

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

VICTIM SERVICES SUBCOMMITTEE

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CONFERENCE CALL

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THURSDAY
APRIL 24, 2014

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The Subcommittee met
telephonically at 3:00 p.m. Eastern Daylight
Time, Mai Fernandez, Chair, presiding.

PRESENT

MAI FERNANDEZ, Chair
THE HONORABLE ELIZABETH HOLTZMAN
THE HONORABLE CHRISTEL MARQUARDT
BG (Ret.) COLLEEN MCGUIRE
DEAN MICHELLE ANDERSON
DEAN LISA SCHENCK
MEG GARVIN

ALSO PRESENT

WILLIAM SPRANCE, Designated Federal Official
COL PATRICIA HAM, Staff Director
CDR SHERRY KING, Supervising Attorney

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P R O C E E D I N G S

(3:16 p.m.)

CDR KING: Mr. Sprance, since you're the DFO, could you start the meeting?

MR. SPRANCE: I will, Sherry.

Good afternoon. This is Bill Sprance, the Designated Federal Officer, and this meeting of the Subcommittee is now open.

CDR KING: This is Sherry. Just to start the meeting, Mai, if you want -- if it's okay, I sent out an email yesterday, and I thought we might want to start with the Victim Services findings and recommendations. The staff did some editing since last week on many of them, and Dean Anderson did a lot of work over the weekend on some of them. So, Mai, if you want to start with those, we could do that.

Just to point out to everybody, I also sent out a new draft of the Victim Services Report. It's different than the one you had the very first time you deliberated on

1 findings and recommendations. And Dean
2 Anderson also contributed to that over the
3 weekend. So, if you want to go ahead and start
4 deliberating on findings and recommendations,
5 starting on page 67 of the report I sent out
6 last night.

7 CHAIR FERNANDEZ: Why don't we
8 start there.

9 CDR KING: Perfect. Thank you. So,
10 this is Sherry. Just to -- Finding and
11 Recommendation 1 is just basically -- it's one
12 you've already seen before. It's just
13 basically the one talking about the number of
14 changes and initiatives DOD, SAPRO and
15 Congress have done. And then your
16 recommendation to study or to capture the data
17 and assess the effectiveness of the program.
18 And then with a view to streamline or
19 eliminate those that are not successful.

20 I think -- I tried to incorporate
21 your discussion from the meeting on 4/18, so
22 I don't know if you've had a chance to look at

1 that one.

2 REP. HOLTZMAN: This is Liz
3 Holtzman. On Recommendation 1, is there any
4 reason that you don't add the words at the end
5 of it, "and expanding the programs that are
6 successful, preserving and expanding those
7 that are successful?" I mean, why are only
8 focused on eliminating?

9 CDR KING: We can do that. I don't
10 think anybody had mentioned that before, which
11 is probably why we didn't write it.

12 REP. HOLTZMAN: Okay. Well, anyway,
13 it just occurred to me that what we're asking
14 for is to cut out --

15 CDR KING: All right.

16 REP. HOLTZMAN: Based on the --
17 (Simultaneous speaking.)

18 REP. HOLTZMAN: -- make sure that
19 we have continuation of the programs. And I
20 think it says that.

21 JUDGE MARQUARDT: Well, I think --

22 COURT REPORTER: Sorry to

1 interrupt. This is the court reporter. Could
2 I ask the speakers to please identify
3 themselves when they speak?

4 CDR KING: Yes, that was Christel
5 that just spoke.

6 REP. HOLTZMAN: Yes, this is Liz
7 Holtzman. I thought I said add words and
8 continue and expand that are successful.

9 CDR KING: Actually, ma'am, when I
10 look at it, I think if you look at bullet 2,
11 the third line -- or the second line, the end
12 of the second line says, "To determine which
13 are effective, which should be continued,
14 expanded, or are duplicative of other
15 programs, and how best to allocate funds and
16 personnel for Victim Services programs in a
17 research-constrained environment."

18 CDR KING: Okay, but that's a
19 finding and we're saying that Recommendation
20 1 only deals with eliminating.

21 REP. HOLTZMAN: Okay.

22 CDR KING: That's Liz Holtzman.

1 Okay. Whatever you want to do. I don't --

2 REP. HOLTZMAN: Well, we'll try to
3 -- if it's okay with the other members or if
4 everybody agrees we can put it in there also.

5 CDR KING: Fine.

6 MS. GARVIN: Yes, I think it's fine
7 to move it to recommendations, or just copy it
8 into it. This is Meg Garvin.

9 CDR KING: Does anybody disagree
10 with that?

11 CHAIR FERNANDEZ: No, I think we
12 move forward.

13 CDR KING: Okay. So, number 2 and
14 number 5 kind of go together now based on Dean
15 Anderson's recommendation, so I don't know if
16 you want to discuss those now or go through
17 the rest -- discuss number 2 now and go to 5,
18 or wait until you get to 5.

19 CHAIR FERNANDEZ: We'll --

20 CDR KING: Okay. So, should we just
21 go to 3 now, and then when we get to 5 you can
22 look back at the findings on 2? How about if

1 we go to Finding and Recommendation 3?

2 REP. HOLTZMAN: This is Liz
3 Holtzman. I just have one on 1A, which is --
4 the Recommendation 1A, the fourth bullet talks
5 about the MCIO must be notified. It seems to
6 me since we're talking about -- I just thought
7 it might be clearer just to say the MCIO must
8 be notified, and add the words "as required by
9 existing law and policy." We're not suggesting
10 that we're making up some new notification
11 requirement, or different from what's already
12 in the law.

13 CDR KING: Also number 2 --

14 REP. HOLTZMAN: Well, there's a
15 third bullet on page 58, 68, sorry.

16 CDR KING: Okay. And also, I'm
17 sending to --

18 REP. HOLTZMAN: And the other issue
19 raised in that is the restricted report need
20 not be released, and to whom is that
21 restricted report to be released to? It was
22 not clear from that. I mean, they're

1 relatively minor but the point is --

2 CDR KING: You may want to discuss
3 these bullets, and Finding and Recommendation
4 2 more, I think, when you get to number 5
5 since that's where the recommendation is that
6 goes with all of them.

7 REP. HOLTZMAN: Is this the finding
8 for 2? I thought this was the finding for 1A.
9 I don't really -- or the recommendation for
10 1A. I'm just saying what it was actually.

11 I'm sorry, it's findings and
12 recommendations. I'm very sorry. I'm skipping
13 the gun. I'm jumping the gun. I apologize.

14 CDR KING: Okay. So, Recommendation
15 3 is your recommendation to provide additional
16 information at the MEPS center to the new
17 recruits that includes this definition of
18 sexual assault, possible consequences of a
19 conviction for sexual offenses, and
20 information about the DOD Safe Help Line and
21 other avenues for assistance. And I think you
22 looked at, or you've discussed this

1 recommendation and finding a couple of times,
2 but I think we modified the language slightly
3 based on your 4/18 meeting. I think you
4 approved it there but we may have -- you may
5 have modified it slightly. Is there any
6 recommendations or things you want to change
7 on this one?

8 CHAIR FERNANDEZ: This seems pretty
9 straightforward to me.

10 CDR KING: Okay.

11 CHAIR FERNANDEZ: This is Mai.

12 CDR KING: Okay. This is Sherry
13 again. If you want to move to Findings on
14 Recommendation 4 and Recommendation 4. This
15 one is the recommendation that you want, the
16 eight-day reports to also include restricted
17 reports and the services that are being
18 provided to victims for restricted reports
19 without identifying or releasing personally
20 identifying information. And I tried to modify
21 the language based on your discussion at the
22 last meeting on 4/18. Does anybody have any

1 additional changes to this, or are you okay
2 with this language, or do you still want this
3 recommendation?

4 MS. GARVIN: This is Meg. I think
5 the edits are good, and I think the new
6 version of it should stand.

7 REP. HOLTZMAN: This is Liz
8 Holtzman. I just wanted to -- on the fourth
9 bullet, tracking -- add the words, "or
10 reporting on," because this is a question
11 about that reporting as opposed to just
12 tracking. I'm sure, you know, and this is sort
13 of technical. I also don't think that bullets
14 2 and 3 are necessary, but that's not a major
15 --

16 CDR KING: We can take them out if
17 other members want to. I mean, it's --

18 REP. HOLTZMAN: So, my
19 justification is that all it talks about is
20 the reports that are required to be given,
21 which is --

22 CDR KING: Right.

1 REP. HOLTZMAN: Why do we care
2 about that? I mean, we're talking about
3 reports that are being given, and we're
4 talking -- so, I don't think it's really
5 relevant, but if you want to keep it in there.
6 It doesn't hurt, just takes up room.

7 CDR KING: We can take them out and
8 let someone have -- so, if any other members
9 have any feelings about whether we should
10 leave them in or take them out?

11 CHAIR FERNANDEZ: I think we should
12 move on, because we're limited in our time.

13 CDR KING: So, take them out?

14 CHAIR FERNANDEZ: Sure.

15 JUDGE MARQUARDT: This is Christel.
16 I think we ought to take them out.

17 CDR KING: Done. Okay, then on
18 number 5 --

19 REP. HOLTZMAN: Wait a minute, 4 on
20 the recommendation, is there something missing
21 at the bottom of Recommendation 4?

22 CDR KING: It goes to page 5.

1 There's two bullets, ma'am. The second bullet
2 is on page 70.

3 REP. HOLTZMAN: Okay. Well, I don't
4 think the first bullet is clear to me,
5 "restricted reports is" -- and "which a member
6 of the" --

7 CDR KING: Oh, I see.

8 REP. HOLTZMAN: "After the offense
9 direct the service to require a written
10 incident report no later than eight days
11 following a restricted report, as well as
12 unrestricted which our service" -- aren't we
13 -- don't we care about the report that should
14 include what care was given to the victim?
15 Shouldn't that be what is being transmitted to
16 the Secretary of -- is that what the
17 restricted report should contain? I mean,
18 isn't that what the information should
19 contain?

20 CDR KING: Yes.

21 REP. HOLTZMAN: An incident report.
22 Aren't we asking for the incident report to be

1 about services to the victim?

2 CDR KING: You're right. We did
3 leave that out. We'll put that back in.

4 REP. HOLTZMAN: Somewhere it should
5 be there. That's all I'm saying.

6 CDR KING: Right.

7 DEAN ANDERSON: Is there -- this is
8 Michelle. I'm wondering if there's a reason
9 why the construction of the first bullet in
10 Recommendation 4 doesn't just say, "The
11 Secretary of Defense direct the services to
12 require written incident reports no later than
13 eight days following a restricted or
14 unrestricted report."

15 JUDGE MARQUARDT: I think that
16 wording is better, that system.

17 DEAN ANDERSON: In other words, the
18 only people making restricted or unrestricted
19 reports are members of the armed forces, so --
20 it's Michelle again.

21 CDR KING: Well, I guess it could
22 be civilian dependents also, especially if

1 it's the offender -- I guess it could be --

2 DEAN ANDERSON: Well, don't we want
3 to track those, too? This is Michelle. I'm
4 wondering --

5 COL HAM: Ma'am, this is Colonel
6 Ham. They're not tracked by the Section 1743
7 of the NDAA, which it only directs them to
8 submit written incident reports in sexual
9 assaults in which a member of the armed forces
10 is the victim. So, if the intent is to make
11 equivalent the requirement for restricted
12 reports to the statutory requirement for
13 unrestricted reports, they are limited to when
14 a member of the armed forces is a victim.

15 DEAN ANDERSON: I see, that's why
16 this sentence is constructed the way it is.

17 COL HAM: Yes, ma'am.

18 DEAN ANDERSON: Got it.

19 REP. HOLTZMAN: This is Liz
20 Holtzman. I'm on page 70, the first bullet.
21 Why are we protecting -- I mean, I'm sure
22 there's a good answer, but why are we

1 protecting the identity of the alleged
2 offender? Suppose it's public?

3 COL HAM: Ma'am, on a restricted
4 report it is not revealed. If the victim
5 knows, it is not --

6 REP. HOLTZMAN: This doesn't --
7 this bullet is not restricted to restricted
8 reports.

9 COL HAM: Okay.

10 REP. HOLTZMAN: If it's intended to
11 be, I understand that. But if it's not, I
12 don't know what it's --

13 COL HAM: Yes, ma'am. You're
14 correct. This is Colonel Ham.

15 REP. HOLTZMAN: So, I don't know
16 how you want to fix it.

17 COL HAM: We can make it more
18 specific.

19 REP. HOLTZMAN: You can just say
20 when restricted reports are made. Just
21 introduce the second -- the first bullet with
22 that, in a restricted report, when restricted

1 reports are made. Add those words.

2 CDR KING: Okay. Anything else with
3 respect to number 4? Okay, if you want to move
4 to number 5? In this one, the recommendation
5 is the one -- the new recommendation that Dean
6 Anderson wrote that combines number 2 and 5 is
7 on page 71. I left the old ones in here so
8 that you could see what they were, and if you
9 want to take any of those for findings.

10 DEAN ANDERSON: This is Michelle
11 Anderson. I -- the intent of this
12 recommendation is to vest more authority in
13 the victim over control, imperfect, though
14 it's always going to be, but some control over
15 the information. And, also, allowing the
16 intervention of an SVC to -- for consultation
17 purposes before the trial in order to make a
18 restricted or unrestricted report so that the
19 decision is a little bit more knowing and
20 informed, and that Command should respond to
21 the queue of whether or not it's a restricted
22 or unrestricted report.

1 Now, of course, as we've discussed
2 there may be other ways in which information
3 comes to investigators about a situation, but
4 this is just about identifying information
5 about an instance of sexual assault that comes
6 to a Commander, and what should happen at that
7 moment.

8 CHAIR FERNANDEZ: So, Michelle,
9 this is Mai. The way I'm reading this is I'm
10 raped, I tell you, you tell my Commander, my
11 Commander then needs to go and speak with my
12 SVC to figure out if this is restricted or
13 unrestricted.

14 DEAN ANDERSON: Right. And if you
15 don't have an SVC that's obviously the
16 opportune moment to grant you one, and to give
17 you an opportunity to deliberate with that
18 counsel on the question of whether or not it's
19 going to be restricted or unrestricted.

20 REP. HOLTZMAN: This is Liz
21 Holtzman. Okay. I have some questions, and
22 then I have some concerns. My first question

1 is, right now the way it's written, and I
2 think you did a very good job of writing a
3 very concise and clear recommendation, Dean
4 Anderson. My hat is off to you.

5 Right now, it's -- taking Mai's
6 example, let's say I'm the victim and I go to
7 my sergeant and say hi, sarge, I just was
8 raped. I'm just trying to figure out what to
9 do about it. Okay? Directly to the chain of
10 command. Under your -- as I read this
11 recommendation, that sergeant would have no
12 right -- that would not destroy the
13 confidentiality. Is that correct?

14 DEAN ANDERSON: Yes, there's the
15 phrase "other than a direct report from a
16 victim." When a victim comes directly to
17 Command then it's an unrestricted report. Now,
18 we could -- obviously, this was drafted this
19 weekend, you know, so it's imperfect drafting.
20 And I think that we could change that if
21 people felt like they wanted Commanders to be
22 required to advise the victim that they need

1 to speak with an SVC. That would make it more
2 uniform as between those who come directly
3 forward to the chain of command, and those who
4 do not.

5 REP. HOLTZMAN: Okay. In sentence
6 number -- in line number 3, because you want
7 to revise --

8 DEAN ANDERSON: Oh, I see. Yes,
9 yes, yes, yes.

10 REP. HOLTZMAN: They confide in
11 others in the chain of command or not. And I
12 guess if you're going to allow that, I think
13 that's a huge change in policy, and I have
14 real concerns about that because I do not -- I
15 mean, we have one -- we talked about it last
16 time, I mean, it's really two conflicting,
17 very conflicting issues here.

18 On one hand what the military has
19 done over the past three years and Congress is
20 to say no more hiding stuff under the rug, so
21 the military Commanders now have a mandatory
22 reporting requirement immediately. They cannot

1 for any reason not report. I mean, so to
2 change that, I don't think we've taken enough
3 evidence to know what the impact of that would
4 be, so I have -- even though it may give the
5 victim more leeway, I have a lot of concerns
6 about doing that, because I don't think we're
7 yet out of the woods. I mean, this is my
8 hunch. I could be wrong, but I don't think the
9 military is yet out of those old woods where,
10 you know, there was a reluctance to, you know,
11 to open up on what had happened, and to refer
12 all these cases for prosecution. So, that's a
13 big, big concern that I have here. And I don't
14 think I could -- I mean, that's just -- I'm
15 not sure I could support it, even though I
16 understand where you're coming from, and I
17 very much value giving victims, empowering
18 victims as much as possible.

19 DEAN ANDERSON: So, how about this,
20 Liz? I take your point. I completely agree
21 that I don't think the military is out of the
22 woods on a question of Commanders burying

1 allegations. There was a report in the
2 Washington Post yesterday about the head of
3 the Blue Angels being disciplined for doing
4 exactly that, so I completely agree with your
5 concern.

6 What if we took out the
7 parenthetical in line 3 that said, "in the
8 chain of command or not," and it just said
9 that "sexual assault victims have the ability
10 to confide in others before deciding whether
11 to make a restricted or unrestricted report."
12 And then down in the third to the last line we
13 remove that when information comes to a
14 Commander about an instance of sexual assault
15 by whatever means we take out "other than a
16 direct report from victim." The Commander
17 communicate with the appropriate SVC. So, what
18 that does is it forces the interface, not
19 between the Command and the victim, but even
20 if the victim comes to Command, the thing that
21 Command needs to do is to advise that the
22 individual needs to consult with the SVC, so

1 that it takes out the potential for Command
2 burying - I mean, not entirely, obviously.
3 They can violate the rules and regulations,
4 but at least on paper says that the Command
5 has to refer this question to the SVC and
6 allow the victim the opportunity to consult
7 with an SVC before deciding whether to make a
8 restricted or an unrestricted report.

9 REP. HOLTZMAN: And how much time
10 would you give the victim?

11 DEAN ANDERSON: I don't know. I
12 assume that the SVCs are - I mean, all of our
13 other findings and recommendations around SVCs
14 encourage fairly prompt interactions that are
15 -- you know, allow the victim to consult with
16 an SVC. And a lot of the testimony from the
17 SVCs in my recollection, at least, was that
18 they spent some time doing exactly this, that
19 is consulting with victims about whether or
20 not to make a report that is restricted or
21 unrestricted. They're in the best position to
22 consult with the victims about what the

1 implications are for doing this.

2 REP. HOLTZMAN: Well, I understand
3 that, but I also -- but my question is how
4 long are we - how much time are we giving the
5 victim to make up his or her mind about what
6 to do?

7 DEAN ANDERSON: You feel like that
8 needs to be explicit in the recommendation?

9 REP. HOLTZMAN: See, what worries
10 me having been a former prosecutor is delay
11 with regard to investigation. You have DNA,
12 other materials out there. It's imperative if
13 you can move quickly, so the delay is not only
14 an empowering factor, it could be a factor
15 that undermines or inhibits the investigation,
16 that's all. So, I appreciate what you're
17 trying to do but I just have concerns about
18 the delay. I just do. I'm sorry. And I don't
19 know how to resolve it, because I think you've
20 done a really good of trying to do that here.

21 And suppose the Special Victim -
22 I mean, I don't know. You could just - what

1 I see here is bureaucratic - a possibility of
2 bureaucratic delays, and that's not a good
3 thing. I mean, on the one hand you got the -
4 your objective which is I - you know, I
5 strongly support which is empowering the
6 victims. On the other hand you have the
7 possibility of all the bureaucratic delays,
8 and I don't know.

9 So, what you would be saying here
10 is that in every single case, the Commander
11 must check with the Victims Services, I mean,
12 the Special Victim's Counsel before referring
13 a matter.

14 DEAN ANDERSON: I guess that
15 assumes, of course - this is Michelle, that
16 the SVC is promptly available, and can engage
17 in that consultation. And, obviously, we're
18 making recommendations that they are promptly
19 available -

20 REP. HOLTZMAN: I would feel more
21 comfortable about this if we made the
22 suggestion that this should be examined as a

1 way of preserving or enhancing victim's sense
2 of empowerment, as opposed to actually making
3 a direct recommendation. I just - that's
4 where I am. So, you feel free to do what you
5 think is best, because I know that we don't
6 necessarily share the same view about this,
7 but that's fine, because I respect very much
8 where you're coming from here.

9 DEAN ANDERSON: Meg, you work with
10 - are you still on the line?

11 MS. GARVIN: Yes, I am.

12 DEAN ANDERSON: What's your take on
13 this because you are the expert among us about
14 counsel for the victims.

15 MS. GARVIN: Well, I mean, the SVCs
16 from my understanding are being - you're
17 different by branch, right, but generally
18 pretty quickly available. I wouldn't imagine
19 it would be a significant delay with regard to
20 access to the SVC, and the SVC having spoke
21 with her client. The delay could be inherent
22 in the decision making process by the victim.

1 Right? Like when you lay out the pros and cons
2 of both directions, that's a hard moment,
3 right, for someone to decide which way they
4 want to go. But the delay factor could be
5 real. I don't know that it would be
6 significant, but it could be real.

7 I like this recommendation with
8 regards to - in terms of empowerment and
9 choice, and like would clearly aid with the
10 trauma aspect, meaning decreased trauma for
11 victims when they have this much agency. But
12 I just don't understand how it does relate to
13 the current directive to Commanders. Like
14 isn't it - this now would be in conflict with
15 what - or what Commanders are supposed to do
16 right now. Is that accurate?

17 CDR KING: Yes, 1742A and B require
18 Command, if any information about a sexual
19 assault comes to them to refer it for
20 investigation, that they have to. So, this is
21 basically saying change the statutory
22 obligation of Commanders, the section of the

1 obligation of Commanders under 1742 to say the
2 first step is check with the SVC to confirm
3 it's unrestricted before you go forward.

4 MS. GARVIN: Right. And I -

5 CDR KING: And the victim has to
6 find an SVC, then it's a direct communication
7 with the victim. So, right, they don't have
8 to have an SVC. They can - they're offered
9 the SVC. You can always choose otherwise.
10 Okay.

11 REP. HOLTZMAN: I don't know
12 whether this would make me feel better, but if
13 it weren't the Commander - I mean, if you
14 didn't change the Commander's responsibility
15 to refer to MCIO, but you put the
16 responsibility on the MCIO to speak with
17 Special Victims Counsel before proceeding, I
18 would feel better about it.

19 DEAN ANDERSON: I take that as a
20 friendly amendment. I don't - you know, the
21 point is - the point here, this is Michelle,
22 is not to obfuscate the obligation of Command

1 to begin to more consistently respond to these
2 allegations that come forward. And I agree
3 with Liz that that continues to be a problem.
4 The intention is simply to - well, it's not
5 simple, is it? The intention is to vest more
6 authority about the distribution of the
7 information that gets beyond the control of
8 the victim in ways that are deeply
9 disempowering and traumatic that we heard from
10 many victims in terms of what they told us,
11 and told the panel.

12 MS. GARVIN: This is Meg. I think
13 that it's - the recommendation that Liz just
14 made about having the MCIOs that have to
15 before investigation proceeds, MCIO has to
16 talk to the SVC. Then we're not contradicting
17 - we're not putting it in that Commanders
18 could sweep anything under the rug. They still
19 have to refer, but the investigation, you
20 don't start turning over rocks unless the
21 victim says turn over rocks. I think that
22 might be a better approach to this. It still

1 empowers but it stops the investigation,
2 potentially.

3 REP. HOLTZMAN: Okay. But I still
4 have a reservation about, you know, whether
5 this somehow could interfere with the
6 preservation of evidence, so I, you know - to
7 me it's better because we're not - I agree
8 with you, Meg, we're not interfering with the
9 Commander's explicit mandated responsibility
10 that Congress has emphasized time and again.
11 I think that would be dangerous to do that,
12 and I don't know that it would have any
13 effect. I mean, so you can go forward and I'll
14 just have a reservation about this in terms of
15 protecting evidence. But I think that might be
16 a - it's certainly better from my point of
17 view that we go down this road with the -
18 having the investigations check with the -
19 investigator check with the -

20 CHAIR FERNANDEZ: Can you just run
21 a practical scenario of what this would look
22 like? This is Mai. To have the investigator

1 stop. So, how does - how would that actually
2 work?

3 REP. HOLTZMAN: Well, presumably,
4 as I see it - I mean, I could be completely
5 wrong, and I hope that there's some
6 professional there like Colonel Ham or
7 Commander King who will tell me I'm wrong
8 here, but right now somebody - someone is a
9 rape victim and they told, I don't know -
10 let's just assume that there's a witness who
11 has gone and told Commander, or told somebody,
12 his Commander then told the Base Commander.
13 The Commander then under the law is required
14 to call the MCIO and say I understand that
15 there's a rape that took place on January 3rd,
16 and these people were present, and whatever he
17 knows, or she knows. So, that's called into
18 the MCIO.

19 The person taking that call would
20 then have a responsibility before they go
21 ahead and investigate it. I understand - now,
22 Dean Anderson, maybe I'm not - or, Meg, maybe

1 I'm not getting correctly how you see it, but
2 before the investigator could commence the
3 investigation after having heard this info
4 would have to call the SVC to see if the
5 report is restricted or unrestricted.

6 DEAN ANDERSON: Yes, I mean - this
7 is Michelle. In some ways what it means is
8 that the first step in an investigation is to
9 consult with the SVC.

10 REP. HOLTZMAN: Correct.

11 MS. GARVIN: Yes. I like that.
12 That's pretty - that seems right.

13 COL HAM: What if - this is
14 Colonel Ham. What if there is no SVC and you
15 have to go to the victim?

16 DEAN ANDERSON: I think that's an
17 important point, Colonel Ham - this is
18 Michelle, that I didn't anticipate, but is
19 possible. What I want to make sure, though, is
20 that there's not a proceeding simply on the
21 basis of there not yet being the consultation
22 that the victim is entitled to. Right? So, the

1 - we could change the language. I mean, I
2 could certainly take this dialogue and change
3 this language for the staff. I'm not trying to
4 shirk responsibility, but I think try to frame
5 it so that the first line of analysis is -
6 the first line of investigation is to consult
7 with the appropriate SVC, and if there is not
8 one, to inquire whether or not there's been
9 the opportunity for that consultation. Because
10 I think what we're trying to do is not just
11 grant the right to the SVC at some point, but
12 grant the right to the SVC at a time when,
13 from the victim's perspective, the
14 distribution of information is most at stake.

15 BG McGUIRE: This is Colleen
16 McGuire. I just - as I heard the scenario
17 being played out, I just had an integrity
18 issue and concern as an investigator that if
19 you knew - and investigators won't
20 investigate something if there was not a crime
21 or if anybody, you know, doesn't want to
22 pursue this. So, if there wasn't a crime, then

1 they won't investigate. But if there was
2 clearly a crime, but they don't want that
3 individual to investigate, investigators, as
4 are Commanders, are still charged and
5 obligated to insure the safety and security of
6 the population. So, this would be an integrity
7 - this would really be, I guess, a shift in
8 philosophy for law enforcement, if you're
9 aware of a crime to not investigate.

10 DEAN SCHENCK: This is Lisa. I
11 think I'd add to that, as well. The problem
12 especially with the military is that the crime
13 may be witnessed but I would say up until last
14 year, victims on active duty could be ordered
15 to testify. Victims of every kind, not just
16 sexual assault, victims could be ordered to
17 testify, so there's a two-fold issue. One is,
18 I think the issue with the investigator
19 ceasing an investigation, ceasing work on an
20 investigation that may involve other crimes
21 besides sexual assault. Right?

22 And the second thing is the people that

1 are part of those other crimes are active duty
2 members, and so now we want the victim not to
3 testify. And we see the conundrum in the
4 military, that's just one of the things that
5 happens in a close unit.

6 DEAN ANDERSON: This is Michelle.
7 I'm not quite sure I'm following you, Lisa.

8 DEAN SCHENCK: Okay. Let be more
9 clear. One, enlisted service members are
10 forbidden from going off post until they get
11 a pass, and when they get a pass they all go
12 drinking and get several rooms in a hotel. And
13 when they get rooms in a hotel they engage in
14 misconduct, whether it's a sexual assault,
15 other various crimes, under-age drinking,
16 disrespect to someone senior. I had a case
17 where one of the service members peed on top
18 of the Company Commander who happened to be
19 walking by. And all this stuff that occurred,
20 the civilian police are generally going to
21 relinquish that investigation to the military
22 police because they believe it's just young

1 kids engaging in misconduct.

2 The military police, however, see
3 this as many different crimes. Some people
4 didn't have passes. Some people didn't go to
5 duty. It all what could be construed as
6 military crimes, and the civilians will
7 relinquish the investigation to the military
8 investigators.

9 If the victim doesn't want to go
10 forward, stop investigating. Right? Is that
11 how I understand it? And so the people who are
12 interviewed as part - in addition to the
13 sexual assault may come up with some other
14 offenses. That's the conundrum for the
15 military, and I guess we could ask Jan, an
16 investigator on the staff, a retired criminal
17 investigator on the staff, but they - that's
18 right, they have a duty to investigate crimes.
19 So, where should they go with that?

20 REP. HOLTZMAN: Well, my
21 answer, this is Liz Holtzman, is that the
22 victim always has the right under the new

1 procedures not to cooperate.

2 DEAN SCHENCK: Yes.

3 REP. HOLTZMAN: So, that's not
4 going to change. That's the - I mean, but I
5 think the problem that was just raised by
6 Dean Schenck is that, you know, all the
7 problems that will arise when you cut it off
8 and say -- well, the problems that will arise
9 when you stop the Commander from reporting,
10 and the problems that arise if you stop an
11 investigation from going forward. And you also
12 don't know, by the way, whether the victim
13 herself or himself has been coerced in some
14 fashion not to go forward. We're all assuming
15 that victims don't want to go forward because
16 they really don't want to go forward, but
17 there could be coercion in some cases, as
18 well.

19 DEAN ANDERSON: That's why I think
20 the - this is Michelle. That's why I think
21 the intervention of an SVC is important. It
22 limits the opportunities for coercion. It

1 doesn't completely eliminate them, but it does
2 limit it substantially.

3 REP. HOLTZMAN: This is Liz
4 Holtzman again. My view is just that we've
5 heard a couple of cases where people - there
6 was inadvertent reporting, and then people
7 felt that their rights had been taken away and
8 felt disempowered. But that's one consequence,
9 but the other consequence of not investigating
10 these crimes is also serious, so I come down
11 on the other side.

12 CHAIR FERNANDEZ: Let me - this is
13 Mai. So, let me address Colleen and Lisa.
14 Okay? So, the first step of the investigator
15 is going to go to the SVC. There could be a
16 panoply of crimes that got committed when the
17 sexual assault got committed, but the only
18 thing that the investigator is going to ask
19 the SVC about whether to go forward or not on
20 is the sexual assault. Is that a problem?

21 REP. HOLTZMAN: Yes.

22 COL HAM: Ma'am, this is Colonel

1 Ham. We can use a real life example. Those of
2 you who went to Lackland; actually, I think it
3 was the Comparative System folks who I was
4 with who spoke to the OSI investigators who
5 investigated the misconduct there. They
6 affirmatively sought out people who not only
7 had not reported "offenses," who did not think
8 there were offenses, but instead sought out
9 consensual sexual activity with the military
10 training instructors. So, they would not ever
11 have an SVC. They wouldn't - and they refused
12 to cooperate in the investigation because they
13 didn't - in their view there was no crime.
14 So, the MCIOs continued to investigate. That's
15 what they were directed to do under current
16 policy, so one of the issues I'm raising is
17 people get an - they're entitled to an SVC at
18 certain points in time, one of which is they
19 accept that they are a victim of a crime. And
20 that was an open question in those cases. So,
21 I'm just raising that as an example, that you
22 may not have an SVC to go to, not only because

1 the victim hasn't gone to one for advice, but
2 because there's a question of whether what
3 happened, which everyone agrees to, is an
4 offense.

5 I guess the second issue would be
6 if you go to a counsel and ask have you spoken
7 to X, if that's your client, I know the
8 typical defense counsel answer is I'm not
9 going to answer that question. And then the
10 second thing is well, she told us you're her
11 attorney. Yes, I'm her attorney. And what did
12 she tell you about what she wanted to do with
13 this report? I'm sorry, I'm not answering that
14 question. That's privileged information, and
15 I'm not going to answer your question. So,
16 those are all other issues that arise, but I'm
17 wondering if there are ways to deal with
18 those.

19 DEAN ANDERSON: Well, surely, I
20 mean, let's take them separately. This is
21 Michelle. The fact that in some instances
22 someone refuses to participate because they've

1 engaged in consensual behavior, and they
2 received an SVC. That's a real possibility. I
3 think that the military investigator should
4 proceed with an investigation. I don't think
5 this recommendation should change that, and I
6 do think that the recommendation can deal with
7 circumstances in which there is no SVC, and
8 the victim refuses to cooperate, and refuses
9 an SVC. I don't know in those instances - in
10 fact, I'm pretty confident in those instances
11 that you're referring to, there was no SVC
12 because the program wasn't at that time up and
13 running. In fact, I think the program was in
14 response to that, the scandals that emerged
15 from Lackland, in part, at least. So, I agree
16 with you that we want that the
17 recommendation take it into account.

18 The second issue was - actually,
19 what was the second issue, Patty?

20 COL HAM: Ma'am, if an investigator
21 called me as a defense counsel and said all
22 right -

1 DEAN ANDERSON: Right, and the SVC
2 refuses to disclose.

3 COL HAM: Right. Have you seen her
4 or him? My answer is, I'm not going to answer
5 that question.

6 DEAN ANDERSON: Well, why don't we
7 make it so that the first line of
8 investigation is to consult with the victim,
9 and to advise the victim that the victim has
10 a right to speak with an SVC before making a
11 determination about whether or not something
12 is restricted or unrestricted. I mean, it's
13 simply the warning that's given, and then
14 proceeding in - you know, give the victim the
15 opportunity to consult with an SVC on this
16 question. If the victim refuses, then we
17 continue with the investigation. That I think
18 would take care of circumstances in which the
19 SVC, even to be the conduit of information, or
20 we might think that the SVC would feel that
21 those questions are privileged and would not
22 want to answer those questions. I think

1 talking directly with the victim provided the
2 victims have an opportunity to consult with
3 counsel.

4 MS. GARVIN: This is Meg. I think
5 that's right. It's essentially kind of a
6 quasi-Miranda moment. Right? The investigator
7 is saying to the victim you know you have a
8 right to counsel. Right? Do you want to
9 exercise that right. Do you want to access
10 your SVC now? And if they say yes, then like
11 a Miranda moment, all questioning - I mean,
12 I know not all investigation stops at that
13 moment, but we're saying everything stops
14 while the victim consults with the SVC, and
15 then it's which direction is this report
16 going.

17 REP. HOLTZMAN: This is Liz
18 Holtzman. I guess my concern about this is
19 that this allows the - I want to - people
20 have said, I don't remember who said it, but
21 there's a larger issue here than just the will
22 of the victim. You have the safety of the

1 other people on the base, and we have the
2 safety of civilians if they - someone who has
3 committed a sexual offense is allowed to go
4 unpunished, or if the case is not investigated
5 someone is allowed to go unpunished.

6 So, what you're saying here is
7 that if a third party, even let's say it's not
8 even inadvertent. Let's just say there's a
9 third party, a witness who comes forward and
10 tells the Commander I've seen a rape, and this
11 is what had happened, and then we're going to
12 allow the victim to stop the entire
13 investigation? I don't know why - what is the
14 value of doing that? How do we know this
15 person hasn't done this before, and won't do
16 it again? Why do we give this power to the
17 victim? I understand the victim doesn't have
18 to cooperate, but why should the investigation
19 stop if there's other evidence?

20 DEAN SCHENCK: This is Lisa. I also
21 wonder, you know, sometimes there's multiple
22 tiers involved.

1 REP. HOLTZMAN: Right.

2 DEAN SCHENCK: And multiple victims
3 involved, so what happens in the scenario
4 where the victim doesn't want to go forward?
5 And I totally agree and understand, but when
6 the other victims want to go forward, or the
7 other accused admits guilt? And then we have
8 real cases, and even though the confessions
9 have to be corroborated, we have ways of
10 corroborating those confessions. So, maybe
11 later in the process that victim may want to
12 say okay, I will testify. And we can't just
13 say oh, we didn't investigate. We did nothing,
14 even though we had confessions from two of the
15 accused, and another victim. See what I mean?

16 REP. HOLTZMAN: Yes. I had to -

17 DEAN SCHENCK: This is Lisa. I had
18 a case where it was multiple accused, multiple
19 victims.

20 REP. HOLTZMAN: I mean, this
21 wouldn't happen in the civilian world, a
22 victim couldn't stop an investigation.

1 DEAN ANDERSON: In the civilian
2 world, though, there are different - this is
3 Michelle. In the civilian world, though, there
4 are different incentive structures and a
5 different history of the problem. And there
6 isn't the Command structure that's forced to
7 disclose something. Things come forward to the
8 police by any number of mechanisms, sometimes
9 the victim, sometime others. I'm not sure that
10 this is as big a issue, though, unless I'm
11 missing something, as we might be thinking it
12 is. I mean, this is simply whether or not the
13 reporting is restricted or unrestricted. You
14 know, if someone else comes forward around
15 this, the first thing the military police do
16 is reach out to the victim and advise them
17 that they have an opportunity to consult with
18 an SVC on whether to make a restricted or
19 unrestricted report.

20 Let's say that the victim says I
21 want to make a restricted report, but there's
22 evidence outside the restricted report that

1 this is an actual case, and that evidence is
2 already in front of - has already been
3 reported to the Commander, to the police. The
4 police can go forward and their victim chooses
5 not to participate. We're not vesting
6 authority around - we're not vesting the
7 decision making about whether or not to
8 investigate with the victim. We're vesting the
9 authority about whether or not to make a
10 restricted or an unrestricted report with the
11 victim. That is going to influence whether or
12 not military police pursue a case as it does
13 in the civilian world. In the civilian world,
14 someone reports that domestic violence has
15 happened, or a rape has happened, the victim
16 says I don't want to go forward, I don't want
17 to testify, even if there's good evidence,
18 sometimes the prosecutor says well, look,
19 we're not going to pursue this, and sometimes
20 they say we are going to pursue this. And
21 that's still within the jurisdiction of the -
22 - and authority of the police.

1 This simply curtails - what it
2 does is it changes the automatic shift from a
3 restricted to an unrestricted report, which
4 divests the victim with the only authority she
5 has, or he has, which is whether or not to
6 fully disclose and be open for the
7 investigation, or whether or not to try to
8 keep the information private for any number of
9 reasons.

10 CHAIR FERNANDEZ: You know, I hate
11 to make this kind of suggestion because I
12 always think it's a bunch, but is this
13 something that needs to get studied? I mean,
14 I think that people have raised really good
15 issues on both sides, and I don't think any of
16 us feel particularly comfortable with the
17 language, with anything that we've come up
18 with. Am I wrong in sort of - and is this
19 something that we need to maybe declare the
20 findings and ask for a study in some other -
21 for another body to make a solution, whether
22 it's the Pentagon, or the SVCs would make a

1 suggestion. But to identify that the problem
2 is there, but that we don't have the solution.

3 DEAN ANDERSON: Yes, this is
4 Michelle. I mean, I really think that we have
5 enough information that this is a substantial
6 problem, and that it deters people, the
7 feeling that they will not be able to control
8 the information is something that deters
9 victims from coming forward. I think that's
10 established by the record that we've reviewed.
11 I think it's up to us to come up with creative
12 possible solutions, and this is one way to
13 vest that authority in the victim without
14 limiting either the Command's decision making
15 and requirement, the requirement on Commanders
16 to report to the military police, nor does it
17 divest the military police from the decision
18 making authority about whether or not to
19 continue to proceed to investigate despite
20 whether or not this is a restricted or
21 unrestricted report. It's actually a form of
22 modest intervention. It gives the victim a

1 Miranda warning that she has the opportunity
2 to consult with a Special Victim's Counsel who
3 is already in play, just often at a later
4 stage of the game. This recommendation moves
5 that opportunity to consult with counsel more
6 formally to an earlier stage in the process,
7 and it allows the decision about whether or
8 not to make a restricted or an unrestricted
9 report more knowing and intentional. And it
10 takes away the thing that - or it attempts to
11 take away the thing, it won't be perfect, but
12 it attempts to take away the thing that I
13 think is deterring people from reporting,
14 which is I won't get to decide what happens
15 with the information. That's going to be true
16 in many circumstances, and it's certainly true
17 in life, but this is an attempt to try to vest
18 some control with the victim in terms of
19 whether or not the report, at least, is
20 restricted or unrestricted. So, I would not
21 support simply making a recommendation to
22 review this question. I'm open to revising and

1 continuing deliberations on what the
2 appropriate mechanisms are. I think it's only
3 to become a lot better, move from Command to
4 the military police made it instead of
5 consulting with the SVC, consulting with the
6 victim and giving the warning, the Miranda
7 warning that you have an opportunity to
8 consult with an SVC. I think those are two
9 good revisions to what's here, and I think we
10 can deliberate to something that is -
11 hopefully answers concerns that have been
12 expressed.

13 REP. HOLTZMAN: Well, this is Liz
14 Holtzman. I kind of agree with Mai that I
15 don't mind having a study. I just don't - I
16 mean, I don't know the extent of the problem.
17 You say that it's big, Dean Anderson. Maybe
18 you're right, but I don't remember the
19 testimony indicating that this is the reason
20 that people didn't come forward because they
21 were - because they weren't able to file a
22 restricted report, or because the information

1 came out otherwise. I'm not sure that that's
2 - you know, how much - how widespread the
3 problem is.

4 So, that's part also of my concern
5 here because the not knowing how widespread
6 the problem is, I'm not sure that we want to
7 create some bureaucratic mechanisms here that
8 can have other unintended consequences. I
9 don't know what they are. I mean, maybe
10 they're not, and maybe you're right, that this
11 will work in a perfectly fine, fair way
12 without undermining law enforcement concerns,
13 as opposed to victim-oriented concerns.

14 I just don't know the extent of
15 the problem, and I don't know what the
16 consequences would be of the suggestions that
17 you've made.

18 BG McGUIRE: Because to be - this
19 is Colleen McGuire, again. And I recall some
20 of Russ Strand's presentations in I think it
21 was Austin where we talked about many times
22 when we approach a victim that may or may not

1 want to do a restricted report or
2 unrestricted, that our investigators are
3 trained really to influence them to make the
4 decision to make it unrestricted. And they're
5 pretty good - they've got good techniques and
6 good track records in doing so.

7 MS. GARVIN: This is Meg. You know,
8 it sounds like we are really split. I mean,
9 I'm right with Michelle on this in the revised
10 version of it at least, because if all we're
11 saying is inform the victim they have right to
12 counsel, which is the right we afford
13 defendants. Also the victim does consult with
14 their SVC, and the outcome of that
15 consultation is their report of the incident
16 is a non-report. They're saying no, that's not
17 reporting. Let them not control what the
18 problem for the investigator is, other than
19 you have an uncooperative victim which could
20 be uncooperative otherwise.

21 What we're doing is we're saying
22 the actual disclosure of your story you have

1 control over in the moment. I guess, I'm not
2 seeing - in that more mild version of this
3 recommendation, I'm not seeing the hurdle to
4 investigation. In the initial one where we are
5 saying stop investigating, that seems like a
6 big shift of policy. In this one we're saying
7 you just confirmed you have an uncooperative
8 witness, basically, and her version of the
9 story is there's not a criminal report.

10 BG McGUIRE: Meg, is that true? I
11 mean, because, I mean, I'm asking, too. I
12 mean, is that what the outcome of the more
13 mild version would be?

14 CHAIR FERNANDEZ: If you went
15 restricted there would be no investigation.
16 It's not just an uncooperative victim. You
17 have to -

18 BG McGUIRE: Right, but no. But,
19 Mai, if someone else has brought information
20 forward, there's still an invest - isn't that
21 what we're talking about? Victim states
22 restrict - I mean, maybe I'm confused about

1 how - what that means. When someone else
2 reports on them, I mean, I know then there's
3 an investigation. Yes, I guess it's a question
4 of does it automatically stop, and does the -
5 - the problem we're having, the policy
6 discussion we're having is does the victim get
7 to stop investigation. Right? That's the crux
8 of this?

9 CHAIR FERNANDEZ: Yes.

10 DEAN ANDERSON: Right. And I think
11 that the - this is Michelle. The intent of
12 the recommendation from the get-go was not to
13 vest that authority with the victim. I mean,
14 in terms of whether or not this is an issue,
15 you know, the victim's control over their own
16 reporting. There's the survey of victims of
17 military sexual assaults said that 70 percent
18 believe that they did not want anyone to know
19 of the sexual assault. They felt uncomfortable
20 making a report to Command, that's 66 percent,
21 and they did not think the report would be
22 kept confidential, that's 51 percent. So, in

1 terms of the crux of the problem at least in
2 terms of the survey of victims of military
3 sexual assault themselves, they're agreeing
4 with statements that strongly suggest they
5 don't have control over the information, and
6 that's one of the reason why they don't make
7 a report of a sexual assault.

8 REP. HOLTZMAN: Do we need to take
9 a vote on this?

10 CHAIR FERNANDEZ: I think so. I
11 think -

12 MS. GARVIN: This is Meg. Before we
13 take a vote could we - and I know we're under
14 time constraints. Could we consider breaking
15 it down into incremental recommendations and
16 then taking a vote on those? Meaning, would
17 there be consensus that the Miranda warning at
18 least should be given? Would there be then
19 consensus on what happens at that next moment,
20 and then would there be consensus on that next
21 - because what we have in front of us are
22 incremental steps of a recommendation, and I'm

1 just wondering if there is consensus around
2 pieces of those or not. And maybe that
3 requires redrafting, because I don't think the
4 one in front of us right now is drafted
5 necessarily incrementally, but that would be
6 one process instead of voting in a total up or
7 down. I do think we've heard evidence that
8 this is a problem for victims, and the
9 solution we may not have the whole answer to,
10 but I'm wondering if that incremental approach
11 might be appropriate.

12 CHAIR FERNANDEZ: That's what I'm
13 wondering. Are we really in the kind of
14 situation we're in right now, the best to make
15 that judgment? Could we not just specify the
16 findings and let the recommendation come after
17 a study is done?

18 DEAN ANDERSON: Well, this is
19 Michelle. This is that study. I mean, I'm -
20 we've been tasked to make recommendations for
21 changes that will help to enhance, among other
22 things, enhance reporting and victim's

1 services. So, I agree with Meg that breaking
2 this down, because I actually think that the
3 recommendation as it was originally drafted
4 was far too broad, and too sweeping. And that
5 we've come to a place where we actually might
6 agree on some small steps.

7 CHAIR FERNANDEZ: What would the
8 recommendation on the Miranda look like?

9 DEAN ANDERSON: It would look like
10 the first step in the investigation for the
11 military police is to contact the victim to
12 get a statement and to advise the victim that
13 they have a right to consult with a Special
14 Victim's Counsel before making the
15 determination about whether or not they file
16 an unrestricted or a restricted report.

17 REP. HOLTZMAN: Let me ask you in
18 that light, this is Liz Holtzman. Along the
19 lines of the point that was made, I forget who
20 raised it, that investigators are pretty
21 persuasive about trying to persuade people to
22 make unrestricted reports. Is the police

1 officer, the investigative agency barred from
2 trying to persuade the victim at that point to
3 make an unrestricted report?

4 DEAN ANDERSON: You know, I don't -
5 - this is Michelle. I don't think we have to
6 get into that. I'm certainly not suggesting
7 Miranda warning is a constitutional
8 prohibition on any kind of persuasion once
9 someone has elected, or before someone has
10 elected to see an SVC. I think, though, that
11 once someone has elected to see an SVC, that
12 that should be the next step. That seems to
13 make sense.

14 You know, I'm very sympathetic to
15 the concerns about community safety, and the
16 concern that allowing victims to control the
17 report more, and the restricted nature of the
18 report may decrease the sum total of
19 investigations and weeding out of offenders
20 who may be multiple offenders. I'm sorry, that
21 may be repeat offenders. But I think we've got
22 enough evidence that, in fact, law enforcement

1 is thwarted by victim's refusal to come
2 forward because they don't feel safe, they
3 don't feel like they have control over the
4 information once they do come forward. That I
5 think, ultimately, the law enforcement - the
6 desire for effective law enforcement and
7 protection of the community weighs in favor of
8 this kind of a change in policy, because if
9 victims feel more empowered to control the
10 information, we saw this time and again, that
11 many victims who initially made restricted
12 reports became comfortable with the system,
13 became comfortable with the rights that they
14 had, understood the process more and changed
15 to unrestricted reporting. And I think the
16 reason they did that is that they've been able
17 to interact with the services that the - that
18 are provided for victims by the different
19 services in the military. And I think we're
20 trying to enhance that, we're not trying to
21 undermine the law investigation, you know, the
22 law enforcement process here. In fact, we're

1 trying to support it.

2 CHAIR FERNANDEZ: Okay. What we
3 have on the table is do we try to pass some of
4 this incrementally, and by that we start off
5 with what we're calling right now the Miranda
6 warning. Do we decide that we put it up as a
7 finding but not issue a recommendation, but
8 ask that it be studied? Is there anything else
9 on the table right now?

10 BG MCGUIRE: This is Colleen
11 McGuire. Just one more thought and
12 consideration, is that oftentimes when - and
13 this is a case where a victim confides in
14 somebody and somebody gives the information to
15 whomever, there's always that potential of the
16 alleged perpetrator.

17 That person now is tainted, could
18 be potentially without the benefit of a trial
19 one way or the other. So, that individual may
20 even elect to want to pursue a wrongful, or
21 even, you know - I'm just looking at the
22 accused rights, as well, in the event that the

1 victim has confided in certain individuals,
2 roommates or whatever, that information gets
3 to the Commander and others, names are going
4 to be known. You've got another party in the
5 mix. That's just another thing to be in
6 consideration of.

7 CHAIR FERNANDEZ: But an
8 investigation can exculpate somebody.

9 BG MCGUIRE: Yes.

10 CHAIR FERNANDEZ: Did you see that
11 happen a lot, Colleen?

12 BG MCGUIRE: To be honest with you,
13 I had never - personally I never ran into a
14 case where there was inadvertent exposure or
15 admittance to some sort of victimization to
16 rape or sexual assault. We knew or were aware
17 of restricted reports, and that was it, but I
18 never ran across anything where it was
19 inadvertent, because I think if it were, we
20 would have investigated.

21 CHAIR FERNANDEZ: Okay. Do we vote
22 or - do we have a vote to vote?

1 MS. GARVIN: Well, before we vote
2 I'd like to at least break down the
3 recommendation and rewrite it on the basis of
4 the discussion we've had here.

5 BG MCGUIRE: I vote for that.

6 CDR KING: Who was that just
7 speaking?

8 BG MCGUIRE: This is Colleen, I'm
9 sorry. I vote for the breakdown.

10 CDR KING: Thanks, Colleen.

11 JUDGE MARQUARDT: This is Christel.
12 I don't think it would hurt to spell out on
13 paper exactly what the two positions are so
14 that everybody knows if we're going to vote on
15 it.

16 MS. GARVIN: This is Meg. I think
17 that makes the most sense.

18 CHAIR FERNANDEZ: Okay. Why don't
19 we - so when are we going to make this -
20 because we don't have any more calls after
21 this. Correct?

22 COL HAM: That's correct, ma'am.

1 This is Colonel Ham.

2 CHAIR FERNANDEZ: We have to do it
3 over the computer, or how do we do this?

4 DEAN ANDERSON: Well, this is
5 Michelle. It's 4:30 and I respectfully submit
6 that we're not going to get to all of the
7 recommendations in the next half an hour in
8 all likelihood. I think we're going to have to
9 schedule another meeting. I could be wrong
10 about that.

11 JUDGE MARQUARDT: Well, I would
12 prefer to get it right rather than to rush it.
13 And we are put in a very difficult time frame,
14 so I'm with you for having another scheduled
15 phone visit if we can manage it.

16 DEAN SCHENCK: This is Lisa. I
17 agree with that. I think we should definitely
18 have another phone meeting.

19 CHAIR FERNANDEZ: Can staff manage
20 that?

21 CDR KING: We can have a meeting
22 any time you want to, ma'am, but we need to

1 get the report in so I don't know who's going
2 to write these - you know, who has, in fact,
3 written the language. I'll be happy to
4 distribute it. I'm not sure I'm really clear
5 on what you want us to write, so someone else
6 is going to have to help us with that. But we
7 need to get this report in - I was hoping -
8 we really need to get it to the RSP panel,
9 the main panel which some of you are on by I
10 thought tomorrow or Monday we had planned, so
11 I don't know.

12 COL HAM: This is Colonel Ham. You
13 need to take what time you need. And if that
14 means you can't report on the 5th of May, then
15 that's what it means. I will tell Judge Jones
16 that. You need to take the time you need. We
17 have a statutory deadline for the RSP, and we
18 have limited availability of our RSP members
19 in May, very, very limited, so - but you need
20 to decide what you want to do. Right now
21 there's a - we were trying to get these out
22 to the full panel members last week.

1 Obviously, we've blown that deadline.

2 They need some time to review this
3 before your briefing, which is currently
4 scheduled on the 5th and 6th. If, Mai, if you
5 decide that you are not going to be able to be
6 ready for that date, then that's your
7 decision, and I need to tell the Judge as soon
8 as possible so we can decide, or she can
9 decide the way forward. But it's not on us to
10 rush you to any decision other than we have a
11 statutory deadline from Congress, and that is
12 looming in front of us and coming up very
13 quickly.

14 REP. HOLTZMAN: This is Liz
15 Holtzman. Can I make a suggestion? Can we
16 agree that we will resolve this issue at some
17 other point, and move ahead as quickly as we
18 can on the balance of the findings and
19 recommendations as much as we can finish
20 today. If we can schedule another meeting,
21 that's fine, and we can give the full panel,
22 you know, at least two-thirds of what we've

1 done, or three-quarters of what we've done.
2 But I think we should just move forward and
3 try to resolve this in some other fashion.
4 Maybe somebody drafts up the, you know, the
5 two opposing proposals and we take a vote by
6 long distance, whatever, computer.

7 DEAN ANDERSON: Well, this is
8 Michelle. I'm certainly willing to work on
9 this based on this dialogue and try to break
10 out the moments of time that I thought that we
11 had identified as possible places where we
12 might have an intervention and possibly agree
13 as a Committee. And I can circulate that to
14 anybody who wants to help work on this. I'm
15 willing to do it tonight, and try to work with
16 a couple of you to get the flavor of this
17 dialogue as best we can. And then I think it's
18 - then it's up or down votes on specific
19 moments of time rather than the whole thing.
20 Although, the whole thing may go down, and
21 that's fine.

22 CHAIR FERNANDEZ: Okay. What I

1 would say is, Michelle, why don't you give a
2 crack at writing the two positions out. Send
3 it to staff, staff can then send it to us, we
4 do an up or down vote on this particular
5 piece. I think there - would people be
6 available tomorrow at 9 a.m.?

7 JUDGE MARQUARDT: This is Christel.
8 I am not. I'm on a Board that I committed to
9 meeting with.

10 DEAN SCHENCK: This is Lisa. I'm
11 only available from 9:00 until a quarter to
12 10. I've got a faculty meeting at 10.

13 CHAIR FERNANDEZ: That's 45
14 minutes. And if we know we've got 45 minutes
15 to go, and we've got a half an hour now, we
16 could turn some of this out. Who else is
17 available?

18 DEAN ANDERSON: This is Michelle.
19 I'm available.

20 REP. HOLTZMAN: This is Liz. I'll
21 look to be available.

22 BG MCGUIRE: I can be available,

1 and I will have coffee. It's 6:00 in the
2 morning over there.

3 CHAIR FERNANDEZ: Okay. Let's try
4 to give it an hour tomorrow morning, and that
5 way that gives most of the day for the staff
6 to be able to do what it needs to do. And
7 we've got to get this out so the staff can get
8 it out next week. I mean, it would be - we're
9 not going to meet the statutory deadline
10 otherwise. So, my thing is, Michelle, let's -
11 - you go with 5. Let's move on to number 6.
12 Sherry, you're on.

13 CDR KING: Okay, so number 6 is -
14 I think you already agreed on number - let's
15 see, wait now, sorry. I modified this based on
16 the discussion. This is the mechanism -

17 CHAIR FERNANDEZ: Sherry, what page
18 are we on at this point?

19 CDR KING: Okay. Go to 71.

20 CHAIR FERNANDEZ: Okay.

21 CDR KING: Recommendation 6, which
22 is there's no current mechanism for a sexual

1 assault victim to keep a report of sexual
2 assault restricted and request to be moved
3 away from the physical duty or living location
4 of the alleged assailant. So, this is for the
5 expedited transfer.

6 I tried to take your discussion
7 about it into the findings, and into the
8 recommendation. I don't know if I did it very
9 well, but the recommendation I ended up with
10 is on page 72. "Service Secretary should
11 insure that Commander location and training
12 address the Commander's authority to make duty
13 and other assignment transfers based on the
14 recommendations of medical personnel even if
15 the specific underlying reason for the request
16 for the transfer is protected and cannot be
17 disclosed."

18 And then the second one is, "The
19 medical personnel, SARCs and VAs to be trained
20 on the option, if the Commander has the
21 possibility or the authority to effect a
22 transfer based on medical recommendations."

1 So, this kind of skirts around the expedited
2 transfer for a restricted, so nobody has to
3 tell about the restricted. This is what
4 General McGuire was talking about at the last
5 meeting, that you wanted to try to
6 incorporate. So, it's kind of a backdoor way
7 of allowing some leniency for victims who make
8 a restricted report to talk to medical
9 personnel who can then go to a Commander and
10 say based on medical reasons I recommend you
11 move X, or move him to a different building,
12 or move him to a different side of the
13 building to a different work location in order
14 to separate the two without having to tell the
15 Commander why specifically this victim has to
16 move. And that's based on current regulations,
17 and that's exactly what General McGuire was
18 talking about at the last meeting, so I tried
19 to include that in the findings and that
20 recommendation.

21 COL HAM: This is Colonel Ham. This
22 goes a little further than current policy than

1 the DOD instruction on sexual assault
2 prevention and response, which recognizes that
3 health care personnel can convey to the
4 victim's Commander adverse duty impacts
5 related to sexual assault without revealing
6 the source of the adverse duty impact. That's
7 already in current policy. I think that's what
8 General McGuire was referring to, if I'm
9 correct, General McGuire?

10 BG MCGUIRE: Yes, that's right.

11 COL HAM: That already exists. And
12 the health care personnel, as you heard in
13 testimony and has been written in policy may
14 not disclose the reason for their
15 recommendation on duty limitations or
16 whatever.

17 REP. HOLTZMAN: Do we move forward
18 on this, Mai? Does anybody have any objection?

19 CHAIR FERNANDEZ: I don't have any
20 objections on number 6.

21 REP. HOLTZMAN: Does anybody else?

22 CHAIR FERNANDEZ: Going once, going

1 twice, gone. We're on 7.

2 CDR KING: Okay, finding number 7
3 relates to the Safe Help Line. We tried to
4 revise the findings based on your discussion,
5 and I left little notes on the side here to
6 say that Safe Help Line contracted with RAINN,
7 and we tried to clarify that.

8 Second bullet says that the
9 military advertises Safe Help Line as a
10 hotline number but they always - they also
11 advertise their own which are not always
12 answered 24/7.

13 And then the third one is that
14 Safe Help Line database, it's not always up-
15 to-date, or accurate. And then we made the
16 finding - we modified the finding just to
17 clarify what you said. Two bullets - I guess
18 there needs to be a bullet under the first
19 one. "The Secretary has set forth clear
20 guidance that the DoD Safe Help Line is a
21 single 24/7 sexual assault crisis hotline for
22 military members, and that they come up with

1 an easily remembered number similar to the
2 website SafeHelp.org."

3 And then the second bullet is that
4 "DoD require the services to provide the Safe
5 Help Line with sufficient contact information
6 to make sure they can always contact a live
7 person on a 24/7 basis," which is what they're
8 supposed to do.

9 CHAIR FERNANDEZ: Anybody have a
10 problem with number 7? It seems pretty
11 straightforward.

12 COL HAM: Mai, can I make a
13 suggestion? This is Colonel Ham. Again, I'm
14 not trying to rush anybody, but the changes up
15 until the new recommendations from Member
16 Anderson which start on page 76 are
17 incorporating all your comments from your
18 prior discussion. If you want, you can move to
19 the new ones which you haven't discussed yet,
20 and if anybody has any further comments on
21 these that you've already discussed that we've
22 incorporated your comments on, you can let us

1 know. Does that make sense?

2 CHAIR FERNANDEZ: Yes.

3 CDR KING: Maybe let us know by
4 tomorrow's meeting so that way if you do have
5 anything you want to discuss, I can be
6 prepared to tell everybody which ones need
7 more discussion.

8 CHAIR FERNANDEZ: Go straight to
9 page 76. Is that where we would start right
10 now?

11 CDR KING: Yes, with Finding on
12 Recommendation 15.

13 CHAIR FERNANDEZ: Okay. Is
14 everybody okay with that?

15 DEAN SCHENCK: Okay. This is Lisa.
16 Let me get it straight. So we're supposed to
17 go back, see the comments and the changes we
18 made based on comments, and then, if we have
19 any problems with that tomorrow morning, we
20 discuss it.

21 CDR KING: Yes, and if you find
22 them ahead of time let me know so that I can

1 make sure that we bring that up at the meeting
2 so that we're not just going through them
3 again like this. So, if you read them tonight,
4 email me and say I have a problem with number
5 13, or whatever, or I want to discuss number
6 13, or whatever.

7 DEAN SCHENCK: Yes, so this is
8 Lisa. Should we use it in the findings and
9 recommendations that follow Subsection M and
10 then not the ones that are in the back?

11 CHAIR FERNANDEZ: What?

12 CDR KING: Ma'am, we were just
13 going over the Victim Services ones right now.
14 I think that's all she meant is so Finding 8,
15 9, 10, 11, 12 -

16 (Simultaneous speaking.)

17 DEAN SCHENCK: Okay, great I'm with
18 you.

19 CDR KING: Perfect.

20 CHAIR FERNANDEZ: Let's go to
21 Recommendation 15.

22 CDR KING: Do you want me to go

1 over these, or one of you?

2 CHAIR FERNANDEZ: Go ahead, Sherry.

3 CDR KING: Okay. Finding on 15 is
4 about harassment and retaliation against a
5 victim in response to an allegation of sexual
6 assault erodes unit cohesion, and the fear of
7 harassment and retaliation deters a victim
8 from coming forward to report instances of
9 sexual assault.

10 And then the recommendation is
11 that "The Secretary of Defense direct DoD to
12 develop and implement training for all members
13 of the military including new recruits that
14 retaliation or harassment by service members
15 in response to an allegation of sexual assault
16 violates good order and discipline," or
17 "violates order and discipline," but it
18 probably should be good order and discipline,
19 I think is the term that's used.

20 CHAIR FERNANDEZ: Yes, it should.

21 CDR KING: Yes. What do folks think
22 about 15? Do you have a problem with it? Okay,

1 let's move on to 16.

2 CDR KING: Okay. The finding on 16
3 is that when an offender outranks or directly
4 commands a victim, sexual assault is an
5 especially egregious abuse of power. Military
6 officials and service members may be more
7 likely to ignore or retaliate against
8 instances of sexual assault when the offender
9 is a high-performing service member or a
10 superior offending against a subordinate. So,
11 the recommendation is that "The Secretary of
12 Defense direct DoD to develop and implement
13 training for all members of the military,
14 including new recruits, explaining that
15 implicit or explicit sexual" - I'm sorry,
16 "implicit or explicit invitations or demands
17 for sex, or sexualized interactions from
18 Commanders or superiors are not lawful orders,
19 should not be obeyed, violate the Code of
20 Military Conduct and will be punished."

21 CHAIR FERNANDEZ: That seems pretty
22 straightforward. Are we okay with that?

1 Anybody have a problem?

2 COL HAM: Ma'am, this is Colonel
3 Ham. In the finding it says "Military
4 officials or service members may be more
5 likely to ignore," and I think it's more
6 nuance. I'm just asking. Of course, you just
7 had a long discussion that Commanders are not
8 free to - anyone in the chain of command has
9 to refer the thing up, so that's already the
10 law.

11 JUDGE MARQUARDT: Take out "be more
12 likely," the descriptor. Just say "may
13 ignore."

14 CHAIR FERNANDEZ: Yes, that's good.

15 DEAN SCHENCK: This is Lisa. I'm
16 not sure what retaliate against instances of
17 sexual assault, retaliate against victims who
18 report sexual assault when the offender is --
19 sexual assault.

20 CHAIR FERNANDEZ: Yes, that's a
21 good point. That was in which number?

22 DEAN SCHENCK: This is Lisa.

1 Finding on Recommendation 16.

2 CHAIR FERNANDEZ: Instead of saying
3 "retaliate against instances of sexual
4 assault," it should be "retaliate against
5 those who report instances of sexual assault."
6 Okay. All right. But you want to leave in the
7 finding that military officials may ignore
8 when they are not permitted to ignore. That's
9 my only point.

10 REP. HOLTZMAN: Well, military
11 Commanders are not permitted to ignore, but
12 other military officials are permitted to
13 ignore. You can say - may be likely to -

14 DEAN ANDERSON: I think that they
15 may even though they're not supposed to. Yes,
16 I also think that Christel - this is
17 Michelle. Christel's revision that just says
18 military officials and service members may
19 ignore or retaliate against those who report
20 instances of sexual assault when the offender
21 is a high-performance service member or
22 superior officer, I'm sorry, superior

1 offending against a subordinate. And this is
2 simply in response to the instances in which
3 the drill sergeant, we heard about this from,
4 I think E, when a set of victims testified or
5 spoke to us about their experiences. And E
6 testified that the drill sergeant had offended
7 against a number of people, and when she came
8 forward she - you know, her wallet was
9 stolen, it ended up in the trash, her food was
10 stolen, so she was really retaliated against
11 for coming forward.

12 So, instead of saying "may,"
13 because that sounds permissive, I take it that
14 the problem is that "may" sounds permissive
15 when the statute does not -

16 REP. HOLTZMAN: Well, I don't think
17 it's the problem. The problem is that military
18 officials are not allowed to ignore.

19 DEAN ANDERSON: So, why don't we
20 say there have been instances in which
21 military officials and service members have
22 ignored or retaliated against those who

1 reported instances of sexual assault when the
2 offender is a high-performance service member
3 or a superior officer offending against a
4 subordinate. I think that's - there have been
5 instances. We've heard testimony about these
6 instances. The Washington Post reported about
7 another instance yesterday, so I think that's
8 a way of stating it more as a finding rather
9 than a likelihood or something like that.

10 COL HAM: Okay. And then, ma'am,
11 your question was should there be an offense
12 for that, and that is already directed to be
13 studied by the Judicial Proceedings Panel
14 actually in response to one of the people you
15 heard from, the ex-Coast Guard member who
16 appeared before you. So, you have that
17 question. There's a bullet that answers your
18 question that the Judicial Proceedings Panel
19 is already directed to study that.

20 DEAN ANDERSON: So, this is a
21 question of whether or not there should be an
22 abuse of power. I wondered whether or not we

1 should recommend that there be an abuse of
2 power crime rather than fraternization, which
3 fraternization is often about consensual
4 behavior, and is conceptualized as consensual
5 behavior, but that abuse of power could
6 additionally be charged when there's a sexual
7 offense against a subordinate.

8 COL HAM: And that's - I'm sorry
9 to repeat myself. That's what the - Congress
10 has directed the Judicial Proceedings Panel,
11 the follow-on panel to the Response Panel.
12 They directed them to look at that exact
13 issue.

14 DEAN ANDERSON: Okay.

15 REP. HOLTZMAN: I'm sorry to do
16 this. This is Liz, but I had a small addition
17 on Recommendation 14 to match it to the - I
18 mean, on the finding on 14 to match it to the
19 recommendation, which is to add language at
20 the end of the sentence.

21 The sentence reads now, "It has
22 been recognized that a percentage of the men

1 and women in the military experience unwanted
2 sexual contact before entering military
3 service." I want to add, "And that a
4 substantial percentage of these victims may be
5 targets for future victimization." I just
6 wanted to add that so it matches the
7 recommendation. I don't know whether that had
8 been omitted inadvertently or what. Are people
9 following me?

10 DEAN ANDERSON: Yes, I am. This is
11 Michelle. I think that's the right direction,
12 Liz.

13 BG McGUIRE: I agree with Liz on
14 that. I don't know if I'd use the word
15 "target."

16 REP. HOLTZMAN: Okay, I just
17 scribbled it, so I'm perfectly happy if the
18 staff revises it to make it more -

19 CDR KING: Yes. One way to say it
20 is may be subject to revictimization.

21 REP. HOLTZMAN: Yes, that's fine.

22 CDR KING: Or may become victims

1 again, something like that.

2 DEAN SCHENCK: This is Lisa. I
3 agree with that. Target used in the military
4 scenario is very effective.

5 CDR KING: okay. Are we ready for
6 17? The finding on 17 is that inculcating the
7 notes and the needs of the individual must be
8 subordinate to the needs is a stable of
9 military training. Nevertheless, subordination
10 of the individual to the mission may be
11 misinterpreted to deter reports of sexual
12 assault and encourage retaliation against
13 victims who come forward.

14 And the recommendation is that,
15 "The Secretary of Defense direct the DoD to
16 develop and implement training for all members
17 of the military, including new recruits,
18 emphasizing that reporting instances of sexual
19 assault is essential for good order and
20 discipline, and protects rather than
21 undermines morale."

22 JUDGE MARQUARDT: I think that's

1 good.

2 REP. HOLTZMAN: This is Liz
3 Holtzman. Can we skip the reading of the
4 balance of the findings and recommendations on
5 page 77?

6 CHAIR FERNANDEZ: Yes.

7 JUDGE MARQUARDT: Well, I've got a
8 question on issue 18. This is Christel.

9 CHAIR FERNANDEZ: Well, let's - is
10 17 okay for the recommendation? Are we okay on
11 that one before we go on to 18?

12 COL HAM: Mai, this is Colonel Ham.
13 For 15, 16, and 17, all the training, and I
14 guess 18 has training, too, do we just want to
15 add a phrase to the extent is not already
16 occurring? We're presuming none of this is
17 incorporated in current training, so it
18 doesn't - I guess my point is it doesn't
19 detract from your recommendation. It just says
20 if you're not doing this in your training, do
21 it.

22 CHAIR FERNANDEZ: Right. Yes, I

1 think that's fine.

2 CDR KING: Okay, so other than
3 that, everybody is good with 17, and we can
4 move on to 18?

5 CHAIR FERNANDEZ: Yes.

6 JUDGE MARQUARDT: This is Christel.
7 I was concerned about 18 because it only looks
8 at victimization of males by a male, and I
9 think that they could equally be victimized by
10 a female officer.

11 DEAN ANDERSON: So, this is
12 Michelle. That relates to the recommendation,
13 not the finding. The finding is gender neutral
14 of an offender. The recommendation identifies
15 the offender as male, and I think you're right
16 about that. And the phrase with examples of
17 one-on-one sexual assault including hazing or
18 sexual abuse by groups of men, that needs to
19 be reframed to include female on male sexual
20 assault.

21 What I wanted to get at with this
22 one is just the interesting ways that we heard

1 that sexual abuse happens against men, that
2 it's often about kind of hazing rituals in
3 which there is sort of a physical
4 subordination, sexual subordination of a new
5 member or someone who's on the outs by a group
6 of people as a way for these people and these
7 four men in this instance to bond with one
8 another, and to assert dominance over this
9 person who was on the outs. But I agree that
10 absolutely we should acknowledge also the
11 possibility and instances of female on male
12 sexual assault.

13 REP. HOLTZMAN: Can I just make -
14 this is Liz Holtzman. Can I just make a
15 suggestion with regard to that? I would not do
16 that in such a way that in any way detracts
17 from the specificity of the language that you
18 already have in here. Male on male sexual
19 assault is a serious problem. It's not as well
20 understood, and it's not as well faced up to
21 by the military, so I would not tamper with
22 the language about that. If you wanted to add

1 a sentence or two about female on male sexual
2 assault, that's fine with me, but I wouldn't
3 undermine - I would not tamper with this
4 language.

5 DEAN ANDERSON: Yes, this in terms
6 of number of instances - this is Michelle.
7 Male on male sexual assault was the vast
8 majority. That's not to say that female on
9 male doesn't exist, and doesn't need to be
10 further investigated and understood. So, I
11 agree with that.

12 DEAN SCHENCK: Okay, so this is
13 Lisa. So, where are we at? Are we keeping it,
14 are we --

15 REP. HOLTZMAN: Yes, we're going to
16 add some language, a sentence or two at the
17 end of 18.

18 DEAN SCHENCK: Okay.

19 REP. HOLTZMAN: Or a finding.

20 DEAN SCHENCK: I was just wondering
21 where we got that information regarding female
22 on male sexual assaults. We definitely heard

1 about the hazing and the -

2 REP. HOLTZMAN: Yes.

3 DEAN SCHENCK: You know, that sort
4 of college type, that atmosphere. And I'm not
5 saying we don't have female on male sexual
6 assault. I'm just wondering where we're
7 drawing data for the finding.

8 DEAN ANDERSON: Yes, that's a good
9 question, Lisa.

10 JUDGE MARQUARDT: Well, could the
11 staff sort of comb the record and figure out
12 if there's anything out there that we heard?
13 I mean, I think we heard overwhelmingly about
14 male on male sexual hazing, really.

15 REP. HOLTZMAN: Well, I think
16 there's sexual assault, too, not just hazing.

17 JUDGE MARQUARDT: Oh, yes, I agree.

18 REP. HOLTZMAN: Plain out normal
19 kind.

20 JUDGE MARQUARDT: Yes, yes.

21 DEAN SCHENCK: Yes, this is Lisa. I
22 agree just from sitting on a bench for six

1 years, there were many male on male sexual
2 assault cases, superior/subordinate included.
3 Maybe we can look at the WGRA survey data
4 because they do ask whether or not your
5 assailant was male or female, and they do have
6 that information in the report.

7 CHAIR FERNANDEZ: That's a great
8 idea, Lisa.

9 DEAN SCHENCK: I don't anybody
10 talking --

11 CHAIR FERNANDEZ: I don't either.

12 REP. HOLTZMAN: Well, maybe put it
13 in a separate item then, leaving the male on
14 male by itself, and if we have enough
15 information to do something on female on male
16 then we can add then. If we don't, then we
17 shouldn't.

18 CHAIR FERNANDEZ: Do you want to
19 move on to number 19, which is transactional
20 immunity for collateral misconduct?

21 CDR KING: From one level
22 collateral misconduct. Discussion on number

1 19?

2 DEAN ANDERSON: So, this is an
3 account, obviously - this is Michelle. This
4 is an account, obviously, to have the
5 collateral misconduct question removed as a
6 potential deterrent which, you know, the
7 Department of Defense itself states that it's
8 one of the largest reasons that people don't
9 report. It's not designed to remove all
10 collateral misconduct prosecutions, but only
11 low-level collateral misconduct prosecutions
12 which we may want to further identify or leave
13 in the way that it is, under-age drinking,
14 alcohol offenses, adultery, fraternization, et
15 cetera.

16 COL HAM: This is Colonel Ham. Do
17 you want to - there's currently a requirement
18 to advise of Article 31 rights for any
19 violation of Uniform Code of Military Justice,
20 if one is suspected. It's not based on
21 custodial interrogation like Miranda, it's
22 based on being a suspect. Is there anything on

1 that?

2 CHAIR FERNANDEZ: So, what
3 currently happens under the status quo,
4 Colonel Ham? As soon as someone brings forward
5 a report of sexual assault, they're told oh,
6 you may be - I mean, we got testimony on
7 that.

8 COL HAM: No, ma'am. During the
9 investigation, and the Comparative System
10 Subcommittee is looking at this. If there's a
11 military criminal investigative organization
12 conducting an investigation and they're
13 interviewing anybody, any witness who they
14 reasonably believe is a suspect of violating
15 the Uniform Code of Military Justice, they are
16 required to advise them of their rights under
17 Article 31(b) of the Uniform Code of Military
18 Justice, which predated Miranda, and is
19 triggered by being a suspect, not triggered by
20 custodial interrogation.

21 REP. HOLTZMAN: Do we -

22 COL HAM: If that is the issue for

1 them investigating, which is different than an
2 issue of whether someone will come forward
3 with a report.

4 REP. HOLTZMAN: Do we have to do
5 anything beyond 19? Is there any problem with
6 19?

7 CHAIR FERNANDEZ: Let me ask you.
8 Did you say the Comparative System
9 Subcommittee was handling collateral
10 misconduct?

11 COL HAM: They are - they have
12 looked at it in some detail. That is not to
13 say that if you believe there's a different
14 prism with which to view it, that this
15 Subcommittee and Role of the Commander could
16 comment on it. Right now the policy is to
17 basically wait. It's the Commander's
18 discretion to wait and to kind of deal
19 gingerly with it. We requested information
20 from the services. They don't formally track
21 this data. There was a data call for 2013 that
22 showed very low levels of adverse action as a

1 result of collateral misconduct, and very -
2 and when action was taken it is at a very low
3 level. But, again, it's not empirical, that's
4 based on the data call.

5 I would just say that this
6 granting transactional immunity for any
7 offense would be a significant action.

8 CHAIR FERNANDEZ: Well, that's kind
9 of how I feel, and I'm wondering if there's
10 been a subcommittee that's looked at this with
11 more detail than we have. I'd like to be able
12 to - I mean, I think that Liz, and Colleen,
13 and I sit on the full panel, and we could come
14 when these are discussed by that subcommittee,
15 come and speak of what we saw on this
16 subcommittee. But I have reservations about
17 number 19.

18 DEAN SCHENCK: This is Lisa. I
19 agree, I have reservations about this. That's
20 why I don't like directing commanders not to
21 take action on some offense. I mean,
22 Commanders are in a position to use their

1 judgment. But, also, when I traveled with the
2 DTF-SAMS cases where there were assertions of
3 - there are substantiated false allegations
4 based on fear of being charged with collateral
5 misconduct. There's always going to be that
6 problem that exists.

7 My problem is really more than
8 we're recommending a really hard stand on
9 this, and I don't know if I'm ready to get
10 there.

11 REP. HOLTZMAN: We haven't heard
12 very much evidence on this on what the
13 solution would do.

14 DEAN ANDERSON: In terms of the
15 scope of the problem, however, we - you know,
16 the way this is constructed, the underlying
17 evidence is elsewhere in the report, so the
18 underlying evidence of the victim's testifying
19 about this, the victim's concern about this,
20 victims being - testifying themselves or
21 reporting themselves in a survey instrument
22 that they didn't want to come forward because

1 of fear of collateral misconduct. That's
2 elsewhere in the report, so the findings look
3 pretty thin and bold, but I think when coupled
4 with the underlying evidence they go directly
5 - they follow directly from the underlying
6 evidence that we heard, the testimony and
7 evidence that we've heard. So, I think that,
8 in fact, the statement - the Recommendation
9 itself is actually more modest than what
10 the Department of Defense says, which is that
11 it's "one of the greatest" I believe is the
12 language, one of the largest reasons why
13 people are deterred from reporting sexual
14 assault. So, I think the finding is very well
15 grounded.

16 People can disagree with whether
17 or not substantively we should make a
18 recommendation about the prosecution of low-
19 level collateral misconduct, but I don't think
20 that one can say that given the findings that
21 Colonel Ham mentioned, which is that this is
22 rarely done, in less than 5 percent of the

1 cases is it done, and they're always done at
2 the fairly low level that we're not talking
3 about a circumstance in which one can make the
4 argument that command authority would unravel
5 without this opportunity to prosecute for low-
6 level collateral misconduct.

7 Plus, the point here is not that
8 collateral misconduct prosecutions themselves
9 are threatened and deterred, which I think
10 that happens occasionally, and is terrible
11 when it happens, but rather the point here is
12 that, in fact, the threat of collateral
13 misconduct prosecutions, even if it happens
14 rarely, and even when it does happen the
15 Commanders exercise wide discretion to impose
16 few if any punishments. The point is that the
17 threat of collateral misconduct prosecutions
18 keeps a lot of folks silent. And I'm not
19 making that up. That's what the Department of
20 Defense has said.

21 DEAN SCHENCK: This is Lisa. I
22 agree with Michelle. That's why I think that

1 the findings, refresh your memory with the
2 public hearing with the other victim. It was
3 where the woman had a weapon, she was on guard
4 duty and she went to the latrine and left her
5 weapon, and when she went to court they said,
6 well what about that weapon. So, I agree, I
7 think this finding is - we have definite data
8 on the findings -- the direction of that we
9 will not prosecute.

10 I believe we're asking the
11 Secretary of Defense to determine -- Secretary
12 to the services whether or not this - what
13 they should do about it regarding the
14 prosecution of those offenses, those low-level
15 offenses.

16 REP. HOLTZMAN: This is Liz
17 Holtzman. Maybe I misstated my point earlier.
18 I completely agree that the evidence for the
19 finding and recommendation 19 is ample. I
20 don't think we have enough information to
21 understand the consequences of suggesting the
22 recommendation. That we don't have evidence

1 on, so I'm a little concerned about the
2 consequences of our making this
3 recommendation, what they would be.

4 CHAIR FERNANDEZ: Well, one thing
5 we - go ahead.

6 JUDGE MARQUARDT: I agree with Liz.

7 BG MCGUIRE: This is Colleen, and I
8 agree with Liz and Mai, as well. I'm just kind
9 of troubled having an absolute, you know, a
10 recommendation with an absolute will not
11 prosecute.

12 JUDGE MARQUARDT: This is Christel.
13 I think that we need to do something, though,
14 because the evidence was so overwhelming that
15 that was one of the reasons that people did
16 not report. And we're trying to encourage them
17 to report, so we need to come up with some
18 language that maybe isn't so absolute but that
19 encourages somebody, the Commander to look at
20 these collateral issues and to - I'm not sure
21 what the language is, but I just think it is
22 an important issue.

1 DEAN ANDERSON: So, one thing it
2 could be - this is Michelle. Just trying to
3 identify a common way forward is possibly
4 allow - I mean, I completely agree with the
5 reference to, I think it was Lisa's reference
6 to the individual who left her weapon in, I
7 think it was in a theater of war, and that
8 would not be covered by low-level collateral
9 misconduct in my mind, at least. And I think
10 we could recommend that the Secretary of
11 Defense direct the DoD to develop and
12 implement a policy that Commanders will not
13 prosecute low-level collateral misconduct, and
14 then relate it to - with a new recommendation
15 that the Secretary of Defense and the DoD
16 figure out what low-level collateral
17 misconduct is most common in these instances.
18 I mean, obviously, it's not the abandonment of
19 a weapon in a military installation, it's
20 going to be under-age drinking, alcohol
21 offenses, and fraternization, those are the
22 ones that we're talking about. And we could

1 even reduce it to those, if - so, I think we
2 could do one or two things to modify this
3 recommendation.

4 One would be to say will not
5 prosecute for under-age drinking, alcohol
6 offenses, or fraternization. Those are the
7 lowest level among these, I would think. Or we
8 could say will not prosecute - will determine
9 what low-level collateral misconduct offenses
10 are not appropriate for prosecution when
11 someone comes forward with a credible
12 allegation of sexual assault. That's another
13 way to go, either that we modify and restrict
14 what collateral misconduct - what constitutes
15 collateral misconduct, or that we direct the
16 Department of Defense to identify what
17 circumstances are so low-level that they're
18 not worth pursuing. I mean, when people come
19 forward with sexual assault, and all know
20 this, under-age drinking or alcohol offenses
21 are often involved.

22 REP. HOLTZMAN: Well, there is a

1 third option which is not to adopt this
2 recommendation in any form.

3 DEAN ANDERSON: Oh, absolutely.
4 Absolutely.

5 REP. HOLTZMAN: And that's my
6 concern. I understand where you're coming
7 from, and I think that's - I just think that
8 when we are going to recommend a blanket
9 policy, and I understand the impetus for this,
10 you know, that we have to do something, but I
11 don't want to do something that we don't
12 really understand the consequences of. I mean,
13 I don't understand the consequences of doing
14 this, so - because I don't know all the
15 cases, and I don't have a strong enough feel
16 for what it would mean to bar Commanders from
17 making a decision. I'm assuming that the
18 number of - I'm assuming that they do this in
19 very rare circumstances, they allow the
20 prosecutions in very rare circumstances
21 anyway, so I'm not sure that - I'm just very
22 troubled about the recommendation.

1 DEAN ANDERSON: Recommendation.

2 REP. HOLTZMAN: Yes, that's all. I
3 don't know that we have enough information if
4 that's a good course of action or not. I mean,
5 it sounds -

6 DEAN ANDERSON: Let me just push
7 back a little bit on this. This is Michelle.
8 The last thing I'll say is that it's not clear
9 to me when something is not current policy
10 what information we might have about something
11 that's hypothetical, and that does not exist
12 in the real world currently. So, it's unclear
13 what kind of information we would have in
14 front of us. What we do have is that Command
15 so rarely uses it, and it's so - you know,
16 that it's not something that's salient in more
17 than 95 percent of the cases. So, that
18 suggests to me that it's not a crucial moment
19 in terms of Command authority. And that when
20 it is pursued, it's very low-level, when
21 collateral misconduct charges are pursued they
22 are pursued with fairly low-level

1 consequences, not - you know, we look at the
2 data and it says counseling, or non-judicial
3 punishment, you know, not something that's
4 worthy of even a judicial proceeding. So, that
5 makes me think that on the side of Command
6 authority, good order and discipline, weighing
7 on that side is very little. Weighing on the
8 other side is tremendous evidence that the
9 threat of collateral misconduct charges deter
10 reporting. And, in fact, the Department of
11 Defense I believe says that it's the greatest
12 deterrent to reporting, or one of the greatest
13 deterrents to reporting. So, I think when we
14 weigh them out, it's difficult to know what
15 further information we would have when the
16 military itself has not come forward and said
17 this is a crucial moment in terms of our
18 ability to maintain good order and discipline.
19 And, in fact, by practice it rarely comes up.

20 REP. HOLTZMAN: Well, I think the
21 answer to that is we could have asked, we
22 could have had some testimony on what people

1 felt the consequences would be. Would this
2 make any difference, would it be a big deal?
3 How - what would it harm? Maybe it has no
4 consequence, or you could be completely right.
5 I'm not saying you're not. I just don't know
6 the answer to that.

7 BG McGUIRE: This is Colleen, and I
8 just wanted to also note that sometimes - you
9 know, if we make a recommendation like this,
10 it almost gives a license for folks to engage
11 in misconduct. I know this is a 180. I know
12 that sounds extreme, but I know I'm not going
13 to be held accountable, so if I go out
14 drinking with my friends and should something
15 happen, not that I plan to have anything
16 happen, I know nothing is going to happen to
17 me.

18 But my concern is even the finding
19 on Recommendation 19, the fear of being
20 prosecuted, or is it the fear of not
21 necessarily being prosecuted, but being held
22 accountable to some degree for what happened

1 because I know what I did was wrong. Is that
2 the fear for coming for forward, or is it the
3 fear, actual fear of prosecution? I think
4 that if I was a victim I would say I'd be in
5 fear of being prosecuted, but deep down I feel
6 that I might be prosecuted in the eyes of my
7 peers and others for having contributed to
8 this behavior. It acts as a deterrent.

9 DEAN ANDERSON: Contributed to what
10 behavior? Contributed to what behavior,
11 Colleen?

12 BG McGUIRE: The alcohol, over-
13 consumption of alcohol.

14 DEAN ANDERSON: Contributes to the
15 sexual assault?

16 BG McGUIRE: No, no, no. I - and
17 that's why I said this is going to come across
18 without actually having clearly articulated in
19 writing. No, I'm not saying that at all. I'm
20 just saying that they know it's wrong to
21 drink. Nobody wants to go - I'm not planning
22 to get sexually assaulted, but then it's - I

1 should just shut up at this point. It's just
2 that the conditions of the instance was they
3 know they did - or they were wrong and they,
4 you know - so they don't want to report it
5 for fear that they're going to be blamed for
6 it.

7 JUDGE MARQUARDT: This is Christel.
8 Look at the other side of it. The purpose for
9 this is okay, I'm going to go out and we're
10 going to have an alcohol party. And I'm not
11 going to be held accountable for raping
12 somebody because they're not going to report.

13 (Simultaneous speaking.)

14 REP. HOLTZMAN: This is a great
15 conversation, but it's 5:15 so I'm leaving.
16 Sorry, everybody. I'm not in favor of this -

17 DEAN ANDERSON: Unfortunately, I
18 have to leave, as well. Thank you.

19 CHAIR FERNANDEZ: Hi, who's still
20 on the line?

21 DEAN SCHENCK: This is Lisa. I'm
22 still here. I don't -- ask the Secretary of

1 Defense to take a look at - you know,
2 recommend he take a look at the possibility of
3 blah, blah, blah.

4 CHAIR FERNANDEZ: Yes, I don't
5 either. What I'm going to do is everybody
6 sleep on it for the night, and then I think
7 we've got more nos than we've got yeses on
8 this one. I don't feel comfortable with it,
9 but I think -

10 MS. GARVIN: I just want to put -
11 this is Meg. I want to put on the record that
12 I am not comfortable removing the findings. I
13 know it's in there in other places but we need
14 a finding on this at the very minimum. And I
15 do support a recommendation on this. I know
16 we're going to talk about it tomorrow, but
17 removing the finding I think would be very
18 problematic from the evidence we've heard.

19 CHAIR FERNANDEZ: Okay. Let's -

20 JUDGE MARQUARDT: This is Christel.
21 Because I can't be on the phone call tomorrow,
22 you know what my position is. I think that we

1 need to address the issue.

2 COL HAM: This is Colonel Ham. The
3 actual - if this helps with the finding, the
4 actual DoD recognition is collateral
5 misconduct by the victim of a sexual assault
6 is one of the most significant barriers to
7 reporting assault because of the victim's fear
8 of punishment. If that helps to use the right
9 wording, I guess punishment is different than
10 prosecution. It definitely is. Do you want the
11 wording as DoD reflects it, or do you want
12 different wording?

13 CHAIR FERNANDEZ: I think let's put
14 the correct wording in for sure. Let's sleep
15 on it and see if we can split the baby on
16 this. I think we all recognize that the
17 finding is hugely important. The problem is,
18 is this the right solution. And therein lies
19 the problem.

20 MS. GARVIN: This is Meg. May I ask
21 a procedural question. If we leave the
22 findings in we have no recommendation and is

1 it appropriate, permissible, possible to put
2 in a statement as an individual member with
3 regard to that?

4 COL HAM: Anybody can make separate
5 statements, and there's no requirement to make
6 recommendations with all the findings.

7 MS. GARVIN: Okay, thank you.

8 DEAN SCHENCK: This is Lisa -

9 CHAIR FERNANDEZ: In your creative
10 head see if you can split the baby for us, and
11 then bring it to us tomorrow morning.

12 CDR KING: Okay. Do you want to
13 talk about 20, Mai, or do you want to hold
14 that for tomorrow, too?

15 CHAIR FERNANDEZ: No, but if I can
16 send around the number and everything tomorrow
17 for the 9:00 meeting, that would be great. And
18 then we're just going to power through the
19 last ones. Okay?

20 CDR KING: It's fine with the
21 staff. Does the DFO want to close the meeting
22 for today?

1 MR. SPRANCE: Happily, this is Bill
2 Sprance, the DFO, and the Subcommittee meeting
3 is now closed.

4 CHAIR FERNANDEZ: Okay. Thanks.

5 (Whereupon, the proceedings went
6 off the record at 5:18 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual
Assault Crimes Panel Meeting

Before: US DOD

Date: 04-24-14

Place: teleconference

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