I do think —- I have mixed feelings about educating people into realizing something they experienced was a sexual assault when they did not experience it as such when they were in the midst of it. But I also think that actually educating people about how they could, how those actions could be perceived, and sometimes are perceived, and how the law actually contemplates them, given what the UCMJ says now, and how we understand their potential consequences, I think that's important, and is a part of the overall education effort that we're ongoing.

The most —- the literature on this, prisons are where we know the most about male sexual assault, and where the incidence rate is the highest, which has something in common with some parts of the military experience, so I —- but there's not —- there's also more literature on this from the Military Sexual Trauma studies that have been triggered by the VA funding that's been specified for military sexual trauma, so they've done some research on veterans asking about this, in particular.

But I think that most of the general experts on sexual assault to whom we spoke, I agree, we asked all of them about it and there's just not much information.

PROF. CORN: In my view, I think we overestimate even the basic knowledge of an 18 or 19-year old recruit. I mean, when we say well, they don't understand that that type of behavior is sexual assault, I'm not sure they understand that forcible sodomy is a crime. I mean, this is reality.

COL. HAM: It is reality.

PROF. HILLMAN: Or that it's sex.

PROF. CORN: Right. So, the increase —- emphasizing the full spectrum of education of potential victims and perpetrators I think is really important.

COL. HAM: Ma'am, there was —- do you have any recommendation on what you're pointing out, that there's a lack of information on this to recommend, or want to discuss, you know, a study. You know, DoD should do a study on the best ways to approach male-on-male since no one seems to be able to tell

you what to do. I don't know. I'm throwing out some things to facilitate some discussion. If there's a lack of information, perhaps then a recommendation can be what is the information? What is out there?

MG ALTENBURG: I'm thinking this last category you're talking about is really an old, old problem in the military, and is probably —- undoubtedly had the sexual content, there's a sexual aspect of it, but bullying in the military and hazing is an old, old problem. And it's almost impossible, not making excuses for commanders, but I know commanders who really were against it and had no idea this was going on at the E-3 and E-4 level; a guy into a new unit out of basic and AIT, which is that second eight weeks of training, and they come in and they've got their ritual. And these are 20-year old E-4s with 18-year old E-2s and E-3s, and they, you know, do the cherry belly or whatever. I'm sure in some places there was a sexual component to it, but it's just bullying, and it's just something they feel is part of their culture and they have a right to do this. And it happened to them when they came in, and it's going to happen to the other guys that are coming in, too. Why shouldn't they put up with it? It's the same kind of junk that happens in fraternities, and used to happen with greater frequency, and more serious offenses.

I'm not trying to excuse it all. I'm just saying this is an old problem. This goes back a long ways.

COL. TURNER: It was part of Senator Webb's argument why women shouldn't come into the military academies because we couldn't take the

bullying that happened at the academies.

(Off microphone comment.)

COL. TURNER: Then it shouldn't have been out there in the first place.

PROF. CORN: We know that specifically many of the mandates are to increase awareness of, you know, the risk of being a victim, the response to being a victim, et cetera, et cetera. I just wonder if —- I don't think it could hurt to emphasize that that awareness has to be full spectrum so that we don't have junior-level officers doing their briefing under the assumption that sexual assault means male-on-female violence only.

MG ALTENBURG: Right. Right.

PROF. CORN: And perpetuating the misunderstanding, because I think that —- what I always found interesting is that when you're a JAG and you find out about a male-on-male act of sexual violence you're not shocked by it because you know that happens, but the commanders and the people in the unit you're working with are really surprised because they instinctively assume sexual violence is male-on-female. So, I think emphasizing that in the training programs is important.

COL. TURNER: I think that's a great idea because most of them think about "gratify the lust or sexual desire," as opposed to something else.

PROF. CORN: Right. Not power and dominance.

MG ALTENBURG: Right.

COL. TURNER: But I think Dean Hillman brought up something really good, too, and this is the issue of the VA. Maybe I missed it, maybe it was a different Subcommittee, but I didn't hear much about sharing of information between the two organizations.

JUDGE JONES: Liz, would you like to speak to that?

(Laughter.)

MS. HOLTZMAN: I think that the Victim Services Subcommittee is looking at that, definitely.

COL. TURNER: Okay.

COL. HAM: Although, we did ask Senator Blumenthal to come to the Committee, and he is not able to appear for your meeting tomorrow. I think he's one of the leaders in that area.

JUDGE JONES: Well, I think this discussion has been very helpful. It gives us something to say about the issue. I'm sorry we don't have more information, but I think we've done just about everything we can.

COL. HAM: Anything else on the male-on-male area, and the lack of knowledge in that area, or lack of —-

MS. HOLTZMAN: Well, I think these are areas the Defense Department needs to be —- if there's not literature you may be correct, Professor Hillman, about the plenitude of materials from studies of rape in jail and so forth. Maybe that's true but, I mean, somehow the military is kind of like Don't Ask, Don't Tell

about this. Maybe they have the same sense of stigma about it, and they don't want to understand and deal with it, but it is an issue. And more men than women are affected by it, actually, in terms of numbers, so I think it really behooves DoD to understand the problem a lot better. Is this more connected to hazing and bullying? You know, what do you make of the sexual component? What can you do to reduce the prevalence? What can you do to help the victims more? Are there more programs that are needed?

PROF. HILLMAN: Ms. Holtzman, that's a great choice of words about Don't Ask, Don't Tell because I think, actually, the Subcommittee ought to point out that now that there is no more Don't Ask, Don't Tell, we actually have an opportunity to better understand this problem because a part of what deterred reporting and assessment of the issue was the ban on open service by gays and lesbians.

MS. HOLTZMAN: Absolutely.

PROF. HILLMAN: So, we are in a better position now, and we do have some in the past where we have had openly serving gay men and lesbians in the service, and that matters, so that should help us going forward.

COL. HAM: So, do you have findings on —- I know I'm getting to the nub/nag part but you —- findings on the lack of information you've been able to obtain on —-

PROF. HILLMAN: Is this what you want? We need more information —-

(Laughter.)

PROF. HILLMAN: —- on how to effectively respond to male-male sexual assault which we know is prevalent in the overall universe of sexual assault within the Armed Forces because of our demographic structure and history, maybe, something like that.

COL. TURNER: But even before we know how to respond we need to better understand the problem.

PROF. HILLMAN: That's right. I said we don't have —-

MS. FROST: It's across the board, every single witness when you asked the question whether it was training, whether it was reporting, whether it was specialized services, you got not a whole lot back.

COL. HAM: Civilian and military.

PROF. CORN: But I think while even in the period of time while you're trying to gather this information doing a better job of explaining the nature of these crimes is also important.

PROF. HILLMAN: And, specifically, just because we're talking about commanders, for commanders to say, just say the words, I mean, to acknowledge that this exists, it starts to undermine the invisibility of the crime and the stigma that is associated. So, that's something that should —- I think it is happening in some, but not everywhere is it happening. Like the Marine Corps, for instance, I'm not sure that it's happening so much, I think just by the way —-

PROF. CORN: By the way, I think that ties into publishing results of court-martials, as well.

COL. HAM: So, we can go through, by "we," I mean Kyle, I guess, can go —- by "we," I mean you. We can go through the transcript from the discussion and kind of pull out what it sounds like your findings are even though it's not preceded by "we find that," and make some proposed —- I think we're understanding the whole discussion. Kyle, do you have any —-

LT COL GREEN: Yes. No, this has been very helpful because I think this helps us shape, I mean, both the factual discussion, and I think going back to your point, Professor Hillman, I mean, in terms of the best practices, those are just a restatement of what the CDC told us, so some of the strategies in terms of how they're integrated within DoD.

PROF. HILLMAN: I think we should find them credible. That was my impression and, you know, I think we'll do that in many instances, adopt the best —- the studies that are out there and leverage this.

LT COL GREEN: I think —- and I provided a copy of the —- going back to the predators just for a moment. I provided a copy of the briefing that you heard at your last Subcommittee meeting that talked about the fact of that re-offense is actually much more low prevalence. And I do think that one thing the Subcommittee may need to address is, I mean, the DoD has adopted very much a predatory-based strategy towards this that seems to be contradicted by the CDC and other experts.

COL. TURNER: But just to clarify, DoD approach in terms of predatory behavior in what regard? For example, if you have an approach as an investigator that is very likely that in your investigation, a thorough investigation you may find other victims, may be different than looking at it from a predatory perspective for some other aspect.

COL. HAM: The serial predator.

COL. TURNER: Right. But if I've hired an investigator, I want him to do a thorough investigation assuming there may well be more.

COL. HAM: I guess the question is does it affect some of the things Professor Corn was raising, and Dean Hillman, about —- again, is that being taught, and does that impact jurors, does that impact witnesses?

COL. TURNER: Right. That's why I just want to make a distinction. There are a lot of areas that it may not necessarily be accurately reflecting reality based on CDC, and we may want to change that emphasis. But in the area of investigators, we may want to retain that emphasis.

LT COL GREEN: Well, even —- I think, ma'am, also Commander oversight of this is important because you seem to see a trend now with commanders believing that this is more of a predatory problem within their organizations than situational or circumstantial.

And I asked Russ Strand about this, because it does seem that this seems to be at odds with some of the DoD strategy and what the CDC is saying. And I

think one of the things he believes is we may be talking about different things in terms of predatory behavior really encompasses more than just the classic rapist jumping out of the bushes, and that type of predatory behavior that's involved in terms of DoD strategy.

PROF. CORN: My perception of his presentation down in Austin was that his view of predatory behavior is the reconnaissance predator.

PROF. HILLMAN: The grooming behavior.

PROF. CORN: The grooming behavior. And that goes back to your point about do commanders and victims understand that what is often grooming behavior may itself be an offense? And if we respond to that early on, we may forego something more serious. Particularly, by the way, I think particularly on male-on-male violence, there's reconnaissance that occurs. Right? We know that.

COL. HAM: You've heard from —- yes, throwing out the whole discussion, the defense is very concerned with every accused being labeled a predator, or their perception that that's happening, and the impact on the presumption of innocence, and the if he didn't do it here, he's done it before. If you don't stop him now, he's going to do it again kind of rainbow approach that you've heard. Did you have any thoughts on that?

PROF. CORN: That's different than the aggravating nature of evidence that the individual stalked the victim. Right? So, I think it —-

MS. FROST: Yes, but if you're a victim it doesn't matter whether

the rape occurred and it was opportunistic, or if it was the culmination of a long series of grooming behavior.

PROF. CORN: I'm just responding to the concern that, you know, a defense counsel raises a concern that their client is going to be prejudiced because the prosecutor is going to say if you don't stop him now, he probably did it before. If you're not objecting to that.

PROF. HILLMAN: Well, hopefully that's never going to get said.

COL. HAM: But they are doing it in the training. That's the concern.

MS. HOLTZMAN: That's right. The problem is a lot of what I would call junk science because we don't know the answer. It's not well enough understood, but I think some of the things that we're cautioning here is very important, which is not to ignore the same-sex violence, sexual violence. It seems to be really important, because if the commanders don't address it, and don't say this is unacceptable, there's a —- I'm not saying that they're condoning it, but there's a message that some of this problem is either too —- I don't know what you want to infer from that, but it's really unacceptable. But I don't know that we know enough answers here. I still feel quite, I won't say perturbed, that's not the right answer, but I don't feel that we really know enough about treatment, enough about prevention, enough about why these things happen still.

PROF. HILLMAN: This study that Kyle referred to is in the packet

here, "Sexual Abuse, Who Are the Offenders, and How Do We Assess Them?" That's in here, these slides, and this is the presentation that really raises questions about that assessment. This is not enough, but this is a pretty comprehensive look at this subset of the literature on offenders, including that it shows that the assault rate is likely declining in the United States and Canada, those are the two —- "As the incarceration rate is increasing the assault rate is actually declining."

A lot of what's in here raises questions about the criminal response to some of what we're talking about rather than, you know, treatment-focused responses might also be something we want commanders to consider going forward. So, I agree with Ms. Holtzman, we're not prepared to make strong recommendations on that, but part of the response systems we should certainly point to this literature as worth consideration apart from the investigative practices that really are rooted in that repeat-offender predator model.

COL. TURNER: And just so I'm perfectly clear because I'm not always, when I say I want my investigators to assume they're dealing with a serial person, it's so that they put in the investigative resources to just search and see, because we just don't know.

JUDGE JONES: I don't know whether there —- whether commanders, and this is what we've just discussed, are talking at all or much at all about male-on-male. I don't —-

MG ALTENBURG: I doubt that they are.

JUDGE JONES: I don't know what the training is —-

(Simultaneous speech.)

MG ALTENBURG: —- for a lieutenant colonel to even broach the subject.

JUDGE JONES: Right.

MG ALTENBURG: That's why people don't —-

COL. TURNER: Even in the sexual assault training itself.

MG ALTENBURG: Right.

JUDGE JONES: So, I think that's a big point because just saying it out loud is going to make a big difference.

COL. TURNER: And the male victims that have testified to us have —-

JUDGE JONES: Said there's nothing.

COL. TURNER: Not even a word choice, that's just not the conversation.

LT COL GREEN: Judge Jones, do you want to take a break?

JUDGE JONES: Yes, why not, a 10-minute break. I see a lot of smiles.

(Whereupon, the proceedings went off the record at 3:05 p.m., and went back on the record at 3:25 p.m.)

JUDGE JONES: All right, Kyle, where are we, do you think?

LT COL GREEN: Ma'am, the two other outlines that we've created are on Command Climate Assessment and Commander Accountability, so those are -- - again, knowing that they're interrelated with some of the other discussion, but these are the other pieces that you've heard evidence on as a Subcommittee.

MS. HOLTZMAN: What was the other one, Kyle? I'm sorry, I missed that.

LT COL GREEN: Command Climate Assessment and Commander Accountability.

MS. HOLTZMAN: Oh, I got it.

JUDGE JONES: We did hear a lot of testimony from the services about how they were trying to be able to capture the assessments, climate assessments, how the command is doing in terms of sexual assault. So, I mean, I think we could certainly comment on that. I think there was a difference between the Services in terms of how direct the questions in their surveys were, as I recall. And I don't know that one method is any better than another, or at least I don't have an opinion at this point.

I think we mentioned it at the beginning. This is covered in Senator McCaskill's Victims Protection Act. Let me just go right to the measure.

COL. TURNER: A command climate assessment is required after --

JUDGE JONES: Yes, I'm just looking for --

COL. TURNER: Page 12.

JUDGE JONES: Pardon me?

COL. TURNER: Page 12.

JUDGE JONES: It's on 12?

PROF. CORN: Of the legislative —-

JUDGE JONES: Right. "Requires command climate assessments following an incident involving a covered sexual offense for the chain of command of the victim and accused." I thought I saw something a little broader than that, actually, but maybe I'm wrong.

PROF. HILLMAN: The second bullet on page 12, Section 3C, it is also says, "An assessment of support of sexual assault prevention programs and all performance appraisals," —-

JUDGE JONES: That's the one, yes.

PROF. HILLMAN: —- "and the performance appraisals of the commanding officers must indicate the extent to which the officer has or has not established a climate in which allegations of sexual assault are properly managed."

JUDGE JONES: 3C, yes.

MS. HOLTZMAN: Isn't that a kind of narrow definition of favorable climate, just simply that the allegations are properly managed, and the victim doesn't have fear of retaliation? That seems pretty weak.

COL. HAM: There may be unlawful command influence concerns there, as well.

JUDGE JONES: Well, I think —- I don't know which one you're looking at, Liz.

MS. HOLTZMAN: C.

JUDGE JONES: You're looking at C?

MS. HOLTZMAN: Yes, I'm sorry, 3C. You see where it says, "In the assessment you must specifically indicate the extent to which the commanding officer has or has not established a command climate in which allegations of sexual assault are properly managed." Okay? "And a victim can report criminal activity without fear of retaliation," but that seems to me to be like the bare minimum of a command climate.

MS. FROST: That's not to the left of the problem in other words. Right?

MS. HOLTZMAN: Right. It's to the right. I don't know where it is.

JUDGE JONES: It really doesn't speak to —-

MS. HOLTZMAN: It's like a baby step.

JUDGE JONES: Right. It really doesn't speak to what we keep saying about tone from the top and prevention, and leading by, you know, being the commander who cares about the problem and makes his own feelings known.

MS. FROST: Well, I want to jump in here, and if I'm leading us too far afield —-

JUDGE JONES: Oh, everyone will tell you, Joye.

MS. FROST: Yes, that's good.

(Simultaneous speech.)

MS. FROST: What really bothers me is this almost over-weaning dependency on a command climate survey which I have some concerns about anyway based on how complex surveys are. To me, the military has such an incredible opportunity right now to do some formal, and I would say external, evaluation. And it probably needs to be done at the installation level across the Services, because that's where the change gets implemented.

I'm just a big proponent of that, so I want to throw that out. And then I have my personal opinion on the things that I think are going to be the game changers, and I absolutely agree that command climate and what the commander does is part of it, but the little evidence that we've heard already about the impact of the Special Victim Counsel program and the number of restricted reports that have gone to unrestricted, I just think there's a real opportunity here.

MG ALTENBURG: What are you talking about specifically? What do you mean? I agree with you that this is a great opportunity, it's an important opportunity, but you're talking about what as —-

MS. FROST: I mean, all of the changes in the NDAA, the policy directives that are on top of that. You know, it's not just —- it's investigation. I mean, to really show a picture of okay, what's happening in like a large training installation now? What's happening at Fort Hood? I mean, clearly there was some disconnect between senior NCOs that we discussed about —-

MG ALTENBURG: Right. Yes, I agree.

MS. FROST: —- and the leadership. I mean, assessing all of that, the overall —-

MG ALTENBURG: But what you're talking about is assessment, that's what you're talking about.

MS. FROST: Yes, formal evaluation.

MG ALTENBURG: Yes, okay.

MS. FROST: Right.

PROF. HILLMAN: Who would do that, and when would they do it?

MS. FROST: Again, who would do it? I just don't think it should be the military because I don't think that it would have the credibility of what is considered sort of the gold standard of an external evaluation. I mean this is the kind of thing that I think could be done in coordination with the National Institute of Justice, maybe the CDC depending on what it is you're trying to measure and so forth.

MG ALTENBURG: To me, that makes more sense than —- because when we're talking about what the Department of Defense can do, you wouldn't want them to do the survey, anyway, or the command climate —-

MS. FROST: I don't think —- I mean, I think the command climate survey is fine. I just don't think that —-

MG ALTENBURG: You don't think it's enough.

MS. FROST: —- you should be hanging all your ornaments on that particular tree.

MG ALTENBURG: What I think about some of these things is that, for example, whatever this language reads that Senator McCaskill has, I mean, that's very limited, isn't really expansive, doesn't include much, you know, no retaliation and they're not afraid to report, it's going to translate into a block on an efficiency report. It's going to say supports or doesn't support, you know. And this will be, I guess, the standard by which they're evaluated. I mean, I think that's how it will play out.

I doubt that there will be narrative comments on an annual evaluation report, unless it's negative, and then in which case they will be in there. And I don't know if you know it or not, but in the Army, anyway, all that is on an officer's evaluation report regarding equal opportunity is supports or doesn't —- you check a block yes or no, supports equal opportunity. That's all it says. Yet, the Army has done a pretty good job of making all that happen in the last 30 years, you know, so a lot of it, I think, is —- we can talk about documents, and instruments, and descriptions, and standards, and everything else. What really needs to happen is some guy gets —- some general needs to get relieved because he doesn't have control of what's going on, first. And I was telling some other people earlier, I remember when General Wickham came in in '83, and he was deaf on DUIs, and it was the time of MADD and SADD, and he set up a policy where every DUI automatically got a Memorandum of Reprimand from a general officer, whether you're an E-1, or a colonel, or whatever, didn't make any

difference. And that was the allegation really even before it went to court, you got a Memorandum of Reprimand. And the only decision was whether it was going to be in your permanent file or in some temporary file. Okay?

And there were those that said at the time that looks good, and it checks the block, and I guess Congress will like it and everything, but what he really needs to do if he wants to get a handle on DUI in the Army is find out where it's not being done, where it's being done the worst and relieve that general. And you don't even have to say why, because the word will spread within three days through all the general officers he got relieved because he didn't have a good handle on DUIs, and then they'll be motivated to do something instead of talk and press releases, and we're really against this, and the worst of all, "zero tolerance," you know.

MS. FROST: I think that's an important part of it, but I think there is so much more here than just what you do or don't do after a sexual assault.

MG ALTENBURG: Oh, I agree.

MS. FROST: I mean, I'm assuming that ultimately the goal is to make sexual assault and rape a rarity in the military Services. And I think you —- and something that I also think is incredibly important, and it may be assumed here, but I don't see it, is victim satisfaction.

I, actually —- the National Crime Victim Law Institute that worked with the Air Force Special Counsel talked about the victim in that case and how there were certain things that were very important to that victim that didn't relate directly to

a conviction. And I think we —- the military does itself a disservice. You have the perfect opportunity here to really assess the services, you know, the changes in investigative techniques, the changes in the military justice system. And I firmly believe the Special Victim Counsel program is a game changer. That is a dream in the civilian sector.

COL. TURNER: So, on page 8 at the top under "Executive Review and Proposed Legislative Changes," it talks about the President directed assessment that's due by 1 December 2014. Is that going to get to what you're looking at, or is there something beyond that?

MS. FROST: I don't think that's a formal —- that's not formal evaluation. That's an assessment.

PROF. HILLMAN: I think what that means is the Secretary of Defense is going to say well, we passed this bill, and we passed that bill, and we have this new regulation, and we have 20 more Victim Advocates, and we have new Special Counsel, as opposed to how ——--- I mean, it could be —-

MS. FROST: Is it SAPRO that's developing —-

COL. TURNER: I think SAPRO —- I saw —- okay, I'm combining my hats here. I'm not sure where I saw, but I thought it was in this Subcommittee we saw a DoD SAPRO set of slides that halfway through those slides it included potential measures of merit, if you will, metrics along this line. Is that —- maybe I didn't see it here, maybe it was somewhere else. Does that ring a bell?

MS. FROST: No, and I think you're right.

JUDGE JONES: You mean the kind of metrics we're seeing on reporting?

COL. TURNER: Reporting.

JUDGE JONES: Well, we've certainly seen reporting metrics. And I have the impression that there is an ongoing assessment of Victims Counsel.

COL. TURNER: The Air Force, I don't know about the other services, the Air Force has done a couple of satisfaction surveys. But they're kind of just informal and who will fill them out?

COL. HAM: SAPRO has also been tasked —- as you all know, the President after the NDAA passed said I want a report in a year, and we'll consider further changes if he's not satisfied. So, SAPRO has had to develop metrics in order to frame that report. That doesn't sound like what you're talking about, Ms. Frost. You're talking about an outside DoD assessment of —-

MS. FROST: A formal evaluation, I mean, that really goes into the specific changes in procedures, and the supports, in-depth look at victim satisfaction with outcomes.

COL. HAM: A one-time event, or an every-several-year event?

MS. FROST: Well, I think any important part of an evaluation is to have baseline data, and you're not —- five years from now it's too late to go back and say well, we can attribute this because we implemented this particular change. And maybe that's not something to focus on, but I think, you know, whenever you're

implementing —- these are pretty expansive changes, and to really drill down and see at the installation level how they're implemented. I mean, that's the other thing. I think we heard at Fort Hood some discussion about the difference between the way the Air Force Special Victims Counsel program was being implemented versus the Army. Is there a difference five years from now if the Army is going this way and the Air Force is going this way? Is it just because you have to do it slightly different in the Army than the Air Force, or is there something inherent in the program, in one program that's not in the other? I just think there's a lot of research questions just begging to be addressed here.

PROF. CORN: Why do we —- why would you conclude that the internal analytical resources of DoD are not the right organization, just because of the credibility, because what we've received so far has been disappointing? And the only reason I —-

MS. FROST: No, no. I think if you really —- I think it is important from perception, but also the idea of an institution using its own resources to evaluate itself. I'm not questioning the military, but it's —-

PROF. CORN: No, no. And I only ask because I think that —- I mean, we can recommend anything but, obviously, DoD spends a lot of money for agencies that do research, and this type of research and analytics is going to have a big price tag if you go outside. So, I think if we're going to recommend that we have to be really definitive in why we think going outside the indigenous resources of the

Department are beneficial.

MS. HOLTZMAN: If I may say something, I think that there are two issues here. One is the question of evaluating all this stuff, which is, I think, really important. And maybe the reason that I think outside would be a good idea is because, does SAPRO really have the authority to assess how commanders are handling command climate, I mean, militarily can they do that? Is that a metric in their evaluation of the program, or are they just looking at Victim Services? Who's looking at the big picture here? Actually, who in the military is responsible for pulling all these pieces together and saying how are we doing as an organization, as opposed to just —-

PROF. HILLMAN: SAPRO.

MS. HOLTZMAN: What?

PROF. HILLMAN: SAPRO.

MS. HOLTZMAN: Okay, but do they have the authority over the commanders to review the commander conduct? That's all I'm just asking.

PROF. HILLMAN: Not in a consequential way that's directly related to command.

MS. HOLTZMAN: Okay.

PROF. HILLMAN: But they certainly have the information gathering. I don't know if —-

PROF. CORN: Actually, the Inspector General would have more clout.

MS. HOLTZMAN: I don't know, so I'm just raising that as an issue because I don't know the answer to that, so that's one.

And then the second question we have here, which is the command climate, which is one aspect of the whole operation of the military in terms of its treatment of sexual assault. I mean, you have victim satisfaction, you have Special Counsel, you have training, you know, where judge —- where the judges are in this process. I mean, there are a lot of issues that go to the assessment of progress, but we're just focusing —- I mean, at this moment we also have a focus on command climate. How do we measure that, and how do we assess that? So, I think we should try to separate those two out, if we can.

I mean, command climate is one aspect of the overall picture. I agree, we need an overall picture. I hope that SAPRO, its analysis is going to be comprehensive, but I just don't know the answer to that. And I certainly think with regard to command climate, if these are the issues, it's far broader. It's not that the allegations are properly managed, you can have properly managed allegations and the Commander may never issue —- may never talk about, for example, same-sex assault, or all the programs that we have for victims are all the —- the whole attitude of the Defense Department to this and how unacceptable this behavior —- I mean, so —-

JUDGE JONES: Yes, there are lots of other things that ought to be considered, like initiatives, implementation of prevention programs.

MS. HOLTZMAN: Right.

JUDGE JONES: There's all of that sort of stuff.

MS. HOLTZMAN: So, I don't see that here.

JUDGE JONES: The Secretary of Defense has suggested some of that, but it all needs to be put together. But on the —- I don't know. Do you want to —- I was just going to say I'm not —- I think it might be a good idea to have an external assessment. I don't know of what at the moment. I'm trying to figure that out; whether we start with a piece like the Victims Counsel program, which might be manageable and not overly costly. I don't know, and it sounds to me like if we were to try to get an external review of the entire process —-

MS. FROST: I'm not talking about a —-

JUDGE JONES: No, no, I know that. I'm just saying, I'm tossing this —-

MS. FROST: But maybe some key installations. I mean, there's a lot of talk about issues at training installations, for example.

PROF. HILLMAN: I agree. I think that some independent assessment —- I was wrestling with this yesterday, how to articulate the limits of it so that it would be feasible, and also how to articulate the measurable that we're going to seek to assess. I mean, we could —- I think that culture change is the central piece of what has to happen to continue to make progress here, and command climate is the thing that, it doesn't have meaning outside the military, command climate, but that

thing is what —- that is our indicator of culture change, isn't it? I mean, that's what attitudes are. I mean, I assume that command climate means attitudes on, you know, respect, dignity, equality, autonomy, whatever, all those different things that are positive, respect for authority that we need it for the military to function, and that we need to have good responses to sexual assault, and reduce the incident rate. So, it does seem that we can't only count on these surveys to tell us if command climate is improving if that's what we're measuring culture change with, that we should just —- recommending some sort of limited pilot program that would involve outside reviewers that would not, you know, embed this within the DoD. That seems like a reasonable addition to what the surveying is here. Plus we have survey fatigue. I mean, we already have this across the board with all the, you know, the data collection efforts that are out there. And if we do a survey every time there's an incident, that's a little weird. I mean, we're going to get skewed results on that if there's a response. It's a little bit like the —- we don't really want the sensational cases like the one that's going on right now to determine our reform process going forward. We also don't want just the reactions that people have right after there's been some incident that got their attention and involved their friends, or whatever.

JUDGE JONES: So, I guess a question, a narrow question you would ask just to toss this around is, so suppose we do a victim satisfaction survey, I hate to use the word, or figure out some way to measure the effect of the Victims Counsel program, for instance, is that going to tell us about command climate, and/or

do we care if it sounds like it's a big success?

MS. FROST: Or you could go —- I mean, I'm not a researcher, so —

-

JUDGE JONES: I don't mean do we care, I'm saying I think I'd like to know if it's working and victims are happier. I don't know if it measures command climate, and maybe we don't care whether it does. I'm just trying to figure out what kind —- what are we looking for with our research, our external.

PROF. CORN: I think that —- first of all, I think the analogy to support the external audit, so to speak, is an analogy to corporate compliance. I mean, when a commercial company wants to be credible in the eyes of investors it's got to go beyond its internal auditing resources to establish that credibility. So, there's an analogy there that would be logical.

I think that —- I think what we could encourage is for DoD to be a little bit —- try and become more creative with some of these assessment methods. For example, I think one comment you just made that I never even thought of, I'd be interested to survey military judges right now and get just their confidential sense of whether they see an improvement in the climate, whether they're worried about overreaching, whatever the case may be.

There may be other targeted constituents that it seems to me that DoD is focused heavily on this 360 survey which is an adoption, again, from kind of non-military organizations where you do these 360 assessments. But instinctually, for

example, I would say professional military education is a place where the military has already tried to do surveys because the officers or the NCOs in those moments of their career are not in charge of anything at that moment. They're a little bit more relaxed, they're a little bit more likely to be candid about their views because it's a military school house. There's more of a sense of non-attribution, so I think encouraging ways to be more creative in identifying the true indicators of whether there's a positive change in the command climate would be useful, and maybe look at how we've done it on other issues. I don't know, maybe General Altenburg, you chime in. But I remember at CGSC or the advanced course, or the basic course, that's where you get bombarded with a lot of military surveys because I think the military analysts are smart enough to know when you're not working for a Commander at that moment you are more likely to say hey, my last command was screwed up. Right?

MG ALTENBURG: Right, that's a good point, because there are those break points.

PROF. CORN: Yes.

MG ALTENBURG: For non-commissioned officers and for officers where you've got four months or even eight or nine months in a couple of cases where you're in a school environment and you're not working for anybody, and you're not supervising anybody. And you're with your peers, so it's a time when you're more likely to be very open-minded and reflective, and think back and see how those things affect it.

PROF. CORN: Maybe one of the —- I don't know if it's a concern or a finding, but one of the points we could raise is we wonder if DoD is placing too much reliance on the 360 degree evaluation, and not looking at other potential sources of accurate information.

MG ALTENBURG: Also like the idea of targeting like judges, or bench lawyers.

PROF. CORN: Chaplains.

MG ALTENBURG: Or chaplains.

PROF. CORN: Right.

MG ALTENBURG: Or IGs, you know, and people like that.

One other thing I wanted to say about command climate is they've always looked at —- the military has always assessed command climate. What this has done is added specifically and mandated looking at this particular part of it when you're doing that. And I'm not even saying we do it well, because I know of very bad people who had toxic organizations and they continue to get promoted, so it's obviously not a perfect system. But command climate —- and a lot of times we pay lip service to command climate, and if the guy is getting the job done and produces results, nobody gives a darn what's happening to his subordinates in some instances. But we've always at least paid lip service, and I think substantively really to command climate.

Now we have new tools to make an assessment, you know.

That's what this is doing, people are —- the military has finally realized this is an important component. This is a big deal. This really affects, you know —- and for the military they're always going to want to take it to the bottom line. The bottom line isn't money and profit, the bottom line is are they ready to go to war. And if women, you know, and men victims, you know, are being mistreated and not getting the right kind of respect, and not getting the right kind of results from the command, then that unit is not ready to go to war. And, ultimately, that's what they care about.

PROF. CORN: I would predict that if we had had those senior NCOs at the Sergeant Majors Academy instead of in an office at Fort Hood, or Lackland Air Force Base, we would have had a very different degree of candor. I just believe that. I mean that, and that —- so I think there's work to be done on where you're looking for the information.

COL. HAM: The idea for a judges survey has come up in, once again, Dean Hillman's Subcommittee as to assess the training and performance of counsel, and the idea for outside audits, for lack of a better word, has come up both in, I think, Comparative Systems as this notion that some jurisdictions have outside organizations review their investigative files and their unfounded cases, including in some instances Victim Advocate groups to bridge the divide between the various interest groups, and has also come up in the Victim Services realm as an outside entity with which to be an ombudsman or something like that, ma'am, I think has come up in Victim Services Subcommittee, similar to the ombudsman and DOJ. So, it's kind of an

idea that's been running across the Subcommittees, the same idea for credibility sake to get outside the Department of Defense with, of course, reputable organizations to do an honest —-

COL. TURNER: So, I would suggest that we have that already and probably continue to have that in some regards because the GAO, and I'm looking at a 2008 study here, and I know when I was at AETC they came to Shepherd in 2000 probably 11, GAO comes in and does some of this outside organization audit, so for what that's worth, not to say that nobody else could, but that's one level.

But also, it seems to me there are two audiences, sometimes overlapping but not always, one being the American public and senior leadership about all the processes, but the other is commanders who have subordinate commanders they need to fire, promote, hold accountable. So, some of those things may drive different tools and assessment processes.

PROF. CORN: I agree. I actually think the military judges are an under-utilized resource, and I don't think it should be limited to what's happening in their courtroom. You know that they are unusual in the sense that they cover multiple installations at any given time, so that gives them also the ability to give a perspective on whether there are disparities between different commands, and what's working well, and not working well. And they have their radar up for general kind of climate in units, as well, because that could become an issue in a case.

COL. TURNER: And as General Altenburg suggested, IG does that

kind of stuff, too.

PROF. CORN: And chaplains.

MS. HOLTZMAN: Well, a thought I have because this is a huge task, evaluation, and we know from early on that they were never even evaluating victim satisfaction, DoD. I mean, it may be that you don't do everything all at once, in fact, can't do everything all at once. And somebody develops a plan of action which is year one you evaluate ABC, in year two you do DEF, and so and so forth, and that's a way of kind of getting a better grip on what's happening. And including one of the areas of evaluation might be SAPRO itself, how are they doing? What are they —- you know, are they approaching it the right way? Do they need more resources, do they need less? Did they change their focus? I mean, are the right people there, do they have the right command —- I don't know. I don't know the questions to ask. I'm just suggesting some possibilities. So, that might be. And maybe GAO could work out, or GAO and the IG for the Defense Department could work out a schedule of evaluations and audits. I don't know who should do it, but I like the idea of outside evaluation, and I think it should be done in a strategic way, whether it's the judges, or the, you know, Victims Counsel, or victims, or NCOs. I think that should be done in a strategic way, and over time.

And I think the other thing is we ought to also focus on specifically what we think ought to be done about command climate, which is a separate issue from that. And that could be evaluated, too, as part of the evaluation. But

I think Colonel Turner's point that, you know, one of the —- and really the point that you were making too, Joye, is that the —- you know, this is one way of assuring the American public that things aren't being pushed under the rug. And it's also another way of sending an important signal to victims that the process is being thoroughly examined, and fairly examined. I like that idea. I don't know where the money is coming from, that's another story.

MG ALTENBURG: Fortunately, we don't have to come up with the money, just make recommendations. Great freedom.

(Laughter.)

JUDGE JONES: Yes, I think it's very important to have an outside look at this, because right now as far as I know we're relying on SAPRO's metrics for looking at progress, however we define it, more reporting. I assume they're doing something on the various different, or will be trying to test the success of the various new services and programs. So, I mean, it might be a good idea to pick one of those and have a separate look at it, which I'm assuming will support what we're hearing. But it's always a good idea to have an outside look.

You know, one of the things that I've thought, as well, and I haven't been to every site visit by a long shot, but it does seem like the NCOs are a very critical and important set of people in this area in the sense that they're closer to most of the victims. And to some extent from time to time are the victimizers, or at least let it happen. And I wonder if there's something we could do in terms of —- I think someone

suggested they might have been more candid if they weren't on the installation. I think that's probably right. No matter what you say about it, it'll all be kept confidential and everything. I wonder if there's something that we can do to signal that they, in particular, need training, or have to be brought into the fold on this because —- and I don't know whether the senior commanders are in the fold either, but we know a lot about their training, and they're saying a lot of things. But I don't know if we've paid enough attention to that middle to lower level.

And just listening to some of the victims who come and testify, they're not talking about senior commanders here. They're not talking about them for the most part in terms of them actually being the abuser, and they're not even talking about them for the most part as being in the know. It's that lower level of command. So, I don't know. Maybe we just point that out and say that's an area that needs to really be paid attention to. We may not know any more than that, than what I've just said.

PROF. HILLMAN: That's a great point. We did hear, for instance, at Quantico about the different training efforts targeted at different levels including, for instance, at the lance corporal level. They talked specifically about efforts to improve understanding of these issues and undertake broader sort of professional development efforts all the way down into and through the ranks of NCOs and relatively junior enlisted folks. So, it's happening, but I don't —- I think, you know, noting it's important is a great idea.

MG ALTENBURG: It's a tough audience because it's not

homogenous. Officers are all college graduates, most with master's degrees, all of them, nice little pocket. Non-commissioned officers range in age from 20 to 50, and they range in education from a GED to a Ph.D., literally. And then there's many more differences, too. I mean, it's one of the most diverse leader organizations in the world, so it's very difficult to try to figure out how you're going to train them, how you're going to assess them, all of those things make it much more difficult to get your head around, so to speak. I don't have a suggested solution. I'm just kind of indicating what I think the challenge is, you know. Not that it can't be addressed, but it really is a tough audience to deal with.

JUDGE JONES: Maybe just alerting the more senior officers to pay more attention to the NCOs is a start. I don't know. But, you know, they're up here and the NCOs are down here much closer to what's going on. At least that's the picture I have from what I've heard.

MG ALTENBURG: I'm also saying that the NCOs are the important audience.

JUDGE JONES: Right.

MG ALTENBURG: Because they're the ones that make this happen. You know, they're the ones that can hide it, they're the ones that can, you know, dig it out and throw it out in front. They're the ones that can be a part of the problem, not a part of the solution because they're just —- they're in all of it, and it's —- a lot of times it's like any organization where the leader doesn't really know what's

going on, and what people really think.

JUDGE JONES: Right.

MG ALTENBURG: And that's the position officers are in, that's why one of the favorite non-commissioned officer expressions is "don't call me sir, I work for a living."

JUDGE JONES: Well, maybe officers have to be alerted to the fact that they have to —- I'm sure they already know it, but with the idea of command climate and education, identify the NCOs who are the true leaders who can turn around and train, and establish their own level of command climate. Because we can have a great command climate from, you know, the general to the lieutenant or something, but below that I don't know what's going on.

PROF. CORN: I would say that I think that it is certainly worth emphasizing that there has to be more —- there has to be a critical look at the way we're preparing non-commissioned officers to discharge their duty in this area. And if I were to draw one conclusion from our meeting at Fort Hood, less so at Lackland, I would say, is that the NCOs knew the what, but I don't think they really understood the why. The officers knew the what and the why. The officers knew what the policies were, and why they were so vital to the health, good order, and discipline of the unit. The NCOs knew what the policies were. They had a harder time articulating how it was integral to their function as a leader. And that may be a product, for those of us who have been in the military, of the way it's being taught to them. If it's being taught to them as here are

requirements you have to meet, here's the training you have to go through, and there's not enough emphasis on why this is so vital, then they —- in my view, they're less likely to fully embrace it.

I would draw an analogy to battlefield misconduct. I mean, if you teach the Law of War, there's rules you have to follow or else you're going to get in trouble, then it's less effective than if you teach it as rules you have to follow because it's going to contribute to strategic success. That they can embrace, so I think it's worth at least taking a look at the way we're developing their understanding of the problem, the solutions, and the contribution to the overall health of the unit.

COL. TURNER: I agree with you, Geoff, but what concerned me so much from there, and frankly if you had been at Lackland two years earlier it would have been the same thing, clearly worse; and that is that at Fort Hood we were talking to the command sergeant majors, the most senior enlisted. So, if it's not even getting through to them, how is it going to get through to the mid- and junior- level NCOs who are having the first and primary contact with the 18-to-24-year old, year group?

PROF. CORN: I think that that's a real —-

MS. HOLTZMAN: At Lackland, I think one of the reasons that they were more sensitive was because they had all been brought in —-

PROF. CORN: Exactly.

MS. HOLTZMAN: —- to solve a problem, and they knew why they were there.

PROF. CORN: Exactly.

MS. HOLTZMAN: And some of them actually —-

PROF. CORN: Maybe, or maybe because of that environment, the way they were trained was enhanced.

COL. TURNER: Command was deeply involved in helping them understand why that behavior was not okay, and that it was their problem. They owned it, and they took that ownership on to prevent it in the future. They've got to feel that ownership.

PROF. CORN: And they all seemed to understand the strategic debacle that was Lackland prior to their arrival. And I guess that's my point, is that leaders, and especially those junior leaders have to understand this is not just something you do to avoid getting in trouble. This is something you do because it makes the organization better.

PROF. HILLMAN: That relief from command that General Altenburg mentioned, too. Right? That happened at Lackland. I mean, how many commanders were relieved?

COL. TURNER: Quite a number, and those that had retired were still disciplined.

PROF. HILLMAN: That would be Commander accountability, wouldn't it, that we're now talking about?

JUDGE JONES: Are there other recommendations, at least to

begin a discussion about recommendations? We have one, outside evaluation as a possible recommendation. Any others along those lines?

MS. HOLTZMAN: I thought I said that we have to beef up command climate, how you were going to measure it. There's two measures there, as I recall, in the statute.

LT COL GREEN: You're talking about under the Victim Protection Act, Ms. Holtzman?

JUDGE JONES: Yes. Well, the Victim Protection Act —-

MS. HOLTZMAN: Is that what it is?

JUDGE JONES: Yes, is narrow. And then —-

PROF. CORN: I think we could recommend targeted surveys to particular groups of people within the military, for example, judges, IGs, chaplains. I think we could recommend surveys during professional military education for both officers and NCOs to catch them in those periods of kind of rest between when they're going to be in charge or subordinate to somebody in an actual job. I don't think they've done that per se. They may be getting them like everybody else, but —-

PROF. HILLMAN: I think we should recommend something other than surveys. I think that relying only on surveys is a mistake, and it would be cheaper to hire somebody, some team of three people to do some pilot reviews of installations that are representative of the kind of installations that we anticipate have issues, training installations, you know, urban entry point installations, whatever it might be,

urban —- lots of opportunities, whatever it might be, we should do something —- we shouldn't only recommend surveys.

COL. TURNER: Are you talking what you guys in the Army call sensing sessions or something?

JUDGE JONES: You mean this group, this group is where you could do interviews. I mean, they could do —-

COL. TURNER: Sure, interviews, focus groups.

JUDGE JONES: —- focus groups. They might ask to see, you know, documents, whatever.

PROF. HILLMAN: Look at a records review, you know, individual looking for particular —-

PROF. CORN: Audits.

PROF. HILLMAN: Yes, audits essentially, right.

PROF. CORN: And you could —- and maybe survey was a poor word choice. You could do that at those PME moments, as well. That's a good opportunity —-

(Off microphone comment.)

PROF. HILLMAN: Professional Military Education.

COL. TURNER: It might be helpful to know what —- if there is a standing GAO, a directive to the GAO to do reviews so we know what's already being done. And then we

could —-

JUDGE JONES: I don't quite understand what the IG's office does. I was not here when they made their presentation, and I haven't read it. So, I know that they're —- I think they're tasked to review cases —- all the cases where there was a declination in sexual assault, and I don't know whether that's in a piece of legislation that —- proposed legislation I've just read, but that's the only thing I've seen right now.

MG ALTENBURG: The Inspector General at every level, there's one at the installation, and at the division level certainly in the military. The Inspector Generals are charged generally with especially command climate, and inspections, and the like. And they're there to field complaints from people. They're actually another one of the sources we say is a place where a victim can go and make a complaint in the first place, an allegation. So, they have the wherewithal —-

JUDGE JONES: And they are supervised by the Inspector General.

MG ALTENBURG: All the way up, they have their own technical chain, but they have a —- they work for the Commander, by the way. They report directly to that Commander, but a huge part of their responsibility is command climate. They're supposed to be the one that goes to the Commander and says you've got a real problem. You know, you've got a bad company commander down there, or a bad first sergeant that's not doing things right, you know, and therefore that unit is not what it should be.

JUDGE JONES: Well, is there something we should be doing

about the IG system? Do we think it's working? I don't know. I mean, honestly, I wasn't here, but did we form —- were there any opinions formed about that?

COL. TURNER: I think it's very Service-specific. I know the Air Force is undergoing a major change to the way we do our unit assessments.

JUDGE JONES: And are the IGs, I mean, actually helpful in leading in this, and involved?

MG ALTENBURG: In my experience and my opinion it's certainly specific to the individual. You know, just like a commander. I mean, somebody is either good at what they're doing, and they embrace their responsibilities, and it's possible for an inspector general to be nothing but a —- you know, tell the Commander what he wants to hear, or she wants to hear, and not do their job.

MS. HOLTZMAN: Well, on the other hand, the IGs could be given an assignment. I mean —-

MG ALTENBURG: Definitely.

MS. HOLTZMAN: —- to do XYZ, and you could have the various IGs from the different Services. I mean, that was done with regard to an analysis of the Bush surveillance programs. They got the IGs from various agencies together and they were required to write a report, so it can be done.

JUDGE JONES: And they are in place.

MG ALTENBURG: Oh, yes. There's a definite infrastructure there. And going back to the definition of command climate in the bill, it seems to me that we

could make a recommendation to the DoD that they expand on that as it goes down. Because, you know, getting the statute changed again would be another drill, but they could just take that on and say when you're doing this you're going to include more than what the bill says.

COL. HAM: Well, remember this just passed the Senate so the House would certainly be looking for your recommendations, and the Senate, even though this bill has passed, has asked for DoD's views on it.

MG ALTENBURG: Oh, there you go.

JUDGE JONES: I think DoD already has a broader notion from what I could read in here about some of the Secretary of Defense directives, about what should be looked at for command climate, so we could certainly speak to that. So, maybe we can think some more about whether or not —- and as an organization we can use the IGs for something. I'm not saying they're our independent outside look, but maybe they can be helpful. They're there.

MS. HOLTZMAN: Right, and they do investigations, and they can be given instructions.

JUDGE JONES: Right.

MS. HOLTZMAN: Quality is a different story, but I think probably at the top level they're probably pretty competent.

COL. TURNER: I mean, we already have certain things that they're specifically focused on: fraud, waste, and abuse, reprisal, et cetera.

COL. HAM: Whistle blowers go up to DoD IG, I think. Is that right? Whistle Blower Protection Act is DoD IG.

JUDGE JONES: Well, do we think they have a role in a response to the sexual assault issue, I guess is really the question, or are they doing what they're —-

MG ALTENBURG: Oh, I think sure they do. I mean, that would be a very appropriate task they've given to do that at all levels. In fact, the one I'd stay away from is DoD IG, because they're so large and so politicized, you know, and they take so long to do anything that you task them to do, that they're given —- I see you nodding and smiling. I mean, it's a fine organization but if you really want to get something done, you know, use the service IGs.

MS. HOLTZMAN: Well, you have the same problem with the GAO. I can't answer for now but it used to take a long time —-

COL. HAM: One of the issues, I'm asking more the senior folks, that IG is kind of like internal affairs to a police organization, and —-

MG ALTENBURG: Yes, that's true.

COL. HAM: My impression as a soldier in younger days was they're not well liked because —-

(Off microphone comment.)

MG ALTENBURG: They still have to do evaluations.

COL. HAM: If the IG is in your face, it's not good.

PROF. HILLMAN: And you're not going to be as candid as, for

instance, the very different, as you talked about when you're in the school house, you're in a different place. I actually think the unit coheres against the IG in many instances. That doesn't mean IGs can't do good work here, and don't see any reason not to suggest it, but it's —- there is a —-

MS. FROST: But that's a really valid point. In my experience, OIGs are there to find out what's not working, what's being done wrong. And that's why some kind of additional assessment, and again I would say external needs to be done, because we also want to catch people doing things right. And if the Air Force is doing a better job with this than the Army, that needs to be shared, and vice versa. I mean, I think there's absolutely a role for the OIG. With GAO, Congress has been tasking them with so many different studies, I'm just not sure that they would have the resources to do something.

COL. TURNER: I just want to double-check to see if they don't have a standing requirement in this area because, I mean, they were doing something as recently as two, three years ago across the Services, so I don't know if that was a particular issue or is a standing requirement.

MS. HOLTZMAN: Well, Congress would have to instruct that.

COL. TURNER: Right, exactly.

MS. FROST: But there were certain things if you want to evaluate or assess you're not going to be able to do through the GAO or the OIG. And, again, if

you're looking at the heart of victim satisfaction, believe it or not not every sexual assault victim says my idea of justice is a conviction, and the guy goes away for 20 years. And to assess what victims experiences are, what works, what didn't work, what was most effective in supporting them emotionally. And it might vary among victims. It may be different for male victims than it is for female victims. We don't know that, and I just don't think you're going to get that from an OIG or GAO kind of —- or some kind of survey, general survey. I mean, you're talking about posing some specific research questions, making sure that the data is being collected, that the interviews are being conducted. And, yes, it is expensive but we're not talk —- I don't think you have to do it, you know, across each and every service, but you can find specific installations that might be particularly helpful as indicators, leading indicators.

COL. HAM: For the purposes of this Subcommittee you'd be looking at victim satisfaction as a measure of command prevention efforts, and command climate setting-type issues. I understand you're talking about broader issues, as well, but for purposes of this Subcommittee.

MS. HOLTZMAN: We might not get to get an assessment of command climate. We might just interview people who have not been victims to get a sense of what the message is, and how they feel it's been interpreted, do they feel people are complying, do they feel —- I mean, I don't know that you have to be restricted to victims.

PROF. CORN: Yes. I was thinking that —- I think there are two key

kind of assessment points. One is, is the Special Victim Counsel system working and producing a sense that victims —- that the law is not having an abusive effect on someone who reports a crime.

I think the other is do troops really understand the law and their rights, and the reporting process? I mean, with all the effort to train, all the effort to put out policies, what type of assessment is there where we take an airman or a soldier who's a year out of basic training and AIT and say tell me whether you're allowed to report an act of sexual misconduct, and keep it private, or does your company commander decide whether or not your allegation goes beyond the company level?

MG ALTENBURG: I've been shocked to hear people describe what happened in the previous hour when I was a witness to the same comments.

PROF. CORN: Exactly.

MG ALTENBURG: They're described it a completely different way, they heard it a different way.

PROF. CORN: Exactly. And that could really be kind of small focus groups. You could just kind of randomly sample.

(Off microphone comment.)

MS. HOLTZMAN: If The New York Times can't get it right, maybe they don't get it right either, but that would be very important to know because that's an assumption that everybody is making here, which is that everybody knows how to report.

COL. HAM: And SAPRO does measure some of that stuff, but again that's a DoD —- they measure a lot of that, that they understand their reporting options, or do you believe your command has supportive —- I'm forgetting the exact words, all that's in the Workplace and Gender Relations Survey.

PROF. CORN: And at Fort Hood we would ask a question of the NCOs, do the soldiers know —- oh, they know because they get briefings all the time. That does not give me a high degree of confidence that they know.

COL. TURNER: Well, some of this I know for a fact is going on, and some of it varies between commands, and some varies between Services. So, for example, the Air Force SAPRO version, CVS, they've been going out and doing sensing sessions, meeting with people, getting feedback. You know, even our Acting Secretary, Secretary Fanning was personally meeting with SARCs. And I know one particular command when the Commander goes out, the Commander —- the wife of the Commander meets privately with young troops on base, the young airmen who live there on base and talks to them openly, so I know that the commands are sensitive to varying degrees.

PROF. CORN: Well, that raises another possible point of interest, which is is anybody collecting the tactics, techniques, and procedures for assessing this stuff, and then trying to identify best practices so it can be shared across service or command lines. I mean —-

MS. FROST: But that's the whole point of an evaluation. You're

looking at —- I mean, you have to look at all of that, otherwise you're going to be five years, and I think you are going to see some success here, but how are you defining that, and how do you know what contributed, and what didn't? Because you want to keep taking it to the next level.

PROF. CORN: Right. I mean, with other areas of military practice there are offices that collect lessons learned and analyze them, and then that kind of bubbles up into doctrine.

MS. HOLTZMAN: Well, the Air Force did a pilot program and DoD picked it up, so obviously some things are —-

PROF. CORN: Right. And I would assume that's a function of SAPRO, right?

MS. FROST: The Services wouldn't say it's a function of SAPRO. But they —- we asked them the question —- we asked them if they talk to each other. I remember this in some of the panels where we had different reps talking about all these different —- we said do you coordinate with each other? And they say yes, but it is informal, it's not systematized. And I think that it will happen in a cyclical nature, and that actually just —- I don't think there's a way to avoid that, but one way to make sure that cycle brings them back together is to create the convergence that happens with an evaluation that publishes findings, that is then a resource for everybody to use.

JUDGE JONES: And can develop methodologies that can then be used in the future that we hope work.

LT COL GREEN: We're getting late and I want to make sure we get any thoughts and comments on Commander Accountability topic.

MS. FROST: Well, I'm going to throw one other thing out because I guess I sent an email in, it seems like eons ago. And this, again, I think this would fit under Commander Accountability, but I think it's really talking about accountability at the highest leadership levels of DoD. And the cases that garner the most attention are probably not indicative of what most sexual assaults look like in the military.

I will tell you now that people in my agency know that I'm on this Subcommittee. Any time there's anything in the news about military sexual assault and a high-ranking commander, I mean, that's the second part, it gets sent to me with "See?" And this goes back to perception, but it's deeper than perception, and that's the issue of trust.

And I sort of randomly have thrown this thought out, and I -- you know, there could be far better ideas than this, but I think some kind of advisory panel to the Secretary of Defense on sexual assault. I mean, SAPRO does -- you know, they have a function, but I think some kind of independent body that helps keep their finger on the pulse of what's happening, and quite frankly could provide unfiltered feedback to the highest DoD and Service leadership, might be something we think about.

COL. HAM: Permanent Federal Advisory Committee.

(Simultaneous speech.)

COL. TURNER: So, you're talking about something like DACOWITS on this issue.

MS. FROST: Like what?

COL. TURNER: DACOWITS.

MS. FROST: I don't know what that is.

COL. TURNER: Defense —-

PROF. CORN: Advisory Committee on Women In The Services.

MS. FROST: Well, I'm not intimately familiar with that so I can't really say if that's what —- I'm just throwing it. I just —- I think it's clear the higher up you are, the more information is filtered. I mean, that's just a reality of working in bureaucratic hierarchical systems. And I think establishing some kind of advisory panel with information is not filtered. I mean, you would absolutely have to have the ideal credible people, people who are not beholden to any special interest, but certainly have the best interest of the fair administration of justice and victim support, but I'm just throwing that out there.

JUDGE JONES: And the expertise to give the advice.

MS. FROST: And the expertise, absolutely.

COL. TURNER: I mean, that would be the devil in the details. Right? That they understand the system in which we operate given the differences and complexities.

MS. HOLTZMAN: Well, in essence what you're suggesting is a

group pretty much like this, or different?

MS. FROST: I think it would probably be similar, but I think particularly as more and more, I hope, data comes in, if these —- you know, a couple of researchers I think would be ideal. The most frustrating thing about participating in this Subcommittee is the number of times that people say well, I don't think we have that data, or we have the data but we need to go back and get it. I mean, things like that.

I don't know that it's so much about policy at that point, but more keeping your —- again, does it seem to be working? Are there —- is there new evidence, new research that the Department should be thinking about?

COL. TURNER: Do we have a sense that the Secretary or that senior level feels like they're not getting good counsel, not getting good advice? I mean, is there a problem we're trying to fix that's —-

MS. FROST: I'm not saying that that's not happening. What I'm saying is that I —- I think there's a huge public perception, not just with victim advocacy groups, but with Congress that perhaps the military, and I want to be careful here, but that the military is more focused on protecting the role of the Commander than solving this problem. And I think —- I would never want to characterize this as a watchdog, that would not be the intent at all. Help me out here.

PROF. HILLMAN: I think that's right. I think the military is as invested in protecting the role of the Commander as they are in solving this problem. I absolutely think that's true, and that's been how this public debate has

played out, it's how it continues to play out on this.

I think there's a way to understand that, that is that senior service members to an overwhelming degree, but not complete, think that changing the role of the Commander will undermine the ability of the military to solve all the problems that it faces, including this one. And that's why that impression is out there. So, I think that that's right.

I think that the —- you know, you also raised an issue that we just haven't surfaced but rank has profound consequences in the Armed Forces. I mean, I mentioned that rank disparity is the distinctive, one of the distinctive ways sexual assault plays out, and other abuses of power like hazing and other things play out in the military because of the disparities that come with the hierarchical structure of the military, which has been overwhelmingly male and continues to be. I mean, the Marine Corps is the most powerful version of this. You know, 94 percent of the Marine Corps is male. I mean, it's extraordinarily male-dominated and the overall military is 85-percent male. Right? I mean, we're still in a very anthrocentric world there. Those things have an effect on perceptions of it, but the —- I could go on with this and I won't, but just that rank has privileges, place matters, so people perceive high-ranking officers as being immune from punishment.

And what's happening right now, you know, every time there's a high-ranking officer who runs afoul of the norms and standards, and sometimes the criminal —- their conduct runs into the criminal it confirms that presumption that

they're not being accountable. And we have to fight that throughout.

COL. TURNER: And what's sad is those are specific examples where we're, one, being transparent, and two, holding ourselves accountable.

PROF. HILLMAN: Except that it also runs to this is how —- this is the —- the counterargument is there's special rules that apply to officers, you know. Even the elevation of convening authority power to punish an officer, there's a different word for what happens to an officer when they're discharged. They don't get a dishonorable discharge, they're dismissed. Like there is, there just is this reality of distinction, the crime conduct unbecoming an officer and a gentleman only applies to officers, so officers are held to a higher standard, and there's a different set of things that apply. And it creates an impression that they get a different coin when they're in the —- when they are cashing in what's happening in the justice system, and they generally have better representation than your —- or at least flashier, more expansive representation, you know, legal counsel through the process that highlights this. And we're not going to change that.

COL. TURNER: Not from a defense counsel perspective. But let me give an example from the Lackland perspective. Who did we relieve, who did we fire, who did we hold accountable for the failure in good order and discipline, that breakdown? Not the senior NCOs, it was the officers that we punished for letting that system crumble. And the NCOs who were punished were the ones who were personally criminally involved in misconduct, so we held the officers to a much higher

standard.

PROF. HILLMAN: That's why I turned to you when we talked about Commander accountability and people being relieved. I get that.

COL. TURNER: Right.

PROF. HILLMAN: I just think that this kind of watchdog independent assessment --

MS. FROST: Independent assessment.

PROF. HILLMAN: Independent assessment, just recommending that to insure that that's happening, somebody paying attention to that would be the thing.

MG ALTENBURG: I think that's a good idea. I don't know that anybody can do anything about the public perception right now. I mean, that's —-

MS. FROST: I think it would help.

MG ALTENBURG: It very likely would, but it's also a 1 percent/99 percent deal. I mean, people don't even understand the military, they don't think about what the mission is, they —- so many people want to make us like corporations, not understanding that there's a difference in mission and all of that. Then we should change a lot of what we do, anyway, but there's still always at the end of the day, it's about being to ready to defend the country, you know. And when Beth was talking about, you know, the special treatment, you know, and that they're treated differently, well, they have a commission from the President, the rest of the service members don't

have a commission from the President. They take a different oath. You know, all those things are different, and they're different for reasons. And if we're going to start drilling into that, we're going to change the whole system and go back to 1789. Having said that, what you propose is good. I think an outside thing like that would be useful.

MS. HOLTZMAN: But don't think that it won't be accused of being subverted and taken over. That was the accusation made against us when we -- the Response Panel, not the Subcommittee, the Subcommittee was immune. Luckily, all of you did fine, but some of us on the Response Panel were accused of being puppets of, in essence, of the military.

MG ALTENBURG: Even Senator McCaskill who was a very vocal critic of the military has been accused of that. You know, it's no good deed goes "unpunished," I guess.

MS. HOLTZMAN: So, I mean, I think it has to be -- whether it will help engender public trust, I don't know, but it certainly seems to me that -- and I think the Secretary of Defense met with us when we were -- the whole Panel when we were first inducted, and said he very much valued what we were going to do, so I mean he's obviously had a lot of input before he met any of us, so I do think that, you know, there's so many aspects to this, it's a huge problem, and it so intersects with the culture of society, as well as the culture of the military, and brings together lots of different disparate elements. So, I think it could play an important role. I don't think it would be necessarily redundant, but I wouldn't consider it the silver bullet either.

MS. FROST: No, absolutely not, absolutely not.

JUDGE JONES: I would like to see it be a resource outside the military, and whatever the ultimate perception would be based on whatever recommendations it made, it would be available to help the Secretary of Defense with a different perspective. And I think the people that should be on it should be, no offense to anybody here including myself, should be people who are top thinkers, almost like a little mini think tank for him in all of the different ways that we would want if we were trying to make these decisions. You know, just top of the line in terms of research, organizational methods. I mean, you name it there's —-

MS. FROST: Implementation.

JUDGE JONES: Implementation stuff. I mean, I don't —- I would want that.

MS. FROST: Yes.

JUDGE JONES: So, anyway, I think it is a good idea. And I agree, I don't think it's a silver bullet, and depending on what this advisory group might do or how it's constituted, who knows how it will be characterized, but if it helps actually make things work, I think it's a great idea. It never hurts to hear from something outside of your own organization. So, should we end on that? Anything else? Anything else, Kyle?

LT COL GREEN: Just in terms of the Subcommittee's assessment, I mean, obviously in terms of recommendations for outside review, that type of thing,

but are there other recommendations or findings that the Subcommittee is thinking about in terms of the methods of assessment currently in place for either individual commanders, or more systemically?

COL. TURNER: The Commander accountability.

LT COL GREEN: Right.

COL. TURNER: I think I heard accountability, Commander accountability almost two dozen times in the floor debate last Thursday. I think there are two sides of this coin, and one is holding commanders accountable when they do one of three things, they're personally involved in misconduct or know about it, they fail to properly respond in a particular case, or they fail to maintain a unit with good order and discipline. That's one side of accountability.

The other side about it is strengthening good commanders, so accountability is the stick, we need the reward for those commanders we can hold up, you know, the carrots. Because otherwise what happens, I think, is you destroy the courage to make the tough calls, to lead, you engender careerists who are more concerned about their own career progression than doing the right thing. So, accountability without a doubt is very important and needs to be discussed in those various aspects, but there may be also a way to discuss strengthening good commanders at the same time.

JUDGE JONES: I don't see that in any of the proposals.

COL. TURNER: No. Right. The other thing I would suggest is that

in terms of assessment outline here, when we do hold commanders accountable, and frankly this applies to victims, as well, but let's just stick with commanders. When we do hold commanders accountable this issue of transparency with the American public can be challenging because the Privacy Act and the ways the Services interpret those differently. So, for example, any time a Navy Commander, a ship Commander runs a ship aground he's fired, and the world knows about it. Any time a Navy —- Admiral Houck, if you're there, I'm seeing news reports on Navy 05s who do something wrong and you'll see a press release about it. The Air Force tends to not release that information unless it's a general officer, or unless one particular individual has a lot of media attention, or they have personally engaged in the media. So, the transparency issue related to the Privacy Act is not as easy as you might think.

VADM HOUCK: The Navy has always released that information, and sometimes to the chagrin of people in the Navy, but the Navy has always released that information.

PROF. HILLMAN: Wouldn't it help if everybody did?

MS. HOLTZMAN: What information are you talking about, the ships running aground, or the commanders not getting in trouble, or what?

VADM HOUCK: Well, I think as a general proposition, this is an example of what you all have been talking about in terms of senior officers being held to a higher standard. The internal discussion is always how much to release about a person vis-a-vis the Privacy Act, and those of you who know the Privacy Act know that

there's a balancing test that goes on, and the more senior you get the more that balance is always struck against the individual who is alleged to, or has committed a wrong act. So, there is, in fact, a double standard, and it's applied against the more senior person.

As a general rule, the Navy's philosophy has been at least for years that I was around senior leadership and part of these discussions, has always been, as surprising as this might be to some, that the public deserves to know, and that —- they release this on grounds, they release it on misconduct of all kinds really, anything that affects a person who the Navy believes is in the public view which was started as a commanding officer from the 05 level on up, that gets released. That's just how it is.

MS. HOLTZMAN: I wanted to follow-up on the question about accountability because it brought to mind something about —- not the issue of transparency, but the issue of the carrot.

In New York City, we had a really serious crime problem. We developed a system, I shouldn't say we, I was not involved in that. The city officials developed a system called CompStat where they did, on a precinct by precinct level, they did an analysis of crime, the crime statistics, and commanders, precinct commanders were asked or tasked with developing strategies to reduce crime in their neighborhood, in their precinct. And if they didn't have a strategy or they didn't succeed, that affected their promotion, that affected their status, that affected —- and if they did succeed, that was a roll-up. So, they were charged with developing strategies. I

mean, yes, they could talk to their neighbor, and they could draw on other techniques, but developing a strategy to fight crime, that was their responsibility. And they were held accountable on that, and they had —-

JUDGE JONES: They were brutal.

MS. HOLTZMAN: Okay, every month.

JUDGE JONES: Yes, the chief of the department would conduct one every month with a different precinct and they would have a lot of other commanders there. And the precinct that was under the gun, so to speak, really had to know what they were doing. They would get grilled on their statistics, they'd be criticized with different things that happened, and it was tough. And the commanders who were doing a good job and had succeeded got out of there and they were pleased with themselves, and the others made sure that it didn't happen to them the next time. It was really incredible.

COL. TURNER: Did that contribute to the reduction of crime?

JUDGE JONES: Well, whether it was the cause or not we'll never know, but crime went down.

MS. HOLTZMAN: But they were put on the spot in terms of —- they couldn't just sit there and say we're fighting crime. We've got our police, they come out early in the morning, they work all day, we have these many tours. That wasn't sufficient. What is your strategy for dealing with this problem?

I don't know that commanders are being questioned on what is your strategy for dealing with this problem. I mean, the danger is that they'll try to hide the statistics because that's going to be a problem. But if you have a very good way of collecting —- and that's a problem in New York because people have been accused, or there have been suggestions that the statistics have been manipulated. But if people are questioned on how they're trying —- on their strategy, what are you trying to do? What are you trying to accomplish? What is the situation you came into, and is there kind of general agreement on that? Now what are you trying to do to improve it? I mean, they were held accountable on that definitely, so it depends whether the military sees the reduction in sexual assault, the improvement of victim's satisfaction as part of the mission of the Commander. If they don't, it's not going to necessarily improve. If they do, and commanders see, as you pointed out so clearly, if there's not a carrot here, how is this going to make a difference? Why should they? You know, maybe they think for the moment, the press attention, this or that, but long-term it's not going to make a difference. So, maybe there's some way of adopting that CompStat system to the military.

MG ALTENBURG: Now, that kind of system is in the military, and has been for years, not necessarily with regard to sexual assault.

MS. HOLTZMAN: Depends what you're trying to measure.

MG ALTENBURG: Exactly. And so I'm taking your suggestion to mean we ought to do a better job of highlighting this issue in what's being measured,

because there are quarterly review and analysis at every level in an organization, training reviews, you know, you've got to —- what's your readiness to go to war? Do you have logistics? What's the operational status of your vehicles? I mean, they do a lot of that kind of stuff that detects —- and even there are measurements of command climate, what's the rate of offenses, you know, of misconduct, of felonies, all of that gets measured and reviewed.

MS. HOLTZMAN: Right, but measured is not the issue here. They start off with the measurement, that's not the result that you're looking for. Okay. This is the situation in your precinct, so what are you doing to make it better? That's what's going on there. They are —- they've got to have a plan of action. That's what's —- am I correct?

JUDGE JONES: Yes.

MS. HOLTZMAN: So, that's what they need, a plan of action. Well, you know, rapes have gone on in this area, maybe we need to improve street lighting. I mean, there are various things that they could do to address it, not just more police officers, maybe more —- but having a plan of action to address it. So, I don't know whether this applies at all, and not just, you know, when you're doing that training, but if somehow this were incorporated into, you know, their evaluation, not just the numbers, but what are you trying to do to improve the situation personally? What —-

COL. HAM: Trying to encourage innovative —-

MS. HOLTZMAN: Right.

JUDGE JONES: Commanders learned a lot listening to others when they got up there.

COL. HAM: Right. Then the other side of the coin is if you're trying to encourage innovation, do you need to watch, what's the right word? Punishing failure is the word. You know, when somebody tries something new and it doesn't work, you've got to watch them —-

MS. HOLTZMAN: Well, but then you can, what's your plan? Well, my plan is to do X. Great, that sounds great. Next month, whatever, you know. It didn't work, so what are you going to do now, Commander? Huh? What's your next —- okay, that didn't work. Now what? So, you're on —- I mean, you probably can explain better than I can, but that's basically the thing. You're never off the hook because you've got to have a plan of action. What are you trying to do? And you have to have it thought through, can't just be —- and you hear other people so you're not the only one in this boat. Everyone's in this boat, so you're being judged in the same way as everybody else.

JUDGE JONES: Everybody is very anxious listening and learning throughout because they're going to be up next. Anyway, you know, it was a model that worked. It could be a lot broader than just sexual assaults. It could include DUI, which is sort of the alcohol-related aspects, what have you done about that condition?

Anyway, just a model, and we do have to stop now. I think we've

just lost our quorum.

MS. FRIED: Okay, the meeting is closed.

JUDGE JONES: Thank you, Maria.

(Whereupon, the proceedings went off the record at 4:49:55 p.m.)