UNITED STATES DEPARTMENT OF DEFENSE

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

SUBCOMMITTEE REPORT BRIEFINGS AND PANEL DELIBERATIONS

MONDAY
MAY 5, 2014

The Committee met in the Faculty Conference Room at The George Washington University Law School, 716 20th Street, N.W., Washington, D.C., at 8:30 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT:

The Honorable Barbara Jones
The Honorable Elizabeth Holtzman
Vice Admiral (Retired) James Houck
Brigadier General (Retired) Colleen McGuire
Brigadier General (Retired) Malinda Dunn
Colonel (Retired) Holly Cook
Professor Elizabeth Hillman
Harvey Bryant
Mai Fernandez
PRESENTERS:

Major General Jeffrey J. Snow, DoD, SAPRO

STAFF:

Colonel Patricia Ham, Staff Director
Lt. Colonel Kelly McGovern
C-O-N-T-E-N-T-S

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Adjourn
JUDGE JONES: [presiding] All right, good morning and welcome to this meeting of the Response Systems to Adult Sexual Assault Crimes Panel, or, as we call it, the Response Systems Panel for short. This is the sixth meeting of the Response Systems Panel, and it will run today and tomorrow.

Before we start, I want to thank in the room Dean Greg Maggs and the George Washington University Law School for allowing us to use its facility for this meeting. We were here in January, and we liked the location so much, that we asked to use it again. And Dean Maggs graciously agreed.

Congress established the Response Systems Panel in the National Defense Authorization Act for fiscal year 2013. This panel is tasked to conduct an independent review and assessment of the systems used to
investigate, prosecute, and adjudicate crime involving adult sexual assault and related offenses under the Uniform Code of Military Justice for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

Congress initially tasked this panel to examine nine broad areas and, then, added six additional areas in this year’s National Defense Authorization Act, as well as shortening the time for the panel to complete its assessment from 18 to 12 months. The Response System Panel held its first meeting last June.

The scope of Congress' tasks to the Response Systems Panel is vast. In order to accomplish everything assigned to us in time, last September the Secretary of Defense established subcommittees in three areas: the Role of the Commander, Victim Services, and Comparative Systems.

There are four Response Systems
Panel members on each of the three subcommittees, plus other subject matter experts. I serve as the Chair of the Role of the Commander Subcommittee, Ms. Mai Fernandez chairs the Victims Services Subcommittee, and Dean Elizabeth Hillman -- where are you, Dean Hillman? -- chairs the Comparative Systems Subcommittee.

Each Subcommittee had its own objectives and scope of matters to review in order to develop conclusions and recommendations and report them to the Response Panel.

Since their appointment in September, the three subcommittees have worked incredibly hard in their subject matter areas. In addition to being able to attend Response Systems Panel meetings, hear the many witnesses who appeared before us, and review all other information the panel has received, including public comments to the panel, the subcommittees held numerous meetings, heard
from numbers and numbers, hundreds of
witnesses, and received and reviewed thousands
of documents.

Some Subcommittee members also
traveled to 10 different locations for site
visits, where they interviewed both military
and civilian personnel involved in the
investigation, prosecution, and defense and
adjudication of sexual assault, and those
involved in caring for and supporting victims.

Military personnel, both uniformed
and civilian, who spoke to the Subcommittee
during these site visits did so in a non-
attribute environment to encourage them to
candidly express their views to the
Subcommittee members.

Just to give you an idea, the
witnesses the subcommittees heard from in
their meetings included military and civilian
investigators; military and civilian
prosecutors and defense attorneys; current and
former Commanders; military and civilian
medical professionals, including the Centers for Disease Control and Prevention; statisticians, including the former Director and current Acting Director of the Bureau of Justice Statistics; social scientists; academics; military and civilian forensic examiners; military and civilian victim counsel, military and civilian victim advocates and other victim support personnel; sexual assault survivors; victim advocate organizations, and many, many others.

All of the subcommittee meetings were transcribed verbatim and posted on the Response Systems Panel website, along with other materials the subcommittees received and considered.

The subcommittees have also engaged in numerous deliberation sessions in order to formulate and finalize their reports and findings and recommendations to present to the Response Systems Panel. Those are also transcribed verbatim and posted to the
website, and the reports will also be posted
to the website after the meeting concludes
tomorrow.

Today and tomorrow the three
subcommittees will present their findings and
recommendation to the panel for our
consideration and deliberation. As you may
recall, the Role of the Commander Subcommittee
has already issued two interim reports, one in
November and one in January. Both theVictim
Services and Role of the Commander
Subcommittees have completed their reports and
findings and recommendations. The Comparative
Systems Committee will provide the panel this
morning with its interim assessment and will
finalized its report over the next couple of
weeks. Additional deliberations will be held
on May 16th.

Each Subcommittee operates
independently, so has not in the formulation
of its report and findings and recommendations
reviewed or compared each other's reports.
And the Response Systems Panel has not discussed these reports before today.

The panel will determine whether and how to use the Subcommittees' findings and recommendations to formulate our final report to the Secretary of Defense and the Committees on Armed Services of the Senate and House of Representatives, which is due at the end of June.

At this time, as I just mentioned, the panel will meet again on May 16th in Washington, D.C., for more deliberations, and we expect to hold a final meeting on May 29th and 30th in New York City.

Before the Subcommittee presentations begin, however, I requested that the panel hear from Major General Jeffrey Snow, the Director of DoD's Sexual Assault Prevention and Response Office, so that he could present the latest data and information to us, so we have all of it for the Response Systems Panel's final report.
Thank your very much for joining us today, General Snow. And without further delay, hello, and welcome, and would you proceed?

MG SNOW: Yes, ma'am. Thank you very much.

Judge Jones and Members of the Response Systems Panel, good morning. It is my honor to appear before you today and have a final opportunity to share with you the Department's efforts to prevent and respond to sexual assault crimes in our nation's Armed Forces.

As you know, have witnessed firsthand from your extensive work on this issue over the past year, our mission is to reduce, with the goal of eliminating, sexual assault from the military. It is an ambitious goal and it will be tough to realize, given the realities of this crime. But, as you have learned from your research and data-gathering in each of the subpanels, and on this panel,
we are intensively and aggressively pursuing that objective.

I was selected as the Department of Defense SAPRO Director in early January of this year. I have now been on the job for about four months. In this short period of time, I have learned a lot about this crime and our program. Let me share with you a few of my experiences in my first four months.

In my first week in the position, I focused on the prevention and response efforts in our military service academies. I learned that culture and climate are intimately connected to the experiences of cadets and midshipmen, and that creating an environment that is intolerant of sexual harassment can set the conditions to preventing these crimes.

I followed that initial foray into this mission by working intensively for a month or more with the White House, the Joint Chiefs, and the Secretary of Defense on
developing the methodology and the content of
our progress report to the President that is
due in December of this year.

We have now put in place the
metrics, measurements, and analytic processes
that will demonstrate our progress, as well as
the many prevention initiatives and a response
system that is fundamentally and dramatically
improved over the Department of Defense system
we had in place as recently as 2011.

I have visited our first
responders who are on the frontlines of our
prevention and response efforts, visiting
SARCs, victim advocates, healthcare
professionals, and sexual assault nurse
examiners. I visited with the specially-
trained investigators and prosecutors, our
teams that represent our special victims
capability, a capability that became fully
operational in December. It is now showing
promise in our ability to hold offenders
appropriately accountable.
I have visited with the specially-trained attorneys who now provide dedicated legal service/legal advice to victims in an our attorney-client relationship, a resource that the Department of Defense provides to victims of sexual assault crimes and a capability that, from what I have learned, is unmatched anywhere in our country.

I have seen these professionals firsthand in the field, on Army posts, Air Force bases, Navy installations and ships, and witnessed the dedicated efforts of our Marines who have achieved an unprecedented 80-percent increase in reporting of sexual assaults in just the last year.

My team and I have personally participated as informal advisors to the President's Task Force on Protecting Students from Sexual Violence. I attended the ceremony last week with Vice President Biden, Secretary of Education Duncan, Secretary of Health and Human Services Sebelius, and Deputy Attorney
General Cole. And they talked about the recommendations they are making to improve prevention and response on college and university campuses across the country.

I wanted to note that many of their recommendations came from our advice and inputs, benchmarking our prevalence surveys, our confidential reporting system, and the certification program that guarantees professional advocacy for victims in the Department of Defense.

In these past four months, I have had the honor of directly supporting the planning and execution of Secretary Hagel's weekly meeting focused on holding leaders and our system accountable for making progress in preventing and responding to this crime. More importantly, he continues to drive positive change with his direct involvement and his personal commitment to fielding solutions and acting when he has authority to do so.

We have seen this commitment
manifested in his efforts to improve safety for our newest Service members, enhance our military justice system, expand the rights for victims, and in providing oversight of the response system.

   Last week we published our Annual Report to Congress, which demonstrated that the systems we have put into place are beginning to show an effect in the most important area, in the choices of victims who are now reporting these crimes in unprecedented number.

   Still, we know we have a long way to go, which is why we announced our intent to intensify our focus on prevention. We did so by publishing an updated prevention strategy that capitalizes on the best practices of experts and stakeholders from around the country and with the publication of six more Secretary of Defense Directives, bringing to 28 the total number of initiatives he has directed in the past year alone.
My introduction to this difficult issue and widely-misunderstood topic brought me to the National Organization for Victim Assistance who is operating our certification program, ensuring our victim advocates meet and exceed national advocate certification standards. The civilian advocate community is now working to achieve the standards of excellence that we have established in our Department of Defense program.

It is also brought me to the Rape, Abuse, and Incest National Network, where dozens of specially-trained advocates operate a Department of Defense Rape Crisis Hotline. Many of you know that the comments of victims are often captured in posted notes and clipped to the bulletin board in the Call Center. It reminds every hotline operator every day of the important work they are doing to provide crisis intervention and care for victims suffering from terrible trauma.

Finally, and most important, in my
first four months on the job, I have continued a longstanding commitment to personally meet with victims of sexual assault. My first Victim Summit was moving and deeply affected my perspective of this problem, and more than any other experience in my first four months, galvanized my personal commitment to field solutions that can reduce and eliminate this crime from our Armed Forces. I will work as diligently and intensely as I can to accomplish this important work, as I have with every other mission in my career.

And I know my organization has responded to many of your requests for information. So, my intent this morning is to provide you with the information that compliments or updates the information we have provided to date.

Let me have the next slide, please.

Let me begin today by sharing with you a broader perspective, one that is shaped
by our leadership on other difficult societal issues, such as leading our nation's right on integration and our recent efforts to repeal the prohibition on gays openly serving in the military.

Fundamentally, the Department of Defense aspires to be a national leader on combating sexual assaults. Based on extensive collaboration with a wide range of internal/external stakeholders, the Department has developed several bedrock principles that we believe will allow us to serve as a national leader, and are reflected on this slide.

As I mentioned in my opening comments, I had the privilege of being in the White House last week for the release of the first report of the White House Task Force to protect students from sexual assault and was encouraged by the fact that a number of their recommendations are consistent with the tenets of our program.
Although we were not a formal member of the Task Force, on the day the President signed the presidential memorandum establishing the White House Task Force, Secretary Hagel was asked to share his thoughts on this issue with the President and his fellow Cabinet members in a meeting in the Oval Office. These principles formed the foundation of his remarks and are the foundation of our program.

In that meeting, Secretary Hagel committed our office to serve as advisors to the Task Force, and we did so in virtually every one of the many meetings and listening sessions hosted by the White House team. We are proud to report that these principles were benchmarks and several were included in the first Task Force Report.

We commend this initial report to the Committee and recommend you consider commenting on how the elements of our program that are being touted as national best
practices by the White House.

Next slide, please.

This is the agenda I plan to use this morning. I suspect many of you know that last Thursday we released the Annual Report on Sexual Assaults Involving Military Members, as required by Congress.

This year we organized our report according to the five lines of effort in the Strategic Plan the Secretary approved last year. Those five lines of efforts are prevention, investigation, accountability, advocacy and victim assistance, and assessment.

I also want to provide you our program update and a brief overview of our implementation of provisions of law found in the recent National Defense Authorization Act. And then, I will close by discussing our recently-released prevention strategy and our plans to complete the progress report to the President.
Next slide, please.

In our Annual Report, released last week, we have detailed the policy and program enhancements made in fiscal year 2013 to prevent and respond to this crime, which I will cover a bit later in my briefing.

Our top-line results are measured in choices of victims, victims who have made the courageous choice to report and they are doing so in unprecedented numbers. I would like to remind everybody that sexual assault is an underreported crime. As such, the Department took steps to increase reporting because each report allows us to provide care to a victim and an opportunity to hold the offender appropriately accountable. This year's 50-percent increase indicates to us that victims have greater confidence in the response system.

While we see indications that our effects over the last year and a half are having an impact, it does not mean that we are
satisfied with our progress. We will continue to encourage greater reporting while reducing the occurrence of this crime by improving our prevention measures.

I would also like to note to this panel that the Department takes action in every case where it has jurisdiction and sufficient evidence to do so. This year our Commanders had sufficient evidence to take disciplinary action against 73 percent of alleged offenders. This is up from 66 percent the previous year.

Next slide, please.

This chart shows the historic trends of our sexual assault reporting in the Department. It is important to note that each report consists of at least one military subject or one military victim. The crimes involved the range of sexual assault offenses in the Uniform Code of Military Justice from abusive sexual contact to rape.

As you can see from this chart,
reports of sexual assault have increased on average about 5 percent per year since 2006. This year's overall increase in reporting was an unprecedented 50 percent.

This group knows there are two ways to report a sexual assault: an unrestricted report which is referred for investigation by independent criminal investigators or a restricted report which remains confidential. As in prior years, about 75 percent of our reports are unrestricted reports and 25 percent are restricted reports. This has stayed somewhat stable since 2006.

In fiscal year 2013, just over half of the matters investigated by military criminal investigators involved an initial allegation of a penetrating offense, such as rape or forcible sodomy. The remainder of the allegations involved non-penetrating offenses, which are sexual contact crimes such as groping.
The proportions of these crimes, and really highlighted in the circle on the right, have stayed somewhat constant over time. In order, the top three crimes reported to the Department in FY13 were abusive sexual contact, sexual assault, and rape.

Our assessment of increased victim confidence is supported by an additional metric that shows an increase in victim reports of incidents occurring prior to joining the military. Ten percent of the reports made this year were for incidents of sexual assault that occurred prior to military service. This figure has never exceeded 4 percent in the past.

Next slide.

For incidents that occurred in military service, there were 3,235 female victims and 878 male victims. Of the women who indicate experiencing an incident of unwanted sexual contact, about 28 percent are accounted for in unrestricted or restricted
reports to DoD, up from 18 percent in fiscal year 2012. And again, it is important that the panel understand that there was no survey associated with this report. So, what we did is we mapped it against the 2012 findings.

Of the men who indicate experiencing an incident of unwanted sexual contact, about 5 percent are accounted for in unrestricted or restricted reports to DoD, up from 3 percent in fiscal year 2012.

This points to a challenge associated with increasing the confidence of men in our response system and reducing the stigma associated with reporting this crime for our male victims.

Next slide, please.

There were 3,234 military subjects with reported dispositions in FY13. Of the 3,234 subjects with case dispositions reported in FY13, the Department of Defense had legal authority over 2,149 of those cases, so about 66 percent.
Of the 2,149 cases where the Department had jurisdiction, Department of Defense authorities had sufficient evidence to take some kind of action against 1,569 subjects. That was 73 percent.

The other quarter of military subjects could not be disciplined because the evidence did not support action or because DoD authorities determined the allegations were unfounded.

Next slide, please.

The percentage of alleged sexual assault offenders receiving some kind of disciplinary action has been growing each year. We believe this reflects our investment in the training of investigators and prosecutors.

This chart answers the question, when military commanders have legal authority over the offender and sufficient evidence of the sexual assault, what form of disciplinary action do they take against the offender? As
you can see, this year Commanders had sufficient evidence to prefer court-martial charges on 71 percent of the accused Service members. That has not always been the case.

The system in military justice that we have in place today is significantly different from the one that existed as recently as two years ago. This data also demonstrates that more and more victims are getting an opportunity to be heard in the military justice system.

As I mentioned, we have taken our assistance to victims to a new level with the Special Victims Counsel Program. This confidential support helps keep victims participating in the military justice system for as long as they desire.

Bottom line: Commanders are taking allegations of sexual assault very seriously and holding offenders appropriately accountable.

Next slide, please.
In summary, we are encouraged by the increase in reports being made by victims of this crime. Given historical data, we believe the increase in reporting reflects senior leader focus and improved victim confidence, not an increase in crime.

We continue to work to be a national leader on sexual assault prevention and response. We understand and acknowledge the problem. We provide professional advocacy to victims and empower them to report. We provide an avenue for confidential reporting. We conduct independent investigations, and, as reflected in this year's report, we measure our effectiveness and report progress publicly and transparently, and we will continue to do so.

Next slide, please.

We have defined strategic SAPR objectives and synchronized the Department's multidisciplinary approach around five lines of effort, reflected on this slide:
prevention, investigation, accountability, advocacy and victim assistance, and assessment. This SAPR plan provides authoritative guidance to all Department of Defense stakeholders and does two things. No. 1, it tasks the Department and the Services to develop objective criteria for measuring progress and it tasks my organization to manage and update the plan using existing oversight mechanism.

Next slide, please.

This slide highlights our policy and program enhancements. I would tell you that things began to dramatically change when senior leaders turned their focus to this problem. Two years ago, Secretary Panetta heightened the focus on sexual assault in the military. Secretary Hagel has sustained that progress and persisted in directing 28 initiatives since May 2013 to enhance Commander accountability, ensure an appropriate command climate, improve victim
support, and enhance safety. All 28 initiatives have been implemented or are in progress to date, representing reforms to our organization.

In our report, we have detailed the policy and program enhancements made in fiscal year 2013 to prevent and respond to this crime. In the interest of time, I would like to highlight just three for you.

We did create the Special Victims Counsel Program. This offers legal consultation and representation to victims of sexual assault throughout the military justice process. More than 185 attorneys are now directly supporting victims across the Armed Forces.

Another reform: we put in place new methods of assessing the performance of military commanders and enlisted leaders in establishing command climates of dignity and respect. This is done through a system of unit surveys and performance evaluations.
And the last example I would like to highlight for you is we fielded a special victim capability in each of the Services. This is a program designed to improve collaboration between specially-trained investigators, prosecutors, and legal personnel who respond to allegations of sexual assault, child abuse, and domestic violence. This capability improves our ability to identify evidence, support victims, and hold offenders appropriately accountable.

Furthermore, we have expanded the cadre of sexual assault response coordinators and advocates to over 25,000 professionals through our professional certification program.

Next slide, please.

Our initiatives and policies are making an impact, and we are encouraged to see this reform enshrined in law by Congress. We are focused on implementing more than 60 provisions of law included in the past three
We have fully implemented the FY12 National Defense Authorization Act. We are tracking 18 substantive provisions and six congressional reports in the FY13 National Defense Authorization Act, and the vast majority of these are complete.

The FY14 National Defense Authorization Act included 33 provisions of law and the most sweeping reform to the Uniform Code of Military Justice since 1968. We are decisively engaged in implementing these wide-ranging reforms.

Next slide, please.

As Secretary Hagel said recently, the best way to combat sexual assault is to prevent it, which is why he directed the implementation of an updated sexual assault prevention strategy designed to institutionalize a comprehensive prevention approach across the Department.

Using this strategy, we will
intensify our efforts at every level of military society to prevent the crime. This strategy was developed collaboratively with the military Services and civilian experts, such as the Centers of Disease Control and Prevention, the FBI, and colleges and universities with innovative programs and research.

In order for prevention to work, as we reflected on this slide, steps must be taken at every level, from individuals to leadership who make policy. At the core of this effort, we do place Commanders. They set the tone in the units and will be the means by which we foster climates of dignity and respect.

Next slide, please.

Our goal is to develop military leaders and commanders at every level who are informed by the latest evidence-based prevention practices and empowered to establish appropriate climates while holding
members appropriately accountable.

The centerpiece of our approach to
preventing sexual assault is incorporating
core values and enhancing standards of
behavior while shaping the environment in
which our members live and work.

Prevention is much, much more than
just an hour of training, an awareness
campaign, or an inspiring poster. It requires
an ongoing, sustained conversation between
leaders and Service members to promote a
culture of dignity, respect and trust,
professional values, and team commitment.

This chart depicts the Department
of Defense social-ecological model which
adapts the Center for Disease Control model to
a military environment. The DoD model
emphasizes leaders at all levels, both formal
and informal. It recognizes that leaders are
accountable for establishing a healthy command
climate, and it recognizes that everyone, from
the Commander-in-Chief to the Secretary of
Defense, to the newly-enlisted Service member, can influence each sphere/level.

Next slide, please.

In response to the direction from the President, we are developing a SAPR Progress Report to be delivered in December of this year. This report will capture the Department of Defense's SAPR efforts since 2011. It will include a past-year prevalence rate for FY14 using a workplace and general relations survey of nearly one-third of our force, conducted by RAND, and it will provide an assessment of victim satisfaction and confidence in the system through our newly-developed survivor experience survey.

This survey will continue to help us understand the experience of victims at multiple points in the system, measuring those who are in the initial stage of the process and those who have just completed disposition of their cases in the military justice system.

For the first time ever, we also
now have a means of gaining direct and
confidential feedback from victims who have
selected a restrictive reporting option
without compromising their privacy or
privileged communication with their SARCs and
victim advocates.

Our report to the President will
also include the results of the Secretary of
Defense directed review of the military
justice system now being led by the Department
of Defense General Counsel and employing the
Joint Services Committee on Military Justice.

My next four charts show a few
more details of the way ahead, the surveys,
the focus groups, and the justice review
supporting the progress report to the
President.

Next slide.

This slide just reflects what we
believe will be the report content. This is
pretty straightforward. The first part will
just be the scope, and it will highlight
selected initiatives from 2011 to September 2014. And then, the second part of this slide just highlights what we believe to be the projected format of that report.

Next slide, please.

This slide highlights the two surveys that I mentioned in my remarks. The first one is the workplace and general relations survey. I suspect some of you have read recently some comments on this, but I can confirm the Department has made the decision to externalize this survey and RAND is going to lead that effort. And then, of course, I mentioned the survivor experience survey.

Next slide.

As part of this, we will also have focus groups. And you can see those will be conducted between May and July -- excuse me -- May and August of this coming year. The reports will be due the middle of October, and you can see the populations are reflected on this side.
So, our intent is to get a look at Department-of-Defense-wide analysis of common themes. So, these will not be broken down by Service.

And then, the next slide, please.

And this has got the military justice system, and I believe everyone on this panel is tracking this particular review. It has been mandated by the Secretary of Defense.

Next slide, please.

This reflects the report timeline. I will just tell you that we are adhering to a rigorous schedule to develop and deliver the published report by the 1st of December 2014. As I stated earlier, this report will include results and analysis of the workplace and general relation survey, due from RAND on the 15th of October, 2014.

In addition, we are executing tasks associated with delivering our congressionally-mandated Annual Report on Sexual Assault in the Military, just released.

Next slide, please.

This slide outlines our way ahead, which I have attempted to cover throughout this briefing. In summary, we will continue to pursue our efforts to serve as a national leader on sexual assault prevention and response. As reflected in this year's report to Congress, we measure our effectiveness and report our progress publicly and transparently, and I assure you we will continue to do so.

Let me close by sharing with you a few thoughts that I communicated to a national audience at our press conference last Thursday.

First, we know that there are thousands upon thousands of women and men in our Armed Forces who are working hard to create an environment that is based on our
values, that holds our troops to high
standards, and reject sexist behavior, sexual
harassment, and crude or offensive behavior.
They are the standard-bearers, and their
efforts are making a difference.

But we can and we must do more.
We will always remember that behind these
numbers there are real soldiers, sailors,
airmen, and marines who have been victimized
by this terrible crime. And across the
Department, we are working very hard to
establish a climate where these assaults do
not happen.

But if they do, we want every
victim to get the support they need in a
manner of their choosing. We have committed
to providing them the privacy they desire, the
sensitivity they deserve, and the seriousness
that this crime demands.

Finally, I sought to make it very
clear last week to the offenders committing
this crime that we don't care who they are or
what rank that they hold. If they don't understand our core values and are not prepared to live by and enforce those values every day, then we don't want them in the military. That is the position of the senior leadership of the Department, and it is a measure we are communicating across the force.

Thank you again for the opportunity to talk with you this morning. I am humbled by the scope of this challenge, but inspired by the courage of the victims and motivated by the many thousands of first responders who are making a difference in the lives of so many.

Judge Jones and Members of the Panel, thank you for your work and commitment to helping us solve this problem. Your work will also have a profound impact on the lives of many, now and in the future.

And with that, I look forward to your questions.

JUDGE JONES: Thank you very much,
General Snow.

I am sure that we will be going through your most recent report. I note that there are already overlapping comments, initiatives, possibly recommendations. So, we thank you very much.

MG SNOW: Thank you, ma'am.

JUDGE JONES: Are there any questions for General Snow this morning? Mai?

MG SNOW: Yes, ma'am?

MS. FERNANDEZ: Good morning.

Thank you for being here.

I have two questions. I did a quick calculation when you were talking. You said there was 185 Special Victim Counsels now?

MG SNOW: Yes, ma'am.

MS. FERNANDEZ: And there was over 6,000 reports. That would mean that currently there's roughly about a caseload of about 32 cases per Special Victims Counsel.
MG SNOW: Uh-hum.

MS. FERNANDEZ: Is there any kind of evaluation being done to ensure that, as reports go up, there are sufficient numbers of attorneys to meet the victims' needs?

MG SNOW: Yes, ma'am. I made a reference to what we call metrics and non-metrics. And I am not prepared to go into the details of those, and I suspect we will do so sometime in the mid-May to latter-part-of-May timeframe.

But, in this particular case, we are looking at that. I mean, essentially, it has taken a while to institutionally -- what was mandated by law --

MS. FERNANDEZ: Sure.

MG SNOW: -- was started as, you know, an initiative in the Air Force. But we are tracking the workload because this is a case of in this particular case we can look at that workload and, if need be, we can, as you said, develop and train more folks for this
particular capability. And it is something that the senior leaders are sensitive to.

MS. FERNANDEZ: My second question is, I like the fact that you are working with the CDC in developing your command climate structure. When the Victims Services Committee interviewed several victims, and a lot of the retaliation came from their peers. And so, we see a lot of the work that is going on at a top level, but a lot of work needs to be done on the bottom level, making sure that an individual doesn't get retaliated by by their roommate, the person that lives across the street from them.

What is being done to track how that is working on a very low level and to evaluate whether the tactics that are being put forward are successful?

MG SNOW: Yes, ma'am. There's a number of things. I would highlight a couple for you.

There is a command climate survey
that we have added questions specifically to address both sexual harassment and sexual assault. And there was a series of questions that added that. And I can get you a copy of the instrument, but we call it DEOCS 4.0.

And what is different about this is that, one, we have done these before, but now they are mandated, and not only are they mandated, they used to just be for Commanders in the first 90 days and they would go back to that Commander for him to assess it. Now they are required to go to that next higher level of command.

And I believe this is now causing a conversation between Commanders specifically about command climate because we know that, if there is a climate where some of these behaviors are allowed, then, that, in fact, can lead to and contribute to sexual assault.

So, I think there is a lot more sensitivity on leaders about the climate and the dialog that I have not seen anytime in my
recent history.

And again, I think the second part of that, again, is we recognize -- and I think you bring up a very good point -- I mean, ultimately, what we are trying to do is we are trying to change culture, and it is going to take a little bit of time. And this is not going to be solved by some general officer talking about policy. It is going to be solved by this word getting all the way down to the lowest levels in our organizations, so that individuals, you know, at the E2, E3, I would say in the Army at the Team Leader or Squad Leader, and similarly in the other Services, at those lower levels, where we give them the tools, so that they can take some type of action.

Either they can step up, okay, and say something and stop something or they can speak to somebody in the chain of command, so that we can begin to address culture on this particular issue. It is going to take time to
do so.

    MS. FERNANDEZ: Thank you.

    MG SNOW: Sure.

    JUDGE JONES: Yes?

    MS. HOLTZMAN: Yes, I have several questions for the Major.

    And I want to thank you. Or I may even call you "General". I'm sorry.

    Oh, microphones? There you go.

    Thanks.

    Thank you very much for coming here, and thank you for the very important efforts that your office has been making.

    I would like you to respond to some criticism that I read of the report that was issued on Thursday which suggested that the numbers, that's all well and good; that the numbers are increasing, but that the numbers of trials is small in comparison to the total number of reports. So, there is a kind of a dropoff.

    And I just wondered if you could
explain that. Take us through the number of reports and the disposition --

MG SNOW: Sure.

MS. HOLTZMAN: -- so that the public understands what is happening to these cases.

MG SNOW: Sure. You know, ma'am, I should mention to the panel, though, I am fortunate in that I have got Dr. Galbreath who is the primary author of the report sitting behind me in the event that we got in specifically about the report.

But I would answer it this way: I recognize that there is that perception, but I would argue that, if you were to go and read the report, ma'am, we go in there and we detail from what that number starts with to what ends with and the disposition and in between.

Each of these crimes is unique, okay? If there is a report of sexual assault, it is mandated it has got to be investigated.
So, occasionally, you will read reports that Commanders are doing this investigation. The minute I read a report like that, I know it's not right because Commanders do not report reports of sexual assault. They have got to be turned over to a military criminal investigative organization.

Some of those are just unsubstantiated. The Services do it a little bit differently, okay? But the fact of the matter is some number comes out.

In some cases some of the subjects are outside of the purview of our control. So, they are outside of the Department of Defense; in some cases they are foreign nationals. In some cases these happen in areas where the civilians opt to hold onto that.

So, we have a chart in the report, and I don't have it in front of me, ma'am, but I would just tell you that it breaks down and it walks through the numbers. And ultimately,
it gets to the denominator where we have jurisdiction over, and then, we further break that down by what happens to that. And I tried to hit it, but I know I ended up throwing a lot of percentages and numbers at you.

But I can get that to you. We call it, I refer to it as a "waterfall chart". And it will walk that top number to down and tell you exactly what happened. And quite frankly, it is an eye-watering detail.

MS. HOLTZMAN: Well, if I may make a suggestion to you, sir?

MG SNOW: Yes.

MS. HOLTZMAN: Make that report real simple, that chart --

MG SNOW: Okay.

MS. HOLTZMAN: -- so that the American public can understand it. I think it is really important for people to have a sense of what is happening and that there are no holes here; that from the numbers reported to
the disposition, we can account for what is happening.

MG SNOW: Uh-hum.

MS. HOLTZMAN: Because, otherwise, there will be serious questions. You know, there is huge public skepticism --

MG SNOW: Right.

MS. HOLTZMAN: -- and huge cynicism. So, if that is at all possible, if it is an eye-watering report, I will just make a recommendation that you somehow make it a lot easier, too --

MG SNOW: Okay.

MS. HOLTZMAN: -- user-friendly.

MG SNOW: Okay. Two things I would encourage.

I think if you were to read the Executive Summary, I actually think it would give you that.

MS. HOLTZMAN: I did read it, but I am giving you the opportunity to explain to the American people --
MG SNOW: Okay. Thank you.

MS. HOLTZMAN: -- which is not the same as me.

MG SNOW: Okay. Thank you.

MS. HOLTZMAN: The second thing is a little bit outside of your immediate purview, but I want to make an argument here that there is a little bit of outside-the-box thinking that has to go on. And that is, you talked about changing cultural attitudes.

Well, there's still attitudes in this society that demean women, and even within the military.

MG SNOW: Uh-hum.

MS. HOLTZMAN: We do not have full equality for women in the military. I don't even see a woman's face in the Joint Chiefs.

So, I think that if we are going to address the issue of cultural change, the military has to look at itself in terms of how it is going to treat women.

The third issue I would raise with
you, and this is really tough, what do you do about the bombardment of attitudes through the media that condone violence in sexual relations?

I just read an article about a TV program produced by HBO which shows -- I see your assistant nodding his head -- which shows real brutality against women. The producer of that show said, "Well, you know" -- during the rape; the rape itself is brutal, but also brutality within that. And the producer said, "Well, you know, in the end, she wound up enjoying it."

I remember a judge many years ago who refused to sentence a rapist saying, "Well, you know, in the end, she enjoyed it." Well, I think that judge was removed from the Bench.

And I am just wondering why this guy is still there at HBO. But those attitudes come from the outside and bombard people who are young and make them think that
violence against women is okay. What do you do about that?

I mean, that is not in your report.

MG SNOW: Right.

MS. HOLTZMAN: And I know your report is dealing with just some very concrete and important issues, and I don't mean to minimize that. But there is this big universe out there that is undermining --

MG SNOW: Right.

MS. HOLTZMAN: -- the important work that you are doing.

MG SNOW: Well, first of all, I cannot agree more with you that what we are dealing with is a societal issue. And one of the things and the challenges for the Department of Defense is that the individuals that actually sign up to come into the military in many cases -- I would like to think that they are coming from wonderful families with a mother and father that have
high standards who have inculcated them with a set of values that are consistent with the Department of Defense. But I have got to tell you, that is just not the case.

And so, I think it would be wonderful. So, we are dealing with a societal issue. Many of the things that are in the media, not media -- excuse me -- that are on television, in movies, and stuff like that, actually pose a challenge for us because we have got an individual and we have got to inculcate them into our values, in which case in many cases we are causing them, you know, to think differently than how they were brought up. And that is a challenge for us. We do that and we attempt to do it early on.

At the same time, we have got to give them the tools, so if they are subjected to whether it is harassment or assault, and the way you approach those two problems are fundamentally different, I would argue. Okay?

If the cause is a sexual assault,
we would like to solve it at the lowest level
-- excuse me --- if it sexual harassment. If
it is sexual assault, clearly, there is a
crime, and we also attempt to do that.

But it is a challenge, and I would
love it if, in fact, we could decrease the
violence on TV. I am concerned about that
myself, given that I have got two daughters
and a son that gets subjected to it. And you
can try to control it, but it is out there.
And I just think it is one of the reasons why
it makes our job harder.

If I could make one other comment,
it was interesting to me -- again, a number of
my team participated with the White House, the
Task Force, and their report. What was
interesting to me is the amount of learning on
this particular issue. I think they recognize
some of the aspects of it, and I would like to
think it is going to cause them, to cause the
Department to have seen it in a different
light.
We are not saying we have the answer to this. We are not. okay? We are not resting on our laurels. You can see it is a multi-pronged approach. It is going to take all; it is going to take your efforts; it is going to take the partnership with Congress; it is going to take our efforts. I don't see anybody saying we have the answer.

And the one thing that I have learned in my whopping four months here is there isn't a single silver bullet. So, there is not one thing that we can do. But one of the things we could do is to bring pressure, so that there wasn't the degree of violence that we see on TV.

But I also have to be a realist, and you are absolutely right with your comment; I don't control that and the Department of Defense does not control that. But I like your comments.

JUDGE JONES: Are there any further questions?
Beth?

PROF. HILLMAN: Thanks, Judge Jones.

General Snow, glad to hear from you, and it is great to hear you crystallize your sense of the responses that we need to it, apart from the numbers.

And, Mr. Galbreath, the report is almost 800 pages and really has a lot of extraordinary insight into where we are in terms of the numbers. But I worry that, when we look at those numbers, it is not only a little numbing to try to track all that in great detail, but, then, when you describe what the problem really is, it seems to turn to it is the input that is the trouble with the individuals who are joining the Service, rather than how we are managing our responses.

And I wondered if you see in the numbers a sense that there are worst problems with sexual violence now in the military because of some degradation of culture or a
glamorization of violence that takes place in the media. Do you see that? Do you see sexual violence increasing because of broader attitudes?

MG SNOW: I don't, and if I can, I will ask Dr. Galbreath to follow up, because I do feel incredibly fortunate to have him as the primary author.

So, your question is one often asked. And the question is, "Well, listen, General, you've got this increase in reports. You know it is a vastly-underreported crime. How do you know it is not crime?"

And the way I answer it is, I mean, Congress has mandated that we do this survey. We have done this over time. There has been a remarkable consistency with that data.

Let me just say this: the remarkable consistency in terms of the prevalence in women has fallen between 4 to 7 percent and for men between 1 to 2 percent.
If you go back and look over time, even at the height, when you go back when the prevalence was estimated at 34,000 reports of unwanted sexual contact, the number of reports that particular year was over 2,000. So, that is one of the reasons why I don't believe, even though there is no survey, that it is not an increase in crime associated with this year.

Dr. Galbreath, do you want to contribute to that?

DR. GALBREATH: Sure. Professor Hillman, absolutely. You know, that is something that we are certainly looking at, and we touch, we look at all the civilian research that is going on right now, and we are constantly comparing ourselves to where are we and how are we doing that.

The Centers for Disease Control and Prevention helped us with the National Intimate Partner and Sexual Violence Survey in 2010, where we found that there is no greater
risk for sexual assault in the Department of
Defense than there is in the civilian
community. Dr. Dean Kilpatrick's work, Dr.
Christopher Krebs' work on sexual assault all
point to the fact that we are right with those
groups, whether you look at college or
university groups, that we are on par.

So, certainly, something that we
are looking at is, as we go forward, how do
cultural shifts in society impact us as we
come in? So, one of the first things that the
Department is doing is, when people come in,
within the first two weeks of basic training,
they get an explanation of the program of
sexual assault prevention and response in the
DoD.

But the real work, though, begins
when they are in their advanced school, in
their A school or where they are learning
their military operational specialty or their
Air Force Specialty Code training. And that
is when we really begin to have much more
conversational training with them, to begin to
shape and mold those attitudes that are there.

PROF. HILLMAN: So, I guess I
would just follow up by saying that what we
have heard from behavioral scientists like you
talking about how, overall, the rates of
sexual assault and sexual violence actually
are declining sort of worldwide and within the
United States, because of cultural changes
that are not tied to sexual violence in
popular media, but are, instead, tied to the
increased status of women, the different
attitudes towards sexual behavior, and a
greater understanding; in other words, what we
think of, we hope, as a rising tide of better
understanding of the dignity of individuals
and a reduction in, then, the incidence of
this crime.

So, I think that we are dealing
with a problem that we can't entirely see, but
we are not dealing with one that is actually
increasing because of cultural -- at least
from the data that I have seen -- because of
cultural changes.

MG SNOW: And I hope that is absolutely true. I mean, I have heard the same thing and I would like to think that, for the next survey that comes out, that we do see a decreased prevalence.

PROF. HILLMAN: And when you mentioned it has been consistent, we really only have three datapoints, right, the 2006, the 2012, the 2013, or the 2010 to 2000-and --

MG SNOW: It's '4, right?

DR. GALBREATH: '3.

PROF. HILLMAN: '3?

MG SNOW: '3? I'm sorry, '3, yes.

PROF. HILLMAN: Thirty-four thousand, 19,000, 26,000, right?

MG SNOW: Right.

PROF. HILLMAN: I mean, to see consistency in those numbers is pretty tough over time.

MG SNOW: Thank you, ma'am.
COL COOK: Just one question?

JUDGE JONES: Yes.

COL COOK: Thank you for being here this morning.

The report that came out this week showing that the increase in report is a sign that victims trust that, if they come forward and they say something, they are going to get the services and the support and help. That is hopefully, exactly what it is showing.

But I just want to make sure that, as we are changing the culture to make a safe environment for Service members to be in and report allegations when they do occur, in the command climate surveys do they still include the Service member's perception of fairness; that once an allegation is made, that they feel like they trust the system enough that it will be fairly investigated on both sides?

So that, as we become more aware of, not become more aware, but as we recognize and better address the problems of sexual
assault, we are not doing it at the expense of an accused constitutional rights on the other side. We want to make sure that it remains balanced, and that is a hard balance to draw when the perception is it has been so heavy in favor of an accused and the defense community within the military, if that is true in fact.

But I just want to make sure, are there still questions in there that talk about the fairness? When an allegation is made, does the Service member in any unit or in the Commander's unit have the perception that they will be treated fairly as part of that process?

MG SNOW: There are questions here. And, you know, if it would be helpful to the panel, we could provide a copy of that survey instrument. Because there are specifically questions that have been developed now that are in place to address different aspects, No. 1.

I think the other thing that you
are talking to, I think the survivor experience survey that we are developing will actually -- and I am pretty proud of this because, again, it is Department of Defense in conjunction with the Services on this particular issue. There is a recognition we have got to do a better job making sure we understand that what we have put in place to address some aspect is, actually, doing what we expect it to do.

And I would just answer once more. I think when we do show link to the President's report, one, the degree of collaboration with the White House, the one thing that came out loud and clear to us is that, despite our efforts, there is a bit of confusion about our system.

And I would argue it goes back to Ms. Fernandez's comment that, when you are talking about cultural change, we could say the right things, but you have got to drive it down and it takes time.
On the flip side of that, on our system, I think inside and outside, we have got to continue our efforts to educate folks. I think we have done a very good job in the case of Commanders and senior leaders, but we have got to continue to assess it.

The metrics that we identified I think will give us the ability to look at prevention. We will look at investigation. We will look at their response.

I would just share this with the panel: when we did that, what really struck me on the part of Joint Chiefs is that they wanted to make sure that the metrics that we came up with -- and we actually call them metrics and non-metrics, okay? -- that the metrics we came up with accurately assessed our performance. This was not a case of trying to cast the Department in a positive way. This is about how do we best address the problem, and the metrics are the metrics.

Because, you know, if we identify
we have got an issue, then we will take the
appropriate action. But you have to have some
ability to assess it, and I do think we are
doing that.

COL COOK: And on the command
climate, you are assessing it within the unit?
Going back to Representative Holtzman's
comments, and it is well-taken that we have
had testimony here by people who have come in,
and some have expressed their concern about
whether their daughter should join the
military. We have also had at least one
witness who came in and said, you know, his
career concern right now might be his son joining the
military.

So, it is not just within the unit
going that sense of understanding and trust
in the process on all sides, but it is also
the community-at-large that needs to
understand that, and understand some of the
steps that have been taken. So, it has got to
be simplified and communicated as well.
MG SNOW: Well, listen, I like your comment. I mean, this is just not a woman's issue, although, you know, the report is clear there are men and women, but it is also a men's issue. Ultimately, it is a leadership issue for the Department.

And I have been asked this question. I don't mind sharing it with the panel. I mean, I do have two daughters, okay, one that is already graduated from college, but will head off to law school in the fall at Michigan University. I have got another; my youngest is a junior in high school.

And although I do not call her a niece, I will tell you, I have a very close family friend who I kind of call her niece, probably my closest friend in the military, whose daughter is a freshman at West Point. And I am going to tell you right now, if my son or daughter did want to choose the military, I would feel very good about them making that choice to join the military, given...
the amount of effort that is going into it.

Now let me bookend that, though.

I will tell you right now, I had the opportunity to spend time with six victims, okay, five women and one man that accounted. And these are victims within the last 24 months. And I will tell you, it breaks my heart because each of them joined the military to be about something more than themselves. And an incident has happened that has violated that trust, okay? And that saddens me, that they have made this decision, you know, to join, to be part of, which I am probably biased here, but I do think we are the greatest military in the world.

And the fact that in some cases this is causing them to view the military in a different light, not all of them are going to stay in the military because in some cases the violation of trust is so egregious that they can't.

But the courage that they
demonstrated in terms of coming forward, and
the insights that they have provided, and I
would argue even in the case of the legal
counsel, in some cases it just so happened
that some of them were able to account
experiences and the impact that that had on
them through the process. They give me hope
that the types of things that we are doing are
going to have an impact and, ultimately, going
to Professor Hillman's, to drive the
prevalence down in the Department.

COL COOK: Thanks.

MG SNOW: Thank you.

JUDGE JONES: Anything further?
(No response.)

Thank you very much, General Snow.

MG SNOW: Thank you, ma'am.

JUDGE JONES: I guess a break is a
good idea. I forgot we had to set up. That
will be 10 minutes.

(Whereupon, the foregoing matter
went off the record at 9:51 a.m. and went back
on the record at 10:08 a.m.)

JUDGE JONES: All right. General Snow, we see that you have some further information that responds to a question from one of the panel members, so perhaps you could go ahead and do that for us.

MG SNOW: Yes, ma'am. And I actually appreciate the opportunity and, again, for the group. The Honorable Holtzman said, you know, if you've got the breakdown, and we do. It's reflected on that slide.

So if you recall in my comments, I mentioned the bumper really is on this, which is when the Department takes action in every case where it has jurisdiction and sufficient evidence to do so. And I quoted the 73 percent.

The reason I can do that is I can start at the top of this and walk you through. So when we say fiscal year, it's exactly that: fiscal year. And so if you look at it, that number, the total subjects, you see the 3,858.
The number that comes out of that, and that's why we call it the waterfall, 624 of those. Each of these have got to be investigated impartially. In some cases, that investigation is not complete during the fiscal year. So in this case, 624 of these the investigation is still pending. And that will be detailed in our next report. So that gives you the 3,234.

I mentioned some of these allegations are unfounded based on that investigation, so that's a 437. That gives you the 2797. In some cases, you can see that the subject, the accused is either civilian, foreign, unknown, or a deserter. So in some cases, unfortunately, in some of these cases the alleged perpetrator, even after a thorough investigation, you don't know. And that happened in 503 cases. That brings you down to 2,294.

I made the comment some of these remain under civilian jurisdiction. And so in
this case, it's 145, so that gives you the 2,149. And then what we do is we break that down. So if you look at the corresponding number of that 2,149 where command action was considered, then you see the breakdown. So 838 the court-martial charges were preferred, 210 were non-judicial punishment, 139 were adverse action or discharge, and 382 you can see some type of action was taken but it ended up not being on a sexual assault crime, other than that.

Okay. And then you had a number there, the 580 where command action was not possible, and you see that was broken down into insufficient evidence, the 382; 189 where the victims declined. And I have to say, and, again, maybe a much more experience as I am, really hopeful or optimistic that the legal counsel now will begin to drive that number down so that they're getting the advice that they need so fewer of them will decline to participate. But, unfortunately, that
happens. And then nine of those you can see statute of limitations exceeded.

So, ma'am, that's the best I can do in one slide. Hopefully, that is helpful.

JUDGE JONES: I think it's been very helpful. Ms. Fernandez?

MS. FERNANDEZ: Just one more quick question, Dean Schenck brought it up to me during the intermission, was in your records you're showing a lot of the reports are assaults that happened prior to enlistment in the military. As you stated before, you're dealing with people who have come in and all the problems that they have when they come in. And one of the things that we've seen on the Victim Services Committee is that one of the key indications to getting assaulted in the military is a prior assault prior to getting into the military.

I wanted to know are you looking at those numbers and trying to create programs that can address those individuals?
MG SNOW: The answer is, yes, I'm going to do the first part and just tell you that, I mean, when I make the call on 10 percent, I mean, that happened prior, those are not reflected -- they are, but they fall outside, they fall under the category of under civilian jurisdiction because it happened prior to them coming in. So that's the 10 percent.

But the second part, if you want to respond to that.

DR. GALBREATH: Absolutely. As a matter of fact, a number of the services are putting together programs to address the folks with a history of sexual violence. Clearly, everyone can go into mental health counseling provided by the Department of Defense or each of the military services and address those issues.

One of the challenges is is that when folks come in they want a new life. They want something different. And a lot of times
the military is that bridge. And so trying to
-- we have to be able to offer those services
in such a way that allow them to, number one,
is to deal with their past and their history
but at the same time is remain somewhat
anonymous and stay out of the system because
no one wants to jump up and say me, me, me, I
was a victim earlier in life. It's just part
of that sensitivity that we want to be sure
that we're paying attention to.

So I know that a number of the
services are looking at is how can we deploy
those kinds of services and balance those two
interests? But they are working on it.

JUDGE JONES: Anything else?

General, thank you once again. We're going to
now go to the report out of the Comparative
Systems Subcommittee. And, Beth, while you're
setting up, let me just explain, as I did in
my opening remarks.

This is an interim assessment

that's being presented by the Subcommittee to
the RSP, to the full panel. This assessment will be deliberated and finalized by the full panel. It is not the report of the panel. Our purpose today is to accept and be able to begin to discuss and deliberate the findings of each of our subcommittees.

Maria, is there anything you wanted to add to that, or does that cover it?

Okay.

I'm sorry. Does everyone have a copy of this in the audience? All right, great. Professor Hillman?

PROF. HILLMAN: Thank you, Judge Jones. I'd like to start out by thanking the staff, Chair LTC Kelly McGovern, Dillon Fishman, and Jan Chayt, who were the Comparative Systems part of the overall Response Systems staff and all of the staff who worked under the direction of COL Patty Ham to made this possible.

I am going to throw up a lot of information up here, even more than what you
heard in the SAPRO slides. We had a lot of information, and could not have done it without the support of our staff.

I also am here today to represent the Comparative Systems Subcommittee which was formed to bring in subject matter experts to help the members of the panel recon with this big issue, and understand the difference between military and civilian processes, and we are not talking about one thing when we talk about the military response systems, we are talking about different branches of service and different installations military serve and the many different civilian systems that range from large urban areas to remote rural areas, and encompass many different approaches to the problem of responding to sexual assaults.

So the Subcommittee, Comparative Systems Subcommittee, there's four members of the panel. That's Judge Jones, General Dunn, Mr. Bryant, and me, and then six subject matter
experts. Four of them are here today, one more will join us later, and one who could not be here today who brought expertise in military investigations, prosecutions, defense and civilian investigations, prosecutions and defense, sentencing, the entire process of responding to sexual assault.

So we have a lot to tell you. And in order to make this understandable, we're going to kind of focus on framing the issues in a way that will make it make sense. You should know at the start, though, that we have some --

JUDGE JONES: Professor, could we just stop you there? I want to make sure, everyone -- do you have a mike up there?

PROF. HILLMAN: They said there was an integrated mike in the podium.

JUDGE JONES: Okay. As long as everyone can hear you. And, also, I don't know whether your charts or you are going to be picked up by C-SPAN. Are you good? Thank
you. Okay.

PROF. HILLMAN: Thank you. Thank you, Judge Jones. So there are nearly 80 recommendations we will make covering six different subject areas, from surveys and data collection which you just heard some about, from the SAPRO office which is a critical foundation for this part of our understanding of the problem and solutions, all the way through sentencing, the full spectrum of response systems to sexual assault.

Today, we'll present those findings. We'll seek to frame the issues, and we'll try to give the panel a sense of how and why military responses differ from civilian responses and where we think improvement is possible.

So before I start, I want to encourage questions from the panel as we walk through these. I also want to emphasize this is an interim report. Unlike our sister subcommittees, we haven't finished, but we're
close. And these do represent a very close to
final version of the recommendations that
we'll submit to the panel, but we haven't
quite finalized those. And as we've seen in
plenty of our deliberations and in the
presentations of witnesses, the devil is,
indeed, in the details sometimes, and we do
have to hammer out some of the terminology and
some of the precise avenues we think should be
followed going forward.

Before I start, too, I do want to
note that this is a complex and tragic and
intimate subject matter to tackle. The nature
of it makes it very hard to see clearly. That
means it's hard to see the problem, and it
means it's hard to see the solutions. And I
want to emphasize that we are not alone in
trying to devise solutions here or trying to
understand the problem, and we stand on the
shoulders of many researchers and military
officers, civilian jurisdictions, and
different agencies that are now engaged in the
review of military justice practices, military
response systems, and civilian response
systems to this overall problem.

Okay. So with that, I'm going to
turn to our slides. So, first, this is a list
of who's on the Comparative Systems
Subcommittee. As I mentioned, there are four
members of the Response Systems Panel and then
six subject matter experts. I'll introduce
some of those subject matter experts to you
later, as they help me present the materials
in our report.

So here's our mission, which is a
little bit big to do in not 18 but 12 months:
to assess and compare military and civilian
systems from the beginning through the end of
the military justice response to sexual
assault. So, specifically, investigation,
prosecution, and adjudication for adult sexual
assault and related offenses. And we did have
nine objectives. I'll lay those out for you
next.
So the end result here that you'll see today in this interim phase of the Subcommittee's work is 77 recommendations, and we split those into six different categories.

So these are the objectives that were assigned to us by the Secretary of Defense. First, assess the effectiveness of military systems. This includes the UCMJ's definitions, its administration, investigation, prosecution, and then adjudication. And that mandate was set out to us with the time limits of 2007 to 2011. We smashed through those barriers and have looked really right up to the present, to the extent possible, because we've continued to get data, as we did from SAPRO this morning, to update our understanding of the problem.

The second, compare military and civilian systems. Third, this was a specific request that we examine advisory sentencing guidelines that are used in civilian jurisdictions to assess whether those would be
appropriate in the military justice system. That included mandatory minimums.

The fourth objective that was set out for us: compare and assess training levels. The military does a lot of training, more rigorous and more extensive training than many civilian civil sector criminal justice systems, in part because of the high turnover of military personnel, as the military justice system reflects the military overall. So we assessed the training of the many different actors in response system to sexual assault, and we compared that to what happens in federal and state systems.

Number five there, another objective was to look at conviction rates for adult sexual assault and compare it, to the extent possible, with similar civilian numbers. Six, identify best practices from civilian jurisdictions. As you heard this morning, there are some best practices from the military that civilian, interested
civilian institutions, not just criminal justice systems, are adopting, too.

Number seven, assess and strengths and weaknesses of legislative initiatives. Now, Congress didn't stand still while the Response Systems Panel worked, so this was a little tough. And I appreciate the work of our legislative experts to try to keep us up to speed on the many proposals sent forth by members of Congress to address this issue.

So you'll see in our recommendations we specifically address some of the proposals that are out there, and we also try to assess the impact of some of the initiatives already adopted by Congress.

Number eight. This is a very long objective that we set out for you in text, but really this is about collecting information to populate a database of potential sex offenders that would enable investigators to be more effective going forward, even if the victim who identifies that suspected perpetrator in
a report decides not to pursue an
investigation. So we make a recommendation
about that in the -- that you'll see later.
And then, finally, assess
opportunities for clemency, appropriateness of
clemency and the way it's used. So this
assessment of clemency has also arisen because
of changes that Congress has made in the
convening authority's power to alter the
findings of a court-martial after sentencing,
and we'll talk about our reaction to those
changes and our suggestions for moving
forward.
So just to be clear on what the
format is here, we're reporting out to the
panel with an interim assessment of what the
Subcommittee thinks are the right, sets out
the right path for going forward here. The
final report of the Subcommittee will be
submitted in a couple of weeks, as Judge Jones
set out, and then the panel will deliberate on
that Subcommittee report.
So how do we do this? Thirty panel meetings and then Comparative Systems Subcommittee meetings and preparatory sessions to gather information. And in those meetings, we heard from more than 380 presenters, and the list there gives you a sense of all the different parts of the response that exist out there and our effort to try to hear from as many interested and as many expert individuals and agencies as we could. So it runs from statisticians, experts on social science and statisticians, right down to people on the ground in the military justice system and in civilian jurisdictions where they're responding through sexual violence units as special victims units to respond to sexual assault.

And the last bullet there, we did this, we managed this flow of information with a website that posted much of it due to efforts of our staff and then also multiple and progressive deliberation sessions where we
tried to break down the different parts of our scope, assign them to expert members of the Subcommittee, bring it back to the Subcommittee to deliberate, and then hammer out our final recommendations.

I'll say that not everybody agrees on what to do next. Just to make that clear.

Okay. These are site visits that we undertook in order to try to see, to the extent we could given the short time that we had, what's happening on the ground elsewhere that is besides the impression that we were getting from the leaders of military response teams and civilian response teams who were reporting into us.

So the members of the Subcommittee committed to making these site visits, and just about everybody participated in these site visits and our staff participated in every one, which made it possible for us to go. So we went to -- the first few there are the civilian agencies or locations we visited:
the Defense Forensic Science Center and the
Georgia Bureau of Investigations Laboratory to
make sure we understood the forensics side of
the investigative and successful prosecution
part of this.

Next, Dawson Place and the
Philadelphia Sexual Assault Response Center to
understand the ways in which civilian
organizations are integrating the various
aspects of responding to a report of a sexual
assault. And then the rest there are military
installations that we visited. Army and Air
Force, Navy and Marine Corps posted
installations we visited, and we talked at
those installations to people from all the
different aspects of the response to a report
of sexual assault. We heard about prevention.
We heard about the reporting process, to whom
these are reported. We saw some reports
happening in action. We talked to the first
responders. We talked to investigators. We
talked to defense counsel. We talked to
prosecutors. We talked to commanders. And we tried hard to get a sense of the entire chain of events that happens when a report triggers these responses in the military.

In addition to the site visits, we also collected as much information as possible. So we heard from witnesses, we visited these sites, and then we requested information on the many subjects that we weren't entirely clear about what was happening at this time. So that included more than 150 requests for information to the Secretary of Defense and to the service secretaries and also input from victim advocacy organizations. We have and will receive more at this hearing, public comments. We got those both in testimony from individuals who came before us but also written submissions that the public made.

In the site visits, as Judge Jones specified earlier, we made clear that the comments that we received were not for
attribution, hoping to get as clear and
unvarnished a look at what was really
happening as we could in those visits. And
then, finally, we transcribed the meetings.
So all of our deliberations were transcribed
verbatim so that our staff could understand
where we were headed as they attempted to
bring all this information together into the
report and so the public can see how the
deliberations went in the process of crafting
the final report.

And then the last piece of
methodology here, we also looked at a lot of
documents. So as I mentioned earlier, we're
not the only ones to look at this problem. A
lot of others have looked at it, and our
analysis would be incomplete were we not to
reckon with those reports. Those constitute
much of value, much information of value and
a lot of recommendations from the past, many
of which have already been implemented, some
of which have been left hanging. We looked at
those in analyzing the recommendations. We also reviewed the transcripts of witness testimony, and we assessed the data that was available, getting updates from the military and from civilian organizations whenever possible on the numbers that we could possibly compare.

So this is the structure of the recommendations that I'll set out for you today. The findings and recommendations are in six categories. We start with trying to define the problem. I said this was complex to see. It's tough to see the problem. We'd like to share with you our perspective on how we do and don't understand what the problem is right now. That's the survey section at the top here because it's really the surveys on which we relied. That is, in assessing the extent of the problem in the military, the surveys on which we've relied we heard a lot of testimony about and we want to characterize what that testimony taught us about how the
surveys work in the military compared to
civilian surveys to which they're often set
next to.

Next, we'll talk about
investigations, training, prosecution and
defense, sentencing and clemency, and proposed
legislation, and comments about legislation
appear in some instances throughout the
different sections of the report. I don't
want to hide the ball for you too long, so I
want to tell you what our big conclusions were
at the start and set out some themes that run
throughout this many dozens of
recommendations.

So, first, crime victimization
data is difficult to collect. We need it to
compliment the workplace assessments and our
understanding of the environment and the
culture that's out there on the ground that
some of the public health surveys that we do
give us more information on. So without crime
victimization data from the military, it's
tough for us to compare the victimization numbers from the military to civilian jurisdictions.

Second, training is absolutely essential. There's no military unit that doesn't realize this. It's certainly true in responses to sexual assault.

In addition to training, collaboration with civilian experts and with more expert military members is essential to being effective on the ground because of the breadth of the reach of the services' installations, the diffuse nature of where persons get assigned, and the need to leverage the experience that's out there so that we're effective on the ground because we don't have the same length of time and similar duties in the military that we do in the civil sector.

Third, we need to balance the emphasis on prosecuting the cases that should go to trial with resources for defense counsel. This is important to protect the
rights of the accused and to protect the legitimacy of the military justice system itself. We can't have a system that tilts so far towards prosecution that runs roughshod over the rights of individuals who are accused and who are prosecuted for crimes.

Three more. We need to make sure that investigators and prosecutors comply with the rights of victims and the requirements that have already been set out and continue to be elaborated for those persons who have the courage to come forward as victims of a sexual assault. They need to be treated with dignity and respect. That needs to be a central premise throughout our responses, and we would be remiss to not put that in the comparative systems look here because it's certainly a premise that underlies all the effective response to civilian sexual assault, as well as military that's out there.

Number five is a little technical, but we just have the standardized terms here.
We need an easier way to understand what's happening across the services and compare it to what's happening across civil sector. The same problems plague, comparing what's happening to Los Angeles to what's happening in New York or comparing what's happening in Iowa to what's happening in Florida. But we have an advantage in the military in that we can actually establish what the reporting process ought to be, and we can create data that will, in fact, be comparable.

In order to do that, though, we need to set that out and we make some recommendations on how we can do that because, although we have a uniform code of military justice and a single Department of Defense, we have a lot of commitment to different ways of counting that are out there in the branches of service and a lot of different missions that our very big military is addressing that leads to what are reasonable distinctions in reporting and in terminology but actually
leave us unable to make the distinctions and understand success and assess progress, given the way it is right now.

And then, finally, by granting military judges greater authority, authority that's closer to what judges have in civilian criminal justice systems, we can enhance fairness, we can improve efficiency, rationality, and we may also be able to improve the confidence of victims in the treatment that they'll receive from the beginning to the end of the system.

Okay. So I'm going to pause here and stop talking for a moment and introduce one of our Subcommittee members, our expert Subcommittee members to you to introduce the topic of the -- oh, I'm going to do surveys first, right, Russ? So I'll do surveys first, and then we'll do Russ for investigation. I'm already looking for help, and I shouldn't be yet.

Okay. So I'll tackle -- this is
most related to what you heard from SAPRO, which is the assessment of the slides. And, in fact, that slide that Dr. Galbreath put up here right before I started, so we'll do the surveys first and then investigations.

So here's our first recommendation. We think there should be a crime victimization survey that's developed in conjunction with the Bureau of Justice Statistics to actually assess the incidence of crime in the military. This would enable civilian and military comparisons on common principles, rather than what we have right now, which is comparing a workplace assessment to crime victimization survey numbers.

Our challenge there is that the surveys that estimate incidence in the military don't necessarily over-count, don't necessarily undercount, but don't count in the same way that civilian crime victimization surveys count. And because of that, we really don't get numbers that are useful in terms of
drawing comparisons.

So the last bullet there mentions that public health surveys are distinct from crime victimization surveys, and that's because public health surveys serve a different set of goals which apply to the military just as much as they do outside the military but which don't give us numbers about this thing which is crime victimization. When we use uncertain definitions, it leads to confusion.

So the first recommendation there is that we have a crime victimization survey, so we get numbers that we can compare.

Second, we want to define some of the terms in these surveys. We think we should use the Uniform Code of Military Justice because it exists and it sets out what sexual assault constitutes. This would enable us to actually have data that we can compare, unless we change the statute again, which will make it difficult to compare and which we
I think might be a good idea.

So recognize some of our recommendations exist in tension with each other, but we do think that comparing data over time is important. And unless we use the actual definitions of crime when we collect information on crime victimization, we won't be able to assess whether those crimes are being reckoned with properly.

This will also help us track law enforcement and prosecution definitions because we'll stick to the same language and terminology throughout. It will help us better deal with the unknown nature of the actual extent of this problem because of the fact of it being so under-reported as a crime and will help us assess success of some of the programs we've already implemented.

Next on the surveys, the workplace gender relations assessment, which is the survey that the military has used to which General Snow referred and I did, as well,
earlier this morning, is what the numbers
about the actual incidence of sexual assault
in the military have been drawn from. That
survey is intended to assess attitudes,
identify areas for improvement, and then
revise workplace policies, as needed. It's
not structured in a way that gives us reliable
and comparable crime victimization data. Its
definitions don't match the definitions of
crimes.

It's certainly not irrelevant to
the question of crime victimization. It's a
critical backdrop, but it can't result in
numbers, just by its very design, that lead to
something that we can compare specifically to
the sort of crime victimization surveys that
the Bureau of Justice Statistics does in the
civil sector.

Okay. The next thing on surveys
that we recommend here. This is a not
surprising recommendation. We want to
continue to improve response rates and perhaps
actually not only improve them but keep them from getting worse because of the extent to which we use surveys to understand critical things that are happening.

The response rates at the last workplace assessment survey was 24 percent. That's low. That's lower than other military surveys. We got much higher at the national service academies, in part because of the nature of those service academies and our ability to deliver those surveys and get responses in a way that we can't do with the force out there in all the different military installations that they are.

So, in general, the social science experts tell us that response rates under 80 percent require a non-biased analysis. And so you can see the bias that's apparent in that limited response rate to the workplace gender assessment, gender relations assessment. That leads us to some unreliability of that data, and the unevenness of that data over time.
leaves us really not knowing quite what the actual incident rate has been.

There are some other things that also affect our ability to understand what's out there. But this is one of them, the low response rate. So we want to keep working to get higher response rates. We have to survey to get data on unreported information because that's so common in this particular area of crime, but we have to make sure we get responses that we analyze appropriately.

And related to that, we want more help from outside analyzing the data that we do collect. Many of the behavioral scientists to whom we spoke who study crime were excited about the extent of data that's actually been collected in the military surveys. If we release that data and we publish the non-response bias analysis that's been done by SAPRO, we will enable more independent researchers to better understand what's happening in and outside of the military
because that information and the way in which
the questions have been set up has been done
in accordance with a lot of the best practices
out there. We'd like that information shared
so that we can collectively get better at
understanding this problem.

There's some specific suggestions
there, too, from efforts that could flow from
sharing that data, targeted prevention, and
understanding environmental factors because
our harm reduction and prevention efforts can
take place on a broad scale when we talk about
culture change, but the targeted efforts that
specify particular things we know can lead to
faster improvement and a sense of momentum
that will enable the entire effort to proceed
more effectively.

Okay. Number six on the survey
recommendations. Not only do we want to
release the data that's already been
collected, but we want an expert advisory
panel. General Snow referred to RAND, that
the SAPRO has outsourced to RAND, if RAND constitutes outsourcing -- that's probably the wrong term -- had assigned to RAND, selected RAND to do the next survey, and they're developing that. We think they should consult with experts, especially the experts who came from the Bureau of Justice Statistics, the Committee on National Statistics there, specialists in studying sexual violence who can help us make sure we're tracking best practices there.

The survey design, the survey design can lead to tremendous differences in response rates. And because of those, that is response data. There's tremendous difference in outcomes. Because of that, the crafting and the implementation of the survey are really critical to us getting useful information out of it.

Okay. The terminology slide.

I'll just let this wash over you for a moment.

The terms that we use here are not consistent
across the services, the branches of service, so you may see some that are unfamiliar to you, even if you have a book of military acronyms already in your head.

There's also some acronyms that refer to more than one thing, number two and then the last one on the page, for instance. The special victim capability is something different than the special victim counsel. So the special victim capability is that set of resources that enable effective prosecution. That includes a few different persons in that that I'll talk about. The special victim counsel is a new set of lawyers who we've integrated into the process.

So these are some of the words that I'll use if I'm staying on track when I refer to these, but you should be familiar with in terms of understanding the way we talk about these in the military.

Okay. Here's the special victim capability slide. I'm not sure you can read
that from where you are, but let me just summarize. The top line is the civilian general approach, and the lower line is the military's general approach. And it starts with an advocate for the victim. So in the civil sector, the advocate is from a non-profit organization who is sometimes a medical person, sometimes is from the police department, sometimes is a sexual assault nurse examiner. They get support there, too. So that's the victim advocate.

For the military, there's a sort of more robust accompaniment through the process that begins with a victim advocate, the sexual assault response coordinator, and then the special victim counsel from the start. And that second block that is empty is a carryover because that team of persons in the military who start actually work through the process with the victim after a report happens.

The victim witness liaison, which
is listed both in the civilian and military
lines of this slide, is designed to make sure
that the prosecution process, the criminal
justice process gets translated to the victim
in a way that makes sense and keeps the victim
engaged in the process. And you can see the
individuals that the military assigns
throughout these different processes.

This is about the integration of
investigators, prosecution, and all the
support victim advocates and special victims
counsel that we assign to victims as they move
through the criminal justice process or
observe the criminal justice process when the
defender that they've named in the report, the
case moves ahead.

Okay. So I'm going to turn to
Russ now to talk more about this because he's
our investigative expert. So Mr. Russell
Strand has almost 40 years of law enforcement
experience in education, investigation, and
consulting. He's right now chief of the U.S.
Army's Police School Behavioral Sciences, Education, and Training Division. And he has been an important leader on these issues for some time, has been the architect of some of our responses, not only in the military but in the civil sector, as well, to investigations. And I'd like for him to flag some of the issues he thinks are most important here.

So I guess do you want to come up here, Russ, to talk? So I'm going to ask him to talk about what he thinks is most important here, and then I'll run through the slides. And he'll correct me as I get the language wrong going forward.

MR. STRAND: Thank you, Dean Hillman. It's been a real honor and privilege to work not only with the Subcommittee but also with the great staff and the leadership of Dean Hillman as we've moved along. What's been equally fulfilling is to be able to go across our nation and look at all the professionals, both military and civilian,
that are really working hard every single day
to get after this most difficult scourge that
we call sexual assault.

I'm going to be highlighting some
and some not. I'm just going to do an
overview of some of these, and we'll get into
the details as we go along on our
investigative recommendations. And I wanted
to echo Major General Snow's assessment that
this is a dynamic, moving train. The way that
we were investigating sexual assaults 40 years
ago is far different than we are today. The
way we were investigating them ten years ago
is different than today, five years. And so
every year, we just seem to be getting better
and better at it.

What we're realizing and what
we've realized over the last several years is
that investigating sexual assaults is far more
complicated, far more difficult, and many more
biases than the average homicide case.

Homicide cases, in my opinion, are actually
much easier to work than your typical alcohol-
facilitated sexual assault and your typical,
you know, one-on-one sexual assault. One of
the things I hate is that term "he said, she
said" because there is no such thing, never
has been and never should be a he said, she
said case at the end of an investigation
because there's far more information, there's
far more victims, far more offenses, far more
offenders that we need to look to.

So as we've looked across the
spectrum and we've looked at some of the great
agencies out there in the civilian world and
compared them to the great agencies within the
civilian world, I'm going to add a couple more
terms to Dean Hillman's chart. You know, we
have the MCIOs, the military criminal
investigators. To confuse that term, the
people that work within those military
criminal investigative organizations are, in
fact, agents. And we often confuse agents and
investigators. And so you'll see some of that
even in our recommendations.

But in the military we have,
basically, a three-tiered law enforcement
response system. We have patrol, whether it's
military police in the Army, whether it's
security forces in the Air Force, some of the
other security forces, military police in the
Navy, Coast Guard response systems. That's
their first tier.

Our patrol are generally told and
trained to respond. They are not
investigators. They will not do anything
other than protecting the crime scene, making
sure the victim is safeguarded, making sure
everything is safe, and making sure people get
to the right places and the investigators
notified.

The second tier is what we call in
the Army military police investigators, what
the Air Force call security force
investigators, what the Navy calls their
master at arms, and also what the Marine Corps
and the Navy call CID investigators. Now, there's a difference between CID investigators and U.S. Army CID agents.

Basically, that second tier will handle the vast majority of misdemeanors that investigators investigate and also some felonies. Up until the recent changes that Congress made for the military criminal investigative organizations, military police investigators, well, actually, security force investigators and some of the Navy investigators were handling some of the non-penetrative crimes. Congress came back and says, no, we want all sexual assaults to be investigated by the military criminal investigative organizations. So to add to your long list of abbreviations, there we go.

I'm going to highlight just a couple of things that I really feel strongly about in some of our recommendations. Certainly, the volume of cases from even the last several years has increased exponentially
at a time when the Air Force and the Navy were told, you know, you're going to shift a big portion of your sexual assault investigations only to the MCIOs. And so our reports have significantly gone up. And my hope, and I think it's the hope of everybody in this room, is that we're going to continue to see a significant rise in reports of sexual assaults because until we get even close to that prevalence we've got a lot of work to do.

So our hope is that we're going to see a 50-percent increase every year. But what does that do to the investigative climate? So what we'd like to do is revisit the opportunity to maybe bring in some of our investigators again, our second-tier folks, under the auspices of the military criminal investigative organizations, to conduct some of these non-penetrative cases and then have them reviewed, worked for and reviewed by the military criminal investigative organizations. We think that might provide some relief, some
sharing of some of the resources.

We have a significant amount of training that we do, as has already been highlighted by Dean Hillman, and I think it's in that training that really makes the difference between how our agents see these crimes and the complexities of alcohol-facilitated, same-sex sexual assaults, marital sexual assaults, just a whole spectrum, the neuroscience that we're now bringing in to all of this and some of the new interview techniques that we're exploring, some of the promising best practices that the services have been developing and sharing with our civilian counterparts.

I will say that the Navy Criminal Investigative Service, the Air Force Office of Special Investigation, the Army Criminal Investigation Division, and also the Coast Guard investigators have all done a tremendous job in meeting these training requirements. The big difficulty we have is, oftentimes,
advanced training is taken out of hide.

Advanced training is, you know, the services
have to give up some funding, DoD has to give
up some funding, but there's only a pie and
there's only so much in that pie.

So one of our concerns is that, as
we progress and the need for advanced training
continues, when we take the eye off the ball
-- and someday we will. Someday, we won't be
having hearings and all kinds of interesting
committees and everything else to try to get
at this problem. We're going to move
somewhere else eventually. What our concern
is that funding may also move somewhere else.
So very much like in the family advocacy
arena, when back in the 80s when we were
talking about child abuse and domestic
violence, Congress decided that we're going to
give specially appropriated funds to family
advocacy to be used and only specifically for
family advocacy. We're asking for the same
consideration in the area of training for
advanced training for investigators, for
agents, because if we don't have that, our
concern is, now that we're taking some money
out, you know, as we're actually shrinking the
military, the budgets are shrinking, there's
going to be a lot of competitiveness, and so
we don't want some of the money we're now
using to go back into the operational
requirements of the services to meet other
needs. So we're asking for specific
congressional mandates for funding.

Victim collateral misconduct was a
huge issue, as we've seen and we compare
between civilians and military. In a civilian
world, you know, if I'm a detective and I'm
interviewing somebody about underage drinking
or if I'm interviewing somebody about smoking
marijuana or if I'm interviewing somebody
about some other misconduct that I really
don't care about as a detective, I'm not going
to do anything with, I'm not going to stop and
read that person their rights. Generally, I'm
not going to for a couple of reasons. One is, under Miranda, they have to be in custody, and victims generally aren't in custody.

Under the military system, under Article 31, custody doesn't matter. If I'm an official of the government and I suspect misconduct, I must read somebody their Article 31 rights if they're a member of the Armed Forces.

So that creates two problems. One is they're not in custody but they might feel like they're in custody when they're having their rights read to them. The other issue is when we read somebody their rights, imagine this for a moment and it's not hard to do, I'm talking to a victim who's sharing the most difficult thing, the most intimate thing that's ever happened to him or her, and right in the middle of that they might bring up something that I now suspect that they might have been involved in the commission of a crime, a minor crime. Excuse me, I just need
to stop here for a moment and I need to advise you of your rights. The chilling effect that that has on every single human being, on every single person, is amazing. And what that does to that victim at that point in time creates just a profound overwhelming sense of what do I do now? What do I do? Where do I go? I reported a major crime, I reported a crime that the Department of Defense wants to know about. I'm volunteering my information, and now you're reading me my rights.

So we took a long hard look at that, and we've got some recommendations in that area, as well, of either developing a list that the Secretary of Defense would accept as, in the area of sexual assault, you know, minor misconduct that he would be allowed to give immunity for or some other -- I'm not sure how we would do this, but a list where, as an agent, I wouldn't have to read somebody their rights for these types of misconduct. Also, maybe looking at Article 31
for minor misconduct in the area of sexual assaults.

The other issue that we have is case determinations. As we've seen with some of the comparisons, Dean Hillman mentioned that, you know, it's really hard to compare not only between military and civilian statistics but within the services. Each one of the military criminal investigative services looks at case determinations a slightly different way where, for example, the Army unfounds cases based on some -- after coordination with SJA, we make some determinations.

The Navy and the Air Force do not. They basically wait until the case gets to the commander, the commander decides whether it's unfounded or not, and that goes back into the mix.

So what we're recommending is that we look at the Uniform Crime Report, which almost every single law enforcement agency in
the United States uses for case
determinations. We think that will clean up
some problem areas. We don't believe that all
the unfounded cases that we're getting are
baseless or false, but what do most people
think when they hear the term "unfounded?"
What we want to do is rely on what civilians
rely on in the Uniform Crime Report for making
those determinations.

And there's a couple more areas
and I'll be done. One is in the area of the
SANEs. We have a lot of really good dedicated
SANEs, sexual assault nurse examiners. We
can't have one-size-fits-all. Under the
fiscal year 13 NDAA or 14 NDAA, there's a
requirement that if you have an emergency room
with 24-hour seven-day a week, you know,
they're open that much, that there's going to
be a SANE exam.

As we looked at small, medium, and
large installations, if we looked at the Navy
with the ships and everything else, that's
virtually impossible. Even some of our medical centers don't have SANE nurses at large installations, Fort Hood for example. But they have a very good, capable system with off-posts where they can go to these qualified SANE nurses and get the same product experience, and we were even told that those SANE nurses will travel to Fort Hood if requested to do those examinations.

So what we'd ask is that the service secretaries have the medical folks take another look at this and maybe look at making some recommendations to where one size doesn't fit all because it certainly doesn't.

And along the same lines, we went out to the Defense Forensic Science Center, and we went to the crime lab in Georgia, and we talked to a lot of experts. And I will tell you our Defense Forensic Science Center is nothing short of amazing in what not only they're doing but in the research that they're doing for touch DNA and for some other DNA
things that we're going to have in the future. But all of the people that we
talked to, all the experts we talked to said
no more plucking. Currently, in the
Department of Defense sexual assault kit
there's a requirement to pluck pubic hairs and
pluck head hairs and pluck body hairs. And
the lab people that we talked to, the experts
that we've talked to said there's no need for
that. There was back in the 60s and 70s and
maybe even the 80s, but no more plucking.
That's one of our themes. We'll get a bumper
sticker for that maybe as we go along the way.
But we'd recommend that that be taken out.

And then the last recommendation
before I turn it back over to Dean Hillman is
this: In restricted reporting, you know, we
want to hold offenders accountable, but
there's two recommendations that we made on
that offender accountability. We know that
many sex offenders are serial offenders. And
currently under our database with victim
advocates, they don't put in subject data, they don't put in offender data. So if we have a multiple victim case at an installation, maybe in basic training or something, we have no way to go back and say, hey, has there been some restricted reports, has there been some unrestricted reports? And so we're making some recommendations on those lines.

But another thing that we're going to recommend is on restricted reporting. Currently, if a victim reports to law enforcement in any way, shape, or form, there's an automatic investigation. And we went out -- in Ashland, Oregon and several other police departments have some really good best practices, whereas if a victim wants to come and talk to a detective, after they talk to a detective they may determine that they don't want an investigation, and these police departments will not conduct an investigation. We think we should have that same opportunity
for victims to come forward, ask us questions
about the investigation, ask us questions
about how we're going to do this, and maybe
gain some confidence with them.

And so what we're asking is that
the restricted reporting provisions be re-
looked at to allow a victim with a special
victim counsel or a victim advocate to come in
and talk to one of our MCIO agents and tell us
what happened, you know, share with what
happened, give us the information, and then,
after they get done talking to us, make a
determination on whether they want that
investigation to go forward or not. We think
it would not only increase reporting, make it
easier to report, but also answer questions
along the way instead of a victim being told
by some other party, well, you don't have to
talk to law enforcement, which almost
sometimes sets up a negative. So we're asking
for consideration on that.

And so that's a very important
aspect. And what we have found, in a sense, is that victims do want to get more information and we want them to make a more informed decision before they go forward, move forward.

So those are some of the things I highlighted. They're going to be in the recommendation. And we look forward to any questions and comments and give and take. But it's just been a really rewarding experience for all of us. And thank you for your leadership, Dean Hillman.

PROF. HILLMAN: Thank you, Russ. Judge Jones, I'll make a suggestion here that I walk through the recommendations with one from 7 to 22 and then see if the panel has any questions about our survey.

JUDGE JONES: That would be a great idea.

PROF. HILLMAN: Okay. About the surveys or the investigative part before we move on to the rest of this. So the slide
that was up here behind Russ as he spoke, and he actually highlighted much of this so you have a good framework for understanding our recommendations.

This first one says the Secretary of Defense should direct that non-special victims unit agents coordinate with special victim unit agents in all sexual assault investigations. This is recognizing the distinction between the structure of civilian agencies and the structure of military agencies. But having special investigators handle all of these investigations, regardless of severity, is challenging in terms of resource allocation. So this recommendation points in that direction.

This does, as well. This is another point that Mr. Strand mentioned which runs to the importance of training. The secretary should direct continued careful selection and training of supervisory agents and investigators for the special victim
units, utilizing civilian agents because of their experience whenever possible. And in particular, we want to make sure that we have competence and commitment in those who are investigating; that we have supervisory agents to ensure continuity that could otherwise be lost; and, finally, that we do have, we are attentive to the need to reassign when necessary because of the challenge of investigating these cases can certainly create burnout, and we need to protect the people who are responders to this, too, so that they can be there for the victims who come forward.

This runs to our point about the importance of funding. We recommend Congress appropriate centralized funds for MCIOs to provide advanced training because these are complex and difficult crimes to investigate and prosecute. Already military investigator training is more robust than our civilian counterparts, for the most part. However, continuing that and maintaining it is
important. We also want to make sure that we continue training on the importance of reducing bias and eliminating bias because that has so long been a challenge to victims who come forward and encounter that in investigators.

And, finally, we want to avoid the language in reports and, in fact, in interviewing, etcetera, that implies a different event happened than what the victim experienced. And we know how to do that now. We understand what those best practices are. We want to make sure that we train our investigators on that.

Next, this is about the response, the different types of responders to incidents in the military. We recommend the secretary direct the role of military police investigators to continue to protect the crime scene, to ensure safety and well-being, and to report to the military criminal investigative office.
So civilian patrol officers have some discretion here. Military police do not have discretion and have to refer. This ensures a specialized processing right from the outset that should improve the experience for the victim in what's inevitably a trying process and improve the response overall and the potential success of a prosecution.

Next, this runs to the increasing caseload that Mr. Strand mentioned, too. As numbers increase, the burden on investigators does increase, as well. We recommend that there be a little more flexibility and resource allocation so that less severe incidents of sexual assault, and remember sexual assault is a very broad term in the military because of the extent of behaviors that are prosecuted as sexual assault, the minor incidents be investigated under the supervision, under the oversight of special victims unit agents.

So the increased reporting and the
requirement for investigation of all the Article 120, that's the military sexual assault statute, has created an increased caseload. We need to give some flexibility here for better resource allocation, and that's what this recommendation runs to.

Next, here we're getting into the details, but this came up repeatedly as we talked to investigators. We need a standardized procedure to streamline and expedite the military criminal investigative officers use of this investigative technique in accordance with the law. So these are very effective, this is very effective. You know, we mentioned our visits to the forensic labs, and we mentioned how impressive the Defense Forensic capability is. But we need to recognize, too, that forensic evidence is not available in many, many cases and that getting information from the individuals involved is a key part of what the investigators need to do.
These pretext phone calls and text messages, the social media investigations that need to ensue are an important way to get evidence that will enable successful prosecution. Right now, the process isn't standardized. There's different approval procedures. We want to streamline an expedited way to make this happen in the military, as it does in civilian agencies, so we can investigate properly the many cases in which a sexual assault is not reported so fast that there's actually forensic evidence that's available.

And, next, this goes to a critical point in the investigation of a sexual assault and the success of responses altogether because this also runs to the confidence of victims in reporting and our efforts to increase the reporting rates for those who experience sexual assault in the military. This goes to collateral misconduct, which Mr. Strand mentioned.
So we recommend the secretary standardize the policy regarding rights advisement during the interviews of victims of sexual assault when they disclose minor misconduct. The first bullet points out civilian investigators do not advise of rights because the law does not require them to.

The potential prosecution for collateral misconduct is a barrier to reporting and is a barrier to effective investigation. The current policy affords the convening authority discretion to waive liability, criminal liability for minor misconduct, and practices right now vary as to how Article 31b is actually implemented by investigators. We believe there should be a standard policy. We believe we should make it clear to our investigators what they're supposed to do and make it clear to victims what they can expect if they come forward with the courage it takes to report a sexual assault and then there's also, as there often
is, collateral misconduct that's associated with the incidents around that assault.

The second part of our recommendation here is a realization of the fact that Article 31 does require rights advisement right now, unless it's modified. And we want a procedure that grants immunity for victims who disclose collateral misconduct, along with a list of qualifying offenses. And we want to consider recommending that Congress change Article 31b.

So what this would do is remedy the confusion around the immunity that's available to victims who are potentially liable to prosecution for collateral misconduct. We want to protect the rights of the victims that are standardized practice and get our understanding of Article 31 in line with what the law requires.

Next, on the site visits we realized that the sequestration and the furlough had had a negative impact on the
effectiveness of investigations, and we 
recommend that, to the extent possible, the 
secretary should exempt DNA examiners and 
other examiners at the Defense Forensic 
Science Center from furloughs in the future. 

This next recommendation runs to a 
point that I raised at the beginning of this 
briefing and that Mr. Strand also mentioned, 
which is about collecting information. We 
recommend the secretary establish a policy 
that will allow us to collect information 
about persons identified in the reports of 
victims, even if those victims choose to 
submit a restricted report and not engage in 
the unrestricted report and investigative 
process. 

So this means that the SARC, the 
sexual assault response coordinator, would 
enter information on restricted and 
unrestricted sexual assault reports into the 
existing database. It would then be available 
if that alleged offender is identified in
another report of assault. Right now, that
doesn't happen, and there's no information
that gets provided, and we think this would
enhance our ability to build on the
information that we get through both
restricted and unrestricted reports.

And the next recommendation runs
to the same thing, about a change in
restricted reporting policy. Here, we'd like
to allow a victim who comes forward with a
restricted report to talk to an investigator
without triggering the unrestricted report and
the degree of disclosure that that involves
for a person in a military unit.

So right now, a victim cannot talk
to a law enforcement agent or investigator
without making an unrestricted report. This
would allow the victim to speak to that
investigator with the protection, the advocacy
of a victim advocate or a special victim
counsel, this innovation in the military
response to sexual assault which gives a
victim an attorney early in the process.

So law enforcement could not initiate an investigation without the victim's consent, so the victim would have to convert to an unrestricted report in order for an investigation to ensue. But it could increase confidence of victims. It could increase the conversion rate potentially from restricted to un-reporting, and it could increase the intelligence, the information that we're able to collect from restricted reports, in addition to what we get from unrestricted reports.

Next is an audit. Like we think there should be some outside experts who advise us on the surveys that we create about crime victimization to make sure they're right and workplace assessments.

We also think there should be an external audit of DoD sexual assault investigations. We do internal checks right now. Some civilian police agencies use
external audits. We think that would enhance
our understanding of what we're doing right
and what we're not.

We also recommend that the
secretary direct the MCIOs to coordinate and
standardize with trial counsel, this is
connection between investigators and
prosecutors, to ensure that all the
appropriate investigation happens before
there's a report out to the commander. We
don't want reports going to commanders before
everything has been investigated. We heard
some instances in which that had happened.

Service procedures also vary
across the branches of service on this
particular practice. We think there should be
clarification here on how that coordination
should happen and that all investigation gets
done before the commander is faced with, the
convening authority is faced with a decision
about what to do next.

Next, this runs to our definitions
here. So we recommend that the secretary
direct that the Uniform Crime Reporting
standard for unfounding be adopted across the
services and Department of Defense. There's
no reason that we could see to not use an
established civilian standard for what
constitutes a crime that is unfounded.
Unfounded means false or baseless. It should
only be used in the -- we shouldn't use other
definitions or fail to define that term when
we use it in our reports.

Second, this is about the decision
to unfound. That decision to unfound should
be done in coordination between investigators
and the prosecutors. So that's the
recommendation there that we ought to have
that take place with lawyers and investigators
involved who understand what that assessment
means about unfounding, rather than the
unclear process and unclear authority to which
that decision is devolved at this point.

Okay. We're almost through
investigation recommendations. Three more here, and then we'll take some questions.

This is about sexual assault nurse examiners. We recommend that the secretary direct the surgeon's general of the services to review the new requirements for a sexual assault nurse examiner at all the military treatment facilities with 24/7 emergency rooms because we don't see that as the only way to meet the very important requirement that we have qualified SANEs out there to meet the demand.

So the integration and the leveraging that we think needs to happen with civilian facilities and civilian experts applies to SANEs. And we think that the authorization, the NDAA, right now, requirement is too narrow to enable the military and victims to find the best services they can going forward.

That last point is an important one. Although we're talking about this as a
very big problem, and it no doubt is, we also
need to recognize that smaller civilian
jurisdictions and small military installations
may not have enough incidents of sexual
assault that they maintain personnel with
appropriate expertise. You may be trained as
a victim advocate in your unit and you may
have that job for two years and never meet a
single victim. That doesn't make you a good
victim advocate.

We need to have experienced people
with fresh expertise, just like trial counsel
tell us their skills and defense counsel,
their skills are perishable, we need to have
enough of a caseload actually to maintain
expertise. So this enables us to leverage
more effectively the civilian expertise that's
available out there.

Okay. Russ talked to you about
this already. This is the plucked hair
recommendation. So in order to protect
victims from unnecessary intrusiveness in the
sexual assault investigation process, we need to end this process, and we recommend the Secretary of Defense do that now.

And then the last recommendation in our investigation section is about collaboration on SAFE training. So here we think the secretary should direct a working group to coordinate efforts and leverage expertise to create a course for military and DoD practitioners. We think that this is a place where common experience and expertise across the services would help.

We think that there could be a joint force at the joint Medical Education and Training Center. There could also be portable forensic training. There could be joint refresher courses that run. We have different programs to try to meet the same goals here, and we recommend collaborating here through whatever working group would recommend so that we don't duplicate our efforts in each of the services but, instead, build a common ground
of expertise that will enable us to be effective in the different branches of service and the different types of installations and the different types of cases that come forward to us.

Okay. So, Judge Jones, I'm going to pause there and see if there are questions on either the surveys or the investigative part of our recommendations.

JUDGE JONES: Jim?

VADM HOUCK: Thank you to the panel and thank you, Dean Hillman, for what looks to be a terrific set of recommendations and a really detailed and rigorous approach to this issue. And I personally see a lot in it that looks like it's really worthy.

A couple of questions. Three questions, actually. One more than a couple. On slide 34, you talked about audits and outside auditors. Any idea who that might be who's qualified to come in and sort of sit in judgment on what DoD will do? Did you have --
just sort of seeking additional information on what you had in mind there in terms of who outside auditors might be.

MR. STRAND: Yes, sir. When we looked at some of the outside agencies, who they were bringing in, mostly victim advocates looking at -- one city, for example, had a victim advocate review in every single case. One other city had victim advocates reviewing the potentially unfounded cases to make sure that nothing was missed and things like that, just getting another professional look at it.

So much like in our collaboration with prevention, like with RAINN and with PCAR and some of these other, you know, nationally-known organizations, perhaps reaching out to some of them and, you know, some of the victim advocacy groups, some of the other folks who do multi-disciplinary training, some advocacy there, taking a look, not any specific organization but some organization, some nationally-known organization, to periodically
look at our cases, look at a sample of our cases, much like the DoD IG does, pick a sampling of the cases and see if they see any trends that we might have missed within the Department, whether it be from the investigative side, the prosecution side, because really, right now, when DoD IG is looking at an audit, they're looking at procedures, they're looking at making sure that we followed the rules. But we don't have any real good outside organization looking at it to make sure that, you know, from another perspective, to see if we've missed anything on the victim side or the health side or something like that.

So we're not sure what organization, but we would look to some of these national organizations.

VADM HOUCK: Thank you. I do wonder if audit is exactly the right term to describe what you're describing there, but the idea of collaboration with outsiders seems
like a good one.

On slide 29 and 30, I think, there is the sort of fundamental issue of collateral misconduct. And I wonder, beyond the procedural recommendation that you're doing with the Secretary of Defense, start to standardize and uniform this, which I think could be really helpful, I wonder if you've had further thoughts on how you all would categorize minor and how you would account for the obvious difference between civilian society and military society and the role of what you all have characterized as minor offenses.

MR. STRAND: What we've looked at, sir, is things like -- the biggest one is underage drinking, you know, where most, well, most of any police departments really don't, I mean, they care but they're not going to start an investigation, they're not going to hold anybody accountable.

Certainly, in the military, every
violation of every order and every law is really important because we have good order and discipline. And so separating out, and that's why we asked for the secretary level to do it in conjunction with leadership, but we saw things like underage drinking, maybe missing formation because they were doing something else, maybe even some marijuana use. We don't know what that list would look like, but we do know that things, in comparing with what civilians would not be concerned with, that would prohibit or inhibit people from coming forward.

Other things, like in a combat operations area, having consensual sex with somebody is a violation of general orders oftentimes. And so they might be involved with a consensual relationship that went non-consensual. There's a huge barrier then because now they have to come in and admit that they had, you know, a relationship that led into rape and led into some of these other
things which now they can't come forward
without, you know, fairly consistent, you
know, reviews of that misconduct and
potentially, even if it's not just from the
criminal justice side but administrative
repercussions from those.

So just, you know, underage
drinking, maybe a violation of some of the
general orders and some of the other
regulations and policies may be appropriate.

VADM HOUCK: I think the challenge
would be in your own use of the word "minor"
and then your own characterization of all
these things as really important to reconcile
that bridge between minor and really
important.

The last question I had was, slide
36, the conclusion that MCIOs and trial
counsel should make the decision about whether
something is unfounded, and I wonder what role
do you see for the commander in that decision-
making process? It doesn't mention a
commander, so I wondered how you all were thinking about that.

MR. STRAND: Sir, when we were looking at the civilian decision-making process, you know, obviously they don't go out to -- we are different. They don't go out to the manager at Walmart and things like that. But significantly different is when we get done with the investigation we want to make sure that it meets the elements of proof. We want to make sure that we have, you know, that we have violations that we can report before it gets to the commander.

We don't see any utility in the commander weighing in on whether it's founded or unfounded because that commander has to make other decisions, not whether the offense occurred but what to do now when an investigation substantiates an offense. One of the problems that we've seen along the way is in the variety of ways that we determine unfounded. If a commander determines
something to be unfounded, does that mean it's baseless? Not necessarily. Does it mean it didn't happen? Not necessarily. And, again, it just goes to the whole spectrum.

So we'd like to refine that and institutionalize to where a trial counsel and an agent or an MCIO organization looks at this and says do we have enough to determine if an offense occurred? And then if it occurred, do we have enough to determine, you know, within probable cause, that this person did this?

Right now, it's all over the map. For example, CID unfounds reports by the organization. That's compared to other services, and that unfounded report rate is significantly higher, but does that unfounded report mean false or baseless? Unfortunately, it doesn't. It could be a whole spectrum of how we look at this.

So we want to standardize that and just take a look at it. But we didn't see any need for the commander to be part of that case
determination process. We want to run the
same we do with civilians because when we
compare civilian founded and unfounded rates
it's much cleaner and it's much easier to
grapple with.

VADM HOUCK: Thank you.

MR. STRAND: You're welcome, sir.

JUDGE JONES: Liz?

MS. HOLTZMAN: I have a question
to follow up on what Admiral Houck asked.
When does trial counsel get named in
connection with these proceedings? At the
investigative stage?

MR. STRAND: Yes, ma'am.

Generally, in most of our services, in one of
our recommendations that we quantify when that
happens, but, generally, within 24 hours for
most services that trial counsel will be
notified. We've got a recommendation to
ensure that's consistent across the service,
but, generally, within 24 hours that trial
counsel will get notified, be involved with
the case. In most of the services, that trial
counsel is involved from the very beginning.
In fact, in many cases, that trial counsel
will go to the office and maybe even view the
interview, start, you know, looking at the
evidence that we have from the very early-on
stages.

MS. HOLTZMAN: Okay. But your
recommendation would make it a requirement --

MR. STRAND: Yes.

MS. HOLTZMAN: -- with all the
services --

MR. STRAND: Yes, ma'am.

MS. HOLTZMAN: -- the trial
counsel --

MR. STRAND: That the trial
counsel be notified at least within 24 hours.

MS. HOLTZMAN: And with regard to
the collateral misconduct, what do you see as
the -- or did you look at, a better question,
did you look at any possible downside of
eliminating the collateral misconduct,
prosecution for collateral misconduct in all cases?

MR. STRAND: Yes, ma'am --

MS. HOLTZMAN: And if so, what did you find?

MR. STRAND: That gets into a bit of a sticky wicket because some of the ramifications could be, although we have no evidence, but it could be, you know, if I've been involved in collateral misconduct and I'm going to, you know, be in trouble, say I was smoking marijuana or I was underage drinking or I was having consensual relationships with somebody in a combat zone, which is a violation of General Order Number 1, it could be that we're going to have some individual say, well, I wasn't raped, but if I say I was raped I'm going to get out of trouble for that, or if I say I was sexually assaulted I'm going to get out of trouble for that.

So that is a risk. That is something that we've considered and something
that we should continue to consider. But I
don't think it should be a barrier to --

MS. HOLTZMAN: Is that the only
risk you saw?

MR. STRAND: That's the only one
that I saw. I don't know if anybody else on
the committee saw any.

BG MCGUIRE: If I could --

JUDGE JONES: Yes. Thank you.

BG MCGUIRE: Along that vein,
prevention efforts are going to be tied into
some level of accountability. So I think
that, during the course of, you know -- I know
that Major General Snow had mentioned that
they were going to put greater emphasis on
prevention. But if prevention efforts kind of
highlighted the, you know, the dos and dont's
in behavior in order to ensure that you do not
assume greater risk to yourself, do we lose
some level of accountability and teeth to
those prevention efforts if we fail to
highlight that?
MR. STRAND: That's a great question. Ma'am, what I've seen the services start to do is when they're tying their prevention efforts they're not just tying prevention efforts, okay, if you don't want to be a victim don't do these things. What they're doing now is they're starting to tie the prevention efforts in if you don't want to be a victim or accused of sexual assault, you know, excessive drinking, underage drinking. So we're looking at not only just one party but we're looking at all parties involved to where, if you want to reduce your risk, these are the prevention efforts you're going to take.

So I don't see that as undermining. I would have three or four years ago. But the way the prevention efforts are now going, it's cumulative to where we're not just looking at a gender, we're not looking at, you know, the victim or the suspect. We're putting our prevention efforts into both
at the same time. So I think that might mitigate some of that.

JUDGE JONES: Without going into - well, is victims counsel helping this situation, short of establishing procedures to grant immunity? In other words, if the victim already has counsel, have you seen any processes that would indicate that if the victim's counsel is able to talk to the interrogator and/or the trial counsel, probably more so the trial counsel, understandings can be worked out and there won't be a problem? And the understanding may simply be between counsel that we're not going to prosecute until the conclusion of this process, you know, the victim's whatever happens, prosecution, etcetera, trial, her allegations trial. And at that point, we will review it and it may well be that there will be no prosecution of the collateral misconduct.

Is that what's going on now with
or without victim's counsel? What's actually happening here?

    MR. STRAND: The early reports, certainly, that the special victims counsel are helping. The difficulty is, ma'am, is that the trial counsel doesn't make a determination whether something is going to be prosecuted or not. The trial counsel doesn't make a determination of whether the command is going to hold that service member accountable, and that's one of the difficulties.

    JUDGE JONES: Does not?

    MR. STRAND: Does not.

    JUDGE JONES: Right.

    MR. STRAND: So if you're sitting in a room, basically, you have to get the chain of command involved right away. And so when you get the chain of command involved, then you've got, you know, basically, you have to stop what you're doing, you have to stop all the process and procedure. We're right in the middle of what sometimes can be a very
emotional interview, a very emotional thing, and we have to stop them because they were underage drinking. That, basically, would stop the process and does stop the process until you get some other people that can make those decisions and those qualifying remarks involved, and that's very problematic.

So that's why we're asking for a review of a potential list of what would be considered minor collateral misconduct so that we would just be able to bypass that whole scenario and just, okay, I'm not interested in that. I mean, it's part of the case, it's part of what led up to this or what happened afterwards, but we're just going to, just like every single civilian police department, we're just going to go forward and we're going to continue on with the investigation into that very, very serious report.

COL SCHOLTZ: Ma'am, I'm with you and agree that I think the special victims counsel will aid in this problem and try to
help us sort some of this out.

JUDGE JONES: Could you speak up just a little?

COL SCHOLTZ: Sure.

JUDGE JONES: Thanks.

COL SCHOLTZ: Sure. I'm with you.

I definitely agree that the SVCs will aid in this problem. It's a complex issue. I also think we're making a recommendation about involving the judge earlier in the process. That might help, too. Getting requests for transactional immunity early in the process is going to be critical, and I think -- so I think that's where we -- we're, I think, identifying a very complex issue.

I think it needs to be studied by the Joint Services Committee to look at how to do this. Whether or not we're going to be able to identify a list I have some concerns about because I think each case is so factually specific that you're going to have to deal with those facts. And with trial
counsel and the special victims counsel, they're going to have to decide whether this is something that we can deal with early in the case and whether or not there may be some sort of immunity that needs to be granted early or a decision made not to pursue the collateral misconduct.

So I hear you. I think it's a complicated issue. You know, whether or not we can really get a list, I'm not sure we're going to be able to get a list of minor misconduct because --

JUDGE JONES: No, it would be very difficult it seems to me. It is going to be a case by case.

COL SCHOLTZ: That's what I think, too. Okay.

PROF. HILLMAN: Just to be clear, your Honor, the Subcommittee's recommendation is that the secretary establish a procedure to grant immunity and that be accompanied by a list of all minor offenses because what we see
happening on the ground right now is actually a very uneven process that sort of grants immunity to victims in a way that's actually not in accordance with what the law requires with rights advisement and the way the investigative process is ensuing.

So right now what's happening is that DoD policy wants to have the victims have the confidence to come forward, despite this collateral misconduct. But we just don't have consistent processes right now. So that's the first part is to standardize that policy, and the second part is to make investigators and victims on firm ground as they go through the process of interviewing.

JUDGE JONES: As a practical matter then, would you be suggesting that the trial counsel would be able to decide whether to grant that immunity on the spot, or is this meant to be automatic? Or are you leaving that to the --

PROF. HILLMAN: We struggled with
the terms to apply to this. Some Subcommittee members didn't like the term "automatic," some worried about a shift away from the convening authority's power. But to have the convening authority make this decision so early, it happens too fast to get that far away from the interview and the initial contact that the victim has with the response of the system. And so our recommendation was that the immunity happened in a way that's transparent to the victims and investigators.

BG DUNN: I will say that, when we had this discussion in the Subcommittee, I think it's fair to say that we envisioned a very short list that addresses really the three or four major types of collateral misconduct, minor collateral misconduct that arise with victims, one clearly being the underage drinking. One service prohibits all opposite sex members in their barracks, you know, so that is something. So any time something happens in one of their barracks,
somebody is in the wrong barracks, and that's minor collateral misconduct.

So I believe that is, you know, what we envisioned in some of these, you know, as Russ said, violations of General Order Number 1 or being in a location where you're not allowed to be outside of the barracks.

MR. STRAND: The biggest difficulty see, ma'am, is that it interrupts the investigative process if we have to stop and then wait a day or two while people figure this out because then what happens with that victim in the meantime? What happens to the evidence? What happens to all those other things? It can be very problematic.

PROF. HILLMAN: Judge Jones, this is to Admiral Houck, too. I mean, we do have a list, the finding which is on page seven of the interim report where it says for the last ten years DoD policy documents use the following list, and here's the list for the most common collateral misconduct in reported
sexual assaults: underage drinking or other alcohol-related offenses, adultery, fraternization, or violations of certain regulations or orders, the like of which Mr. Strand referred to about consensual activity, for instance. So it is a short list.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: Yes, thank you. I was going to point that out, too, so thank you, Professor Hillman. And the other comment I wanted to make for our panel members is that on this recommendation, it's three-pronged. It's a three-prong recommendation once you get to the actual narrative part. So it's not as flat a directive as that may appear on the slide. There's a process which we recommended in the three recommendations.

And the other thing that I think did appear in Mr. Strand's presentation and I want to reemphasize is that we already know the Naval Criminal Investigative Service in these cases does not advise. They are not
following Article 31. They do not advise their victims of their rights when collateral misconduct comes to their attention, and we did not hear anything that their investigations or good order and discipline was being adversely affected because they weren't making those advisement of rights.

MS. HOLTZMAN: Just to follow up on that point. But did you find an increase in reporting in the Navy?

MR. BRYANT: I don't, I don't know that we found any increase in reporting because I'm not sure that they are going to the extent of advertising that to the Naval personnel that you can come in and we're not going to ask you.

COL COOK: I'd follow up on that, too. I mean, it comes down to the Article 31 being if you are a suspect. It's the person's right, the person who's accused. So your choice is you either violate their rights, which is the process that you just described,
or you have an immunity process.

The only comment that I would make on that immunity is if you're going to come up with this list, it's not just within law enforcement, it's not just within the legal community, it's not just the commanders that have to understand where that line is. It's going to be every service member that's in a barracks or coming into a unit, so what's your communication plan? If you don't have it of just saying, look, if you're talking about a sexual assault that potentially involves drinking, that's not what we're concerned about when you walk through the door. If you were in somebody else's barracks, whether it's because you're in a service that says you can never be in another person's barracks of the opposite sex or if you're in a deployed environment and there's usually a general order that says you can't or it's the same sex type of a crime, you have to be able to, if you don't keep that list really short and
really clear, one, you're going to have a
communication problem with the victim that
walks in and says I thought I had immunity if
I came to talk to you and you haven't clearly
explained it to them. At that particular
time, they're underneath the initial
investigation. It's traumatic. They remember
things vaguely. You don't know what shape
that person is in.

So I understand the concept of
wanting to protect them. I also understand
the concept of not wanting to violate
somebody's rights just because you don't think
it's that important and you'd rather have an
immunity. I would just suggest you've got to
keep that really, really short because you've
got to make sure the service members
understand exactly what lines we're willing to
draw on that process. Otherwise, you're going
to create another problem and some more stress
for a potential victim as they walk through
the door.
MR. BRYANT: Well, I think it's equally important to respond to that that the investigators know what they don't have to stop and advise rights for because it's more important for them to know, okay, this is the list that I have prepared by the service secretaries in conjunction with the Secretary of Defense. We ought to let them decide we're recommending that they decide and also whether or not we just need to make some fundamental changes to Article 31.

And I would also point out that NCIS's practice, obviously as the lawyers in the room know, results in use immunity for that particular victim. So it's already in effect for whatever the size of, the 300,000 people in the Navy, something like that.

COL COOK: Yes, but it's in effect in a way that doesn't comply with the laws as they're currently written. So what you're saying, I mean, it's a suspect is what triggers it --
MR. BRYANT: Well, our very first
--

COL COOK: I'm not saying it's
wrong, I'm not saying it's wrong. I'm just
saying that's the effect of what's being done.

MR. BRYANT: And that's why, in
fairness to our subcommittee and the very
important questions that have been asked about
this, that I wanted to point out that it's a
three-pronged recommendation which starts out
with coming up with some uniform practice
within the services first of all.

COL COOK: Just one really, really
minor, minor question on that. You're
recommending that we go to the UCR. What is
the actual standard for the UCR when you're
saying it's a uniformed standard? Is that on
that one --

MR. BRYANT: About founded and

unfounded?

COL COOK: Right.

MR. BRYANT: In the UCR, what the
civilian community does, it must be baseless or what's the other word I'm looking -- false. Baseless or false. That's it.

COL COOK: And that's what the civilians are using now?

MR. BRYANT: That's it. So, yes, a false report or baseless.

MR. STRAND: Right. And it wasn't a crime to begin with because it didn't meet proof and then false is that somebody made a false report.

MR. BRYANT: Yes.

COL COOK: But underage drinking wouldn't fall under that.

MR. BRYANT: Well, she's asking a different issue than collateral misconduct. I think she switched to another one.

JUDGE JONES: Okay.

VADM HOUCK: I forget the statistics on the number of witnesses that you interviewed, but it was staggering. It was a lot. With this particular issue, to what
extent were commanders, was this discussed with commanders, the issue being collateral misconduct? Was that, for commanders, a part of your information gathering on this issue?

PROF. HILLMAN: Admiral Houck, we talked to commanders about their overall impressions of the process and what their role was in stopping this, but we did not question them specifically on this issue. We talked to investigators and to the victim advocates primarily about this issue of collateral misconduct and to trial counsel with their challenges in getting the information they need through the investigative process.

MR. BRYANT: And, Judge Jones, if I may, one of our findings, Admiral Houck, was that the military services not support automatic immunity. And as Professor Hillman said, there were members of our subcommittee who were also having problems with anything that used the word automatic.

JUDGE JONES: I'm sorry. You go
ahead, Ms. Fernandez.

MS. FERNANDEZ: On the Victim Services Subcommittee, this was one of the issues that we struggled with the most. In fact, it was one of the few recommendations and findings where the Subcommittee was split. The majority came out with a need to study the issue more because we didn't really feel that we had enough evidence to make the right kind of recommendation. Again, we were split, and we'll hear more about that later on.

Let me ask you do you feel that you had enough evidence before you to make the kind of recommendation that you have now, or would you have liked more on this particular issue?

PROF. HILLMAN: It's a great question. We do have evidence that this is a problem for successful investigation and prosecution and a problem for potential victims feeling confident enough to come forward. For me personally then, not speaking
for the reasons that everybody came to this conclusion on the Subcommittee, but for me personally that's enough evidence to decide there should be something taken, not to mention we actually see this as not having a huge impact on actual practice because the actual prosecutions for collateral misconduct in sexual assault cases are vanishingly small. Commanders actually are not prosecuting collateral misconduct in most cases right now.

This could potentially -- this is Admiral Houck's concern. This could tie the hands of some commanding officers in some instances where they would want to prosecute a person for a violation of orders that was part of a series of events that led to a sexual assault. I don't want to pretend that that couldn't possibly have that effect, but the huge majority of cases are alcohol-facilitated sexual assaults where we're talking about underage drinking or violating orders related to the drinking policies, which
will increasingly become an issue because of
the more aggressive alcohol policies that I
think we're likely to recognize as a panel
going forward. And because of that, we need
a list that communicates to investigators and
to victims and to everybody else out there,
including offenders, who see the collateral
misconduct of victims is a way to prevent them
from disclosing what happened and coming
forward.

So we did think we had enough
evidence on that.

MR. STRAND: I also had the
unfortunate opportunity to have to stop a
victim in the middle of talking about rape and
advising that person of their rights, and it
is just, and I speak for all the agents that
I work with and talk to, it is one of the most
difficult things that we can do, you know.
There's no way to make it easier. There's no
way to say, well, you know, I just got to
follow this procedure, I'm not really thinking
you're a bad person, because we're not allowed
to do that. We just have to whip out that
rights advisement and talk about it.

It changes the nature of almost
every investigation once we advise the victim
of their rights, regardless of how we go about
doing it. And if we had to wait for the
command to get involved and decide, well, we
don't have to read her her rights, yes, we do,
it really does have a chilling effect. And
that's what we heard over and over again.

COL SCHOLTZ: If I could say one
thing, it does -- Mr. Bryant keeps talking
about this. In recommendation 13C, we talk
about sending it to the Joint Services
Committee to examine three different
possibilities, too. So I'm tending to agree,
I think there is some need to examine it
further.

PROF. HILLMAN: Judge Jones, I
think that we've sort of closed the loop on
these first two sections. I think that,
first, let me mention that I compressed the recommendations and our staff helped me compress the recommendations to put them on the slides. So the actual text of the recommendations, in the interim nature as they are, is actually in the documents you have. As Mr. Bryant and Colonel Scholtz pointed out, those are more precise elaborations of exactly what we're thinking. The slides don't have all that level of detail, which was a decision to not put too much on the slide.

JUDGE JONES: Understood.

PROF. HILLMAN: And I think we can actually -- Judge Jones, if we take a ten-minute break, I think we can actually finish the training section, the next part here, before the break that was scheduled. So if that's acceptable to you, then we'll do that.

JUDGE JONES: All right. We'll take a ten-minute break.

(Whereupon, the foregoing matter went off the record at 11:41 a.m.)
and went back on the record at 11:53 a.m.)

JUDGE JONES: Go ahead, Professor.

PROF. HILLMAN: Thank you, Judge Jones.

So, at this point, we will turn to the next set of recommendations that the Comparative Systems Subcommittee made, which involve training, and these are 23 to 31.

I am going to ask for help from our expert Subcommittee member Colonel Lawrence J. Morris. Colonel Morris retired from the Army after nearly 30 years of experience in military justice and in training. He is right now General Counsel at the Catholic University of America. His military experience included being head of the Criminal Law Department of the U.S. Army JAG, Judge Advocate General's Legal Center and School and, also, Chief of the U.S. Army Trial Defense Service, when he was very deeply engaged in training. So, he is going to speak
to us about the recommendations made on training.

Colonel Morris?

COL MORRIS: Thanks.

Good morning, Your Honor and Panel Members.

I would actually first kind of amplify Mr. Strand's comment about the support we got from this Committee has been nothing that I have ever experienced before, so tremendous in their competence and their responsiveness to us.

What I would like to do is just mention some of the main concepts under training and, then, talk a little bit about some of the ones that we paid the greatest attention to.

I think there are five overall concepts in the training area, the first being competence, the second being standards, the third being methodology or the way we do it, the fourth being sustainment or figuring out
if we are doing it right, and the last one
being the inherent tension in the military
between expertise and breadth.

To the first one --

MS. HOLTZMAN: Right. I didn't
hear your last word. "Expertise" and what?

COL MORRIS: Breadth, with a "D".

MS. HOLTZMAN: B-R-E-A-D?

COL MORRIS: Yes.

MS. HOLTZMAN: Oh, breadth?

Sorry.

(Laughter.)

COL MORRIS: I apologize for my
accent.

(Laughter.)

So, in the first, you know, our
assumption has to be that justice is a product
of competence in all three parts of the
courtroom, prosecutors, defense counsel, and
judges. So, all that we do to prepare them
officially by putting them in seats or have it
in practice, and unofficially by all of the
ways we develop them when they are not formally in training, we have to assume, then, that means that the justice that occurs in the courtroom is the best-possible product.

In the way of standards, we don't have, either within DoD or even in as we looked around the country, you know, no particular published standards. We all know there are standards for the prosecution, standards for the defense, but no granular training standards on particular discrete competencies in this area.

The way people are trained, and in many ways the military does it most comprehensively by what I think many of you are aware of, a real stairstep of training from the minute they walk into their respective Judge Advocate General's course and, then, throughout with each level of experience and with each level of additional responsibility that is expected of them.

Civilians had a mix. There is
some amount of formal training, generally not
as much, not as routinely available, not as
easy to mandate; tend to be busier people.
And also, though, greater intensity of on-the-
job training and a greater reliance in on-the-
job training. Also, with certain relatively-
shared baseline of experience, at least in big
places.

Where there was a three-to-five-
year threshold before you tend to be trusted
with a sexual assault case of much complexity,
some talked about a baseline of 50 or 60 cases
as considered new experienced enough to be
have launched on your own. I think we know in
the military a relatively-small number who
have that level of experience. We don't have
any kind of formal criterion there, but we do
have an expectation that on-the-job training
occurs in every job all the time. And so, we
have a formal structure as well as kind of an
informal training that goes on through each
level of supervision.
As far as sustainment, there is discussion about some way, and there are a couple of recommendations in there about looking for some common evaluative instrument. We don't have it now. Different Services have begun to look at them, and to the extent that we are looking to unify and standardize some amount of training, then it makes sense to look at some way to measure that without just getting tricked into what is the conviction rate, and that sort of thing, as a baseline or controlling metric.

And then, the area that would always keep this complicated in the military is the tension that I am sure you all have discussed, and everybody wrestled with, between the ideal world of deep competence in a particular area, at least deep competence in trial work as a prosecutor or a defense counsel, as a trial advocate, and the militaries need to have you do other stuff, and to have to grow people through a career,
so that they can supervise people in those realms and in other realms; they can go to war. They have sufficient versatility to do things beyond that area.

And with that in mind, then, let me talk a little bit about some of the recommendations.

One of them talks about, our Recommendation 25 talks about the Navy's plan that has concentrated expertise and created the career track that many of us, as young officers, coveted, and, then, begrudgingly came to realize it is just not likely to happen.

But what is back in front of us, and all we recommend, is think hard about it. Look at the Navy's recent and intensive experience in this area and discuss whether, if not that, something short of a totally ad-hoc system makes sense.

Is there a way, is there something on the continuum between the concentrated
current expertise that the Navy is encouraging and some of the informal practices that grow up among the Services where there is not a formal track, but they do tend to manage and cultivate groups and subgroups of people, so that you don't have an utter randomness to the development of expertise and you don't have such an atomizing of that, that you don't at least take and encourage and cultivate it in the right people at the right levels?

Our next recommendation, similarly, about defense expertise then is, of course, that the defense counsel should never have less training opportunities, less developmental opportunities than the government has. I think we mention later that, of course, there should be equivalent funding.

But we also need to remember here that, although that is important, to be equivalently-resourced, that most of the training happens in the other 50 weeks of the
year that you are not sitting in a class somewhere. So, though that is important, it also is more important, as important, to look at the people who are put into those roles. So, you could go to the best class in the world and, then, come home to an indifferent or distracted or unprepared or not terribly competent boss of this person as a trial advocate, and therefore, that person doesn't get the coaching, doesn't get the development, doesn't get the intensity of the supervision, doesn't have somebody sitting in the courtroom watching them, debriefing them, and all that kind of stuff.

So, though these formal mechanisms are important, it is all of those other expectations that we have that are, then, reflected in the things like assignment policies that are the best guarantors of the corporate expertise on both sides of the courtroom.

Our next recommendation, No. 27,
talks, then, about ways to manage the tension we talk about between the institutional bias toward touching a lot of areas of practice and concentrating hard while you are in the job. And one of the recommendations we have is to sit for two years in place. As a defense counsel, we make that an equivalent argument on the government side. So that you go and do that job and resist the temptation that exists between this person is pretty good at this.

Let's do a new thing.

Particularly with the plateau that the Services are currently sitting at in terms of cases per number of thousand Service members and the percentage that are contested, and that sort of thing, staying in place for some stable period of time at least means that in those tours of duty they are likely to get sufficient experience that the system can say there was some quality and developmental ability that attaches to that tour of duty.

We mentioned the metrics and
mentioned equivalent funding, which, then, takes us out of order, back to the first recommendation, No. 23, which is think harder and look at joint training.

Each of the Services has distinct competencies and recent initiatives that are standing alone really useful. There has long been a lot of cooperation among the Services anyway. So, it is not novel or earthshaking to say, "You ought to work together," because they have, but it is a matter of considering standardizing the cross-communication, particularly in an area that is as critical as sexual assault, and not just because sexual assault is getting the attention, but the basket of advocacy skills that is required in that area is broader than most any other areas.

You have important competencies in dealing with victims, in preparing your witnesses, evaluating scientific evidence, looking at the evidentiary complexity of rape
shield and other matters, and dealing with the
dynamic of preparing and arguing about such a
fundamental human interchange.

It has challenges for counsel,
just as trial advocates, even before you begin
to talk about the stake that the system has in
those cases.

One last recommendation -- I am
not sure where it is, other than I know I
skipped it -- is the presence of civilian
trainers. The military began a move about
five years ago to what are grandly called
"highly-qualified experts," which means
civilians who have done a lot of other stuff
before they came into the military.

That has been, I think by most, I
think by all Services who have used them, an
enriching capability, for a couple of reasons.
One is these are people who have been career
trial advocates mainly or exclusively in the
sexual assault area. So, recognizing we are
not likely to have that, we are not going to
have it soon, and we do have people who have
done it for a career's worth of time, they
bring a depth and perspective that is not
present or not present in any significant
amount in the Services.

They also bring the "Have you ever
thought of that?" kind of perspective of a
civilian who doesn't have the same view that
somebody who has just worked in our
relatively-closed system has.

So, we have a consensus that,
however you structure it, whether it is what
they call the HQE system or some permanency in
the system, there is much value to having some
amount of permanent competency by people who
bring that perspective from the civilian
world, attached to both the prosecution and
the defense training mechanisms in all of the
Services.

I can answer your questions then.

PROF. HILLMAN: So, thank you,

Colonel Morris.
Judge Jones, I think what I will do is I will walk through these recommendations and actually take on a few more that relate, that run into the next session, which are very much related to what Colonel Morris talked about in terms of training defense counsels. And we will make sure -- he hit on most of these -- so, I will go pretty quickly through the ones he mentioned.

So, the first is No. 23 there. It is establish a joint training working group to assess the very things that Colonel Morris set out, looking to eliminate redundancy, consider consolidation, and monitor training and experience, setting out standards, and formalizing in some ways what Colonel Morris pointed out already happens.

The next is about funding for training of Judge Advocates and our recognition that we need the Secretary's support to make sure this is sustained or
increased, in order to maintain the expertise we need in this difficult and challenging arena of litigation.

The next is about training of trial counsel, and that is the recommendation that Colonel Morris mentioned to look, not to implement in a lockstep in inappropriate fashion a program design for the Navy, but to reckon with how to maintain the litigation expertise, which many counsel told us they lose quickly when they step out of the courtroom and that they need to have in order to be successful in these prosecutions.

Next is about training of military defense counsel. Again, we want a comparable level of training and effectiveness for defense counsel to preserve the legitimacy of the military justice system.

This is about only experienced attorneys. So, this is a recommendation to say we need those two years. We would like counsel to be in place for two years rather
than the short tours that they sometimes have, not always, in order to make sure they have the experience and the chance to develop the expertise they need to be effective.

Likewise, the funding needs to be there to make sure they have opportunities that are comparable to the opportunities for training of trial counsel.

And then, Colonel Morris mentioned this, too. We want to leverage, as the Services are, but perhaps it could be a short-term move rather than a longer-term move, we want to preserve that, to continue to fund and expand, if possible, programs that leverage civilian expertise here in the training that happens for military trial and defense counsel.

This is about evaluations, and it is a recommendation that we consider setting some standards and engaging in a formal evaluation there, similar to the Navy's judicial evaluations of military counsel's
advocacy skills, recognizing that feedback for our counsel would be helpful to them and our judges have expertise in reckoning how the attorneys are performing who are before them.

And then, training of military judges here. We can't talk about training and not talk about military judges, especially given that we are going to propose that military judges have a little more muscle in the system than they have right now, and we need to make sure that they are trained as well.

They currently participate in joint training. We need to make sure they have the opportunities to understand the difficulty of these cases and, also, their role in the process as it changes, which it has continued to change over time with all the reforms and alterations that Congress and the Secretary have made to the processes that respond to sexual assault.

So, I am going to go ahead, Judge
JUDGE JONES: Please, go ahead.

PROF. HILLMAN: -- if it is okay with you. Okay. And then, I will do a few of these, and then, I will leave some time for questions of Colonel Morris and the rest of the Subcommittee members from the panel.

JUDGE JONES: That's great.

PROF. HILLMAN: But let me walk through a few more of these recommendations that are related.

The multidisciplinary facilities issue has come up. And much like we suggested that the Navy's litigation track or other Services' programs be considered and leveraged, we don't want to suggest there is a single model that would work for investigators' and prosecutors' collaboration.

So, here we recommend co-location when the caseloads justify consolidation and where resources are available. Because we did see evidence that that worked effectively.
There is no single model that we think is best here. There is no single model among the civilian organizations and government and non-government defense or prosecutors' offices and investigators. There is no signal model there.

But there are many different ways to provide this. Consolidation can improve communication and can also serve our victims better, but it is not the only way to actually make this happen.

Here is an example of some of the different models that we looked at. The first block there is Dawson Place in Everett, Washington, which is close to a military version of an interdisciplinary co-location model, at Joint Base Lewis-McChord, both of which we visited, both of which have really extraordinary and dedicated teams of people working together to bring into one location the different strands of effective response to sexual assault, from the victim advocate, the
SANEA or the SAFE, the forensic support, and
the support through the medical process, the
Special Victim Council, in the military that
is, not in the civil sector, the investigator,
the prosecutor, and then, the victim witness
liaison who serves as the guide through the
process of prosecution for the victim.

The other models that we saw there
are listed, too. In Philadelphia and, then,
in Austin, Texas, we visited those locations
and talked to them about how they set this up;
Arlington, Virginia and Ft. Hood, and then,
Marine Corps Base Quantico, about the co-
location.

But we didn't recommend that co-
location happen everywhere, in being aware of
what the challenges of that could be. I will
mention some more about those challenges
later.

But let me walk through the rest
of these. I will do a few more
recommendations and, then, pause for
questions.

This is about the special victim prosecution, specially-trained prosecutors here. So, we want to make sure that training continues, to make sure that we have special victim prosecutors who are well-equipped to manage the challenges of taking these cases successfully to trial.

But we don't want to put so much of a burden on those prosecutors that we aren't able to deal with the caseload that is likely, given the increase in reports, including some low-level sex offenses in the spectrum of Article 120, misconduct. So, we think requiring special victim prosecutors to try 120 case is not likely to be feasible or effective.

And we think the definition of covered offenses ought to be changed because the terms that are used there don't match, actually, the terms that we are using now to define these kinds of conduct. So, that is a
recommendation about using resources
effectively and, also, defining terms.

The next one is about prosecutors,
too, about resourcing prosecutors. This
relates to the training that Colonel Morris
just spoke to you about.

We need to continue to assess and
provide the resources that are needed to get
well-trained prosecutors in that thing called
the Special Victims Prosecutor or special
victim capability, that SVC, which is that
capability to bring resources together to
address all the needs of the victim through
the process.

We recognize the Services might
need additional SVPs if there is a continuing
trend, especially if we don't change the
requirement that they actually prosecute every
120 case, and that we need to fund the case
preparation requirements, the investigation
and the preparation of the case there.

Let's see, I will do, I am going
to do through 36 here, Judge Jones, and then, I am going to pause for questions.

So, No. 35 is about prosecuting sexual assault cases. Just as we need to assess the effectiveness of counsel on the ground, we also need to assess the effectiveness of this special victim capability. We recommend that that happen annually and that we continue to develop metrics to identify success. In particular, we recommend adding this dropout rate, so that we can assess the effectiveness of keeping victims engaged through the process.

DoD has a list of the criteria for evaluation. The dropout rate actually has shown that this is a capability, the Special Victims Prosecutors, that is helping the success of these prosecutions and meeting the needs of victims who want to stay engaged in the process. We want to make sure that continues and try to measure that effectively.

And then, the last one I will do
right now, prosecuting sexual assault cases. A prosecutor's initial involvement, this is something that Representative Holtzman mentioned. We want to maintain the 24-to-48-hour standard for coordination between the investigation and the special victim prosecutor. And we want to add a requirement that the prosecutor gets in touch with the victim as soon as possible.

Right now, we don't have a clearly-articulated standard for that. It does often happen, and the prosecutor is out there. And the Branches of Service realize that it enhances their opportunity to have a successful case and to find what the right outcome is, if they get in touch with the victim early.

The best practice from the civilian jurisdictions with whom we spoke was clearly that the prosecutor gets involved from the start. One of our Subcommittee members who is not here is Rhonni Jaus, who is the
King's County District Attorney in Brooklyn, New York, and who has many years of experience as a prosecutor in special victims cases, in sex crimes, and lectures and speaks about this.

She finds it absolutely essential that we get the prosecutors involved very early. And so, this is a recommendation that we follow what is happening, but hasn't been articulated in terms of the standards, and is a best practice from the civilian jurisdictions.

Okay. So, the next few are about defense counsel. But I want to leave you a little time for questions. We have about 15 minutes until our break.

Judge Jones, I can do a few more of the recommendations or we could take some questions, if you have them, right now.

JUDGE JONES: Well, let me just ask. Are there any questions relating to the last five or six?
(No response.)

I don't have any. All right, then, why don't we take the next?

PROF. HILLMAN: Okay. If you are following along at home, we are on 37. This is about the military defense, the trial defense structure and budget.

One of our challenges is making sure defense counsel are resourced adequately. There has been attention to the prosecutors and the importance of having the expertise we need to successfully prosecute and win convictions in the cases that we can, and where that is serves the interest of justice and the interest of the victim and the interest of the military.

But we need to make sure defense counsel are adequately resourced, too. So, the challenge has been that military defense organizations don't have their own budgets, and that that limits their abilities in some cases, they think -- they told us during site
visits, and it has been raised before -- to prepare their cases. So, we have some recommendations around that, but they aren't right here yet. We will get to those, though, about how the defense, we can do a better job supporting defense counsel.

This recommendation is about, the next one, 38, directing the Services to give defense counsel investigators. So, defense counsel repeatedly told us when we were out talking to them, and certainly those of you who have been defense counsel have had this concern, that they have to go through -- they don't get the information they need about their case because they don't have investigators.

So, we recommend that there be independent, deployable defense investigators to increase the efficiency and effectiveness of defense counsel and of military justice, then, altogether.

Right now, the military defense
counsel rely on the Military Criminal Investigative Office, and that is insufficient for them. Independent investigations could make things go faster.

Mr. Strand, did you want to comment on that?

MR. STRAND: The MCIO agents are really, really good at what they do, and they are unbiased investigative agencies, but they are often seen by the defense attorneys as being biased or they don't want to disclose to the MCIO agents their hand, or whatever.

So, we did find in many jurisdictions that independent investigators working directly for the defense attorney or defense attorney's office was really beneficial. And we see no reason why that shouldn't also be beneficial in the military as well.

PROF. HILLMAN: Okay. In addition to providing investigators for defense counsel, we recommend that the Secretary
direct the Services to assess the performance of defense counsel in sexual assault cases in particular. We don't have any metrics that are standard that we sort of assess effectiveness. It is never a simple process of evaluating the effectiveness of counsel, but we do it in many other instances, and we need to do it here, too, using the ideas that Colonel Morris set out at the start about how to measure competence in representing clients in the military justice system here.

The next one is about the trial counsel's role and victim's rights. So, we are walking through the process of prosecution and talking about how the different players ought to be assessed and supported in their roles in the process.

This runs to the trial counsel's role in protecting the rights of victims. Right now, there isn't on the record a military judge inquiry into whether or not the prosecutor has actively done the things that
are require. So, we want to ensure that trial
counsel do comply with their obligations to
afford victims their rights, and require the
judge to ask on the record whether the trial
counsel complied with the statutory and policy
requirements related to victim's rights. So,
that is another safeguard for the victim's
rights in the process, by putting it on the
record that the trial counsel did actually
ensure the victim's rights were protected,
which they are required to be under the UCMJ
and which they are now. We just want it on
the record, another safeguard there.

So, 41 is a recommendation about
the interaction of the Special Victims
Counsel, the new feature of military justice
in recent months and year, or so, now and
trial and defense counsel. We need feedback
on how this is working out from staff judge
advocates, from prosecutors, from defense
counsel, and from investigators.

The Special Victims Counsel, they
are lawyers who are going to work hard and
pick up the tools that are available to them.
That is what we expect them to do. But we
don't know what impact that is going to have
on the rest of the system.

So, we need some assessment of
this. So far, we have had positive reports
from the different parts of the system who are
dealing with Special Victims Counsel, but
there are potential issues here, including
some that were reported to us in site visits
and that have been raised elsewhere.

These include issues of privilege,
confidentiality, and delays, because the
government's interest and the interest of
victims will not always precisely align. And
the Special Victims Counsel is now able to
assert the demands, the concerns, the needs of
the victim in a way that will change the
process in an appropriate fashion going
forward, but we need to be prepared to adjust
and adapt to that. So, we need some feedback
on it. So, we recommend we assess that
interaction and keep track of it, as this
Special Victims Counsel Program matures.

This is also about victims' rights
and the Special Victims Counsel. This is a
legislative proposal. I mentioned at the
beginning that our responses to some of the
legislation that is out there appear
throughout the presentation.

This is about the Victim
Protection Act and a particular provision of
it. This is a provision that suggests victims
have a choice of military or civilian
prosecution.

So, we recommend Congress not
enact that provision. The reason is that,
right now, the decision to prosecute is
routinely negotiated between civilian and
military representatives. It was not voiced
to us as a significant source of tension or
problem. Because of that, it doesn't make
sense to us to suggest that the victim have

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that choice of military or civilian prosecution.

And we didn't put this in here, too. So, we want victims to have a voice in the process. They have that, in part, through their advocate and the Special Victims Counsel, but victims don't legally have control over jurisdiction, and suggesting that seems to us a disservice to victims, too.

All right. This one is a hard one, which we punted. So, let me get to that one before lunch. That's good.

So, this is Article 120. Article 120 has been changed significantly twice since 2007. We recommend that the follow-on panel to our panel, the Judicial Proceedings Panel, study the wisdom of future changes.

And especially, we recommend that -- and this is laid out in the recommendation that is actually in the text there -- that we either narrow the spectrum of things that we call sexual assault or split things out in 120
in a way that doesn't compress so much
behavior that is in a spectrum of things that
we call sexual assault, in a way that obscures
what is happening, and makes it difficult to
respond effectively.

We are the Comparative Systems
Panel. We looked at what civilian
jurisdictions do. Usually, sexual assault
refers to felony-level crimes like rape,
penetrative offenses. Misdemeanors are
contact offenses, contact with an intent to
satisfy sexual desires, sexual gratification.

Article 120 spans all of those
things. It is a very broad range of conduct
that is included in Article 120.

The last line there I added to
this slide. We would like follow-on study of
this, in part, because it is very difficult to
decide to change again a statute that has been
subject to so much revision in recent years
and under which prosecutors are effectively
bringing to justice persons now. And yet, the
statute itself has some problems in it. So, we are not sure it should be changed, but we do recommend further study, with an eye towards breaking out what is a very broad spectrum of different offenses that are now charged under Article 120.

Okay, and these next, I think I have -- oh, we are doing great, Judge Jones. We have time to wrap up a couple more of these.

The charging decision. So, this is a no recommendation. So, we did look at whether there should be a change in the discretion to draft the charges, and we compared the civilian practice to military practice. And we found both have broad discretion, and we do not recommend there be a change right now in that, because we currently allow both sets of prosecutors to respond to the situation before them and draft appropriate charges, given the law, even when the law is Article 120.
And then, 45, okay, this is another. This is a finding rather than a recommendation.

Again, we don't recommend a change in the disposition decision. So, civilian and military prosecutors face the same sort of initial case disposition decisions. This is a question of whether they want further investigation or commence or decline prosecution.

The second part of this finding also runs to the alternative disposition options that are available for a military incident of misconduct, as compared to civilian incidents. There are alternative dispositions available in civilian jurisdictions, too.

These are the ones, some of the ones, that are distinctive in the military system, and those continue to exist. We do not recommend that they go away, that the full spectrum of disciplinary actions continue to
be available, and that we continue to track
how they are used, which we are now, which the
SAPRO report does this morning, of how they
are used in responding to the different
incidents of misconduct, including sexual
assault to come forward.

Okay. And, Judge Jones, the next
one is sort of big. So, I wonder if we should
pause there and, then, take any questions, and
come back after lunch to talk about the
military judge's role.

JUDGE JONES: I think that makes
sense.

Any questions with respect to
these last few?

COL COOK: Two more questions.

JUDGE JONES: Colonel?

COL COOK: They are clarifications
really, one for Professor Hillman and one for
Mr. Strand.

In terms of all the training that
is in here, first, I think this is a great
layout of the issues, and I applaud all of you. Thank you for the time and the effort that went into it.

On the training part, on Recommendation No. 9, all of the training has to be funded. In Recommendation No. 9, it just says it is Congress who appropriates centralized funding for the investigation piece, as opposed to any of the training requirements on the defense, the prosecution, the judiciary. And you talked about the Secretary's authority in those cases.

Was that intentional, this distinction between the two, that you want it centralized at the congressional level for the investigators, but at the Secretary's goodwill at the Service level?

PROF. HILLMAN: It was an intention distinction that runs to our understanding that, for instance -- and Mr. Strand can talk more to this -- that
discretionary funds for training are easily lost, and an imperative to do that, an imperative to have them set out separately exists.

One of the comparable programs to the responses that we are talking about is the Family Advocacy Program. Mr. Strand can talk about this.

One way that Congress ensured that there were sufficient resources for where domestic violence ends up -- we should be clear; you know, incidents of sexual assault that take place in a domestic violence context do not come under all the reports that we are talking about. They are still classified separately through the Family Advocacy Program, which is funded separately, which is a problem in terms of addressing this as a holistic set of issues because many sexual assaults do take in place within families and end up there.

But the Family Advocacy Program
was successfully funded and stood up through funds that were appropriated specifically for that and were not discretionary.

Mr. Strand?

MR. STRAND: Yes. We have seen some benefit from that in the training arena of our agents and our investigators and first responders. We did not see the same concern from the legal side, whether funding was a problem or a concern in the outyears. So, we didn't get any information that they were concerned about future funding of the programs the attorneys currently have.

COL COOK: That is what I wasn't sure of. You know, if we talk about maybe sexual assault training in general and earmarking it, as opposed to just picking out one piece of it. Just a thought.

The other question I have, Mr. Strand, is more towards you, when you talk about the investigators for defense counsel. The way the defense counsel can get an
investigator now is they go to the military judge and ask for an investigator to be appointed as a member of their team, and they get that resource.

What you are suggesting, if you would clarify for me, is that we train a pool of defense investigators. Do they automatically go out? Are you talking about regionalizing them or putting them in offices, so they become available as a resource for the defense counsel, or does defense still have to come forward and ask that that person be a member of their team to protect that client confidentiality piece that is so important to their case?

MR. STRAND: Right. That is a great question.

Back when I was first an agent, we used to have investigators over at the defense offices. Usually we would put MP investigators there. Where we had CID agents, I am talking about the Army who had CID agents
investigating the cases and MP investigators who had less training, less experience, working less complicated cases, doing that. So, then, we fell out for a while.

The judge can order an investigator. The problem is, and one of the reasons why we made this recommendation is, I believe the MCIOs right now are overwhelmed with just investigating the case. To add additional requirements, this could easily push it over the top; you know, if the request came to NCIS, OSI, CID, CGIS.

We also believe that defense investigative work is slightly different than prosecutor work. And so, it might be better for the defense attorneys with that confidentiality piece, but, also, with the nature of the types of investigations.

Basically, defense investigators are looking for holes in our cases. They are looking for holes in the investigations. They are looking for things that we didn't do right
and exploiting things, along with contacting, you know, recontacting witnesses or identifying other witnesses.

So, if a military criminal investigator was detailed to do that, that might be problematic from the perception level. Also, they may not have the resources or the desire to be shooting holes in the boats of their fellow agents that they are going to go back to.

COL COOK: So, you are talking about maybe, just to make sure I understand, a stovepipe organization that answers back to D.C. someplace, the same way we have with the defense community, of investigators? So, they are not going to be associated with the local investigative office. They are defense investigators assigned wherever you choose for them to be?

MR. STRAND: They would work for Trial Defense Services or whatever service.

COL COOK: And if a defense
counsel calls them, it is not something that
is successful to that site? Okay. I just
wanted to understand what you were suggesting.

I am not sure if Colonel Morris
had a comment to that.

COL MORRIS: Yes, Colonel Cook.
We didn't want to be too prescriptive about
what it would ultimately look like, because
there are a bunch of models out there. One is
to have kind of Trial Defense Service
equivalent on the investigative side, where
the person checks out of that command, checks
into a defense command, and then, plugs back
in at some point, with all of the protections
that we have come to see in 30-some years of
independent defense counsel that makes it
work.

But, in other ways, the federal
public defender model we talked about as well.
We talked about systems where you could
contract with retired investigators, who,
then, would have -- you would have none of the
aura of less than total independence because they would have to lean back into the system.

So, our sense was to be very clear that it is overdue to have the capability and, then, work out the details.

COL COOK: I just wanted to make sure it wasn't going to be defense has to come forward and ask for that. Again, it becomes a resource available --

COL MORRIS: Oh, you could not have that, right.

COL COOK: Okay.

COL MORRIS: It shouldn't be ad hoc.

COL COOK: I couldn't tell that from the brief comments on the recommendation. So, thank you for the clarification.

COL MORRIS: You're welcome.

JUDGE JONES: Any other questions?

Yes, General?

BG DUNN: I had one comment I wanted to make to clarify the discussion on
the Victim Protection Act. And the reason that we came out like we did, well, there are two reasons we came out like we did.

One, many federal jurisdictions, many federal installations are exclusive federal jurisdiction. Therefore, if the military doesn't prosecute the case, only the U.S. Attorney can then prosecute the case.

And we had, without me identifying the specific office, we had a rather significant U.S. Attorney's Office sit in front of us and say, "Hey, you know, we don't have any more experience prosecuting sexual assault than you do. That is not what we do on a day-to-day basis."

And that really underlay our recommendation with regard to that piece of legislation.

PROF. HILLMAN: Just to underscore General Dunn's point, that means that a victim who would say, "I want a civilian prosecution" could be routing the prosecution to a much
less-prepared and less-resourced authority
than the military would be. And hence, not
serving the needs of the victims.

JUDGE JONES: Then, I think we are
ready to break for lunch. See everybody at
1:30, 1:00? No, no, I mean, when do we come
back? One o'clock.

(Whereupon, the foregoing matter
went off the record for lunch at 12:33 p.m.)

JUDGE JONES: All right, go ahead
Professor Hillman.

CHAIR HILLMAN: Thanks Judge
Jones. Okay, back from this morning. Now
we're continuing with the recommendations from
the Comparative Systems Subcommittee.

And we're turning now towards
recommendations related to the roll of the
military judge. In order to help us with
this, I'm going to ask this afternoon with
some more members of our Subcommittee, to set
up the recommendations for us.

For this section, Colonel Steven
R. Henley, who brings another nearly three decades of military justice experience to our subcommittee. He retired as the chief trial judge of the trial judiciary in the Army. So, Colonel Henley

COLONEL HENLEY: Thank you very much Professor Hillman. I think I'll start by saying one of the criticisms or complaints we heard from the military justice system is the length of time it takes generally from the date of the alleged offense to the date of trial.

And I think that's in part due to the fact that the military does not have standing courts. So I'll start over again, is that fine now? Or I'll speak louder.

So one of the criticisms that we heard of the military justice system is the length of time it takes from the date of the alleged offense generally to the date of trial. And I think one of the reasons we attribute that is that the military does not
have standing courts like the civilian system,
the federal and state judiciaries.

So the military system, the court
itself, does not come into existence until the
convening authority refers the charges to a
general or special court. So it was my
experience on my time on the bench, that once
the charge had been referred, and the military
judge's time, initially is involved with
issues that could have been addressed
pretrial.

Discovery issues, we've heard
reference to requests for expert witnesses,
which now the defense counsel request through
the convening authority. And if the convening
authority denies the request for an expert,
the first time the military judge can address
that is after referral. So if the military
judge actually grants the request for expert
assistance, it's built in some additional time
and delay into the process.

So the suggestion would be while
not to have standing courts like the federal
or state systems, is to have a hybrid where
you involve the military judge earlier on in
the process to try to address and resolve some
of these pretrial issues earlier on before
referral of charges. And those would include
expert requests, various discovery issues,
motions to compel evidence, if there are some
pretrial restraint issue, and those issues can
be resolved before you actually get to trial.

And I think with that background,
I think some of the recommendations in that
context will make sense.

CHAIR HILLMAN: Okay, thank you
Colonel Henley. So Judge Jones I will walk
through these recommendations and then take
questions on these before we move on to the
next section.

So these are all recommendations
numbered 45 in your findings and
recommendations. But they're 45 A through F
because they're all parts of what we recommend
about the military Judge's role. So there's
a few slides on these, I'll walk through
those.

First, comparing the civilian and
military judge's role. As Colonel Henley just
set out, the in the civilian criminal justice
system, we have standing courts. We just
don't have those in the military.

Courts-martial are ad hoc.
Because of that, military judges don't get
involved until referral. There are issues
that come up before referral that military
judges actually do have to resolve. This
would streamline the process and would --
would in our assessment improve it.

And I'll give you some specific
examples of what that is in these. So first,
military judges should rule on defense
requests. Defense requests specifically for
witnesses, for experts, other pretrial
matters.

Right now defense counsel go
through trial counsel, which means going
through the convening authority in order to
get the witnesses for instances that they
want. This requires a disclosure of
information to the trial counsel that many
defense counsel to whom we spoke, did not
appreciate.

We also realize that military
judges already rule on these matters when they
-- the challenge comes up. So having the
military judge do this is not a new task, but
this would be a more formalized way and an
earlier way for them to do it.

And it would also enhance fairness
in light of the Article 32 changes. And let
me mention those as well. I'll mention those
again in the next slide.

We also recommend that military
judges be able to issue subpoenas on behalf of
defense counsel. Many defense counsel told us
that they struggled because they didn't have
symmetric authority to what trial counsel
have, because trial counsel do have subpoena power.

So we realized in the comparative study that some civilian public defenders do have subpoena power. And we recommend that military defense counsel be able to get that subpoena through the military judge.

In terms of the changes to the Article 32. Congress has changed the Article 32 into what closely resembles a preliminary hearing. The changes have made the pretrial processes in the military more similar to civilian processes.

Our recommendation is that a military judge rule -- preside as a military judge. Not as a hearing officer, but as a military judge at the new Article 32. And that that military judge's ruling related to probable cause be binding so that the case does not proceed unless there's more evidence that's brought forward.

So this is a -- this is a
recommendation that would not allow a convening authority to go forward with a prosecution if a judge presiding at a preliminary hearing made a determination there was no probable cause.

The last part of this slide goes to another piece of what would change in the pretrial process. Civilian approaches to victim pretrial testimony vary somewhat. We heard different descriptions of how that works out.

We think that our follow on panel here, the judicial policy panel, should assess depositions in light of the changes of Article 32. And see whether changes are warranted because of the different process by which the Article 32, that is the pretrial process, will unfold under the new Article 32 compared to how it had in the past.

I think, okay. So those are our recommendations related to the military judge's role. So I'd like to give the panel
a chance to ask any questions about the  
military judge. You have a couple of military  
judge -- former military judges there before  
you there. General Cooke, Colonel Henley and  
other experts too, so.

JUDGE JONES: Admiral Houck?

VICE ADMIRAL HOUCK: The  
recommendations on the judges role are  
interesting. And I think that one of the  
things that one of the questions that comes to  
mind is, if we assume that the military  
justice system now is set up like it is, not  
out of a desire to prejudice the defense, but  
for some other purpose. That the unique  
rules, unique vis a vis a civilian system for  
example, about going through the trial counsel  
and going to a commander for resources and  
widneses and experts and such, that there was  
some purpose behind those roles -- those  
rules.

Do you all feel that the purposes  
behind those rules have gone away? That they
don't exist anymore? Is the question clear?

Put another way, it's different than the civilian system. And presumably different for a reason. And I think it's really understandable, the recommendations you make on their face make a lot of sense.

But I'm interested underneath, the rationale for the original system, and does it no longer exist such that we can just move to these changes which make this a lot different system in some respects.

A lot of experience here, so I'm very interested in the answer. Yes.

BRIGADIER GENERAL Cooke: There are a number of reasons why the system was structured as it is. A lot of it is historical and just the way it's evolved.

I think the biggest reason today why defense have to go through the trial counsel and the convening authority in order to get a witness -- to get witnesses or other assistance like that, is because that's where
the money is.

The convening authority is responsible for paying for the trial. And the defense needs to go to the convening authority to get that money if there's money involved.

And we wrestled with that. Because that's still a valid reason. The costs of a case are something that can't be completely wished away in all of this.

However, in view of the strong interest in making sure that the defense is treated fairly and truly has equal access as the code requires, we concluded that that reason is outweighed by having to go to the judge. Now the judge is not going to be a rubber stamp here.

The judge has to look at the defense request and make sure that it makes sense. And presumably the judge is also going to take into account costs involved in the case.

But again, balancing the reasons
why it's been the way it has been, and the
concerns we have about making sure the defense
has equal access, we concluded that the
defense ought to have that avenue directly to
the military judge.

VICE ADMIRAL HOUCK: Did you all see that the system as it is, is created real or perceived, prejudiced to defense interests as it's currently implemented?

BRIGADIER GENERAL COOKE: I can only speak for myself. I think it's both. I think perception is broader than the real.

But I think there are cases, I can't point you to a specific one, but I think based on my experience, there are cases where the defense either didn't ask for a witness, or asked and didn't get, and didn't renew the request to the judge. Or it was too late to renew the request to the judge, because of the current structure of the way things work.

So I think there is an actual detriment to the defense in the way the system
MR. STRAND: Plus the Article 32 process has obviously changed significantly over the last couple of years, especially this last year, to where I think the original role was to have you know, another non-legal person involved, look at it for the commander. That's changed significantly with the last NDAA.

But another thing I'd like to point out. When Professor Hillman talked about you know, the judge making a determination on probable cause with prejudice, I mean binding to the government, without prejudice to the government.

So the government can still go back at any point in time and say we've got this additional evidence, or thank you your honor for you know, this. And then go back and either find additional evidence, have additional evidence, so they can go back again.
There's also been a lot of scrutiny over the legal system as far as 412, you know, and some of those other things. You know, when you have a non-judge making decisions on those, which eventually then can complicate the trial in the future. So those were some of the considerations that we had as well.

BRIGADIER GENERAL DUNN: May I add just one comment.

JUDGE JONES: Go ahead.

BRIGADIER GENERAL DUNN: On the specific issue of access to the military judge earlier in the process for witnesses, we did consider that in light of the fact that Article 32 is -- looks like it, well, it is, you know, with the legislation that's been passed, so much more limited in the future.

And we did hear quite a bit from defense counsel about their you know, their fear that they'll be sort of a complete inability to bring witnesses in and talk to
them in that environment. And we saw it, aside from you know, fairness to defense counsel, we also saw it as a -- or the discussion also centered on speeding along the process of the case a little bit.

Because you know, as we know now, you can't always go to the judge after the prosecutor and the convening authority don't give it to you. It just allows the process to move a little faster.

JUDGE JONES: Yes?

MS. FERNANDEZ: I just wanted to point out that our subcommittee ran into this problem too, pre -- pretrial. And that a lot of times the victims need to assert their rights pretrial. And there is no mechanism in order to do that.

So it works both for the defense and for the victim in this case. And I applaud the innovation.

CHAIR HILLMAN: Judge Jones, may I just respond briefly to that?
JUDGE JONES: Yes, go ahead.

CHAIR HILLMAN: Just that the creation of the special victim's counsel also may increase the number of pretrial issues that need to be resolved. And that runs to the victim being represented through that pretrial process too.

MS. FERNANDEZ: Exactly.

JUDGE JONES: Liz?

MS. HOLTZMAN: I just have two quick questions. One is, I think General Cooke, you mentioned that judges can take into account the cost of issuing the subpoenas. Is that normally something a judge can do?

BRIGADIER GENERAL COOKE: Well I think in most civilian jurisdictions, the judge isn't typically having to get involved in too many subpoena cases.

I think in this situation where the defense doesn't have to worry about the money, the money's coming out of a different pocket, there is a danger that goes the other
way. That the defense will make requests for
witnesses that would run the costs way up.
And the witnesses may not be -- or whatever
assistance is being asked for may be of
marginal value.

So I think the judge is going to
have to look at that and say whether the
defense is being potentially abusive or
reasonable in their requests. And so costs
would I think, have to be something the judge
would take into account here.

If we gave the defense a pot of
money and said you can use your own money,
then there's a natural constraint on the
defense to decide which cases are we going to
ask for witnesses and which aren't we. But
we're not proposing that because that raises
a whole other slew of questions in terms of
funding and so forth.

So this way, rather than the
defense having to go through the trial counsel
and the convening authority and tip his or her
hand on the case, and leave it up to them whether the witness should be produced, or the other assistance should be provided, we think a neutral judge is the one who ought to make that decision.

MS. HOLTZMAN: Also my question has to do with the issue of the disposition by the judge pretrial, which would effect the commander's ability to refer a case for prosecution later. Did you have any input from commanders into this recommendation?

CHAIR HILLMAN: Representative Holtzman, we didn't ask commanders about this. This particular piece, this was a result of what -- of the site visits that we went to. They didn't -- staff can correct me if I'm wrong. I don't remember anybody talking particularly about the need for the command to retain control of the discretion for funding these sorts of requests. They come through the trial counsel.

Essentially what this ends up
being, the trial counsel plays this role. But
the convening authority is the authority
through which the funding comes.

MS. HOLTZMAN: I'm not talking
about funding. I'm sorry, maybe I didn't make
my question clear. I'm talking about the
ability of the judge to dismiss the case
because of a lack of probably cause at the
outset. That in essence preempts the role of
the commander with regard to that.

I'm not saying it's a bad
decision. I'm just saying that the
consequence, so I just want to know whether
you had any input from commanders on that
point.

CHAIR HILLMAN: So this -- this is
the recommendation that came after our site
visits. And as a result of deliberations
about what we learned at the site visits. So
no, we did not pose that question specifically
to commanders.

MS. HOLTZMAN: Okay, thank you.
JUDGE JONES: So is this going to mean that we'll need more military judges, or have we thought about that?

CHAIR HILLMAN: Colonel Henley?

COLONEL HENLEY: Ma'am I'd say yes. And the thing about that, and yes I think you'll need more. What you call them, we're not sure. It could be military judges. It could be the equivalent of a military magistrate who's permanently assigned to the trial judiciaries rather than an extra duty.

Which at least for the Army, there are part time magistrates who perform pretrial confinement reviews, search authorizations --

JUDGE JONES: I was wondering about that, because a magistrate -- obviously there are Article 3 judges and then we have magistrates. So are federal system on magistrates and military judges one in the same?

COLONEL HENLEY: No.

JUDGE JONES: Okay.
COLONEL HENLEY: The military judge is a occupational speciality which you get upon graduating the military judges course and the certification by the service Judge Advocate General. The magistrate program varies amongst the services.

I can speak for the Army. It's a Judge Advocate who's in one of the office who's not in a military justice position who performs magistrate duties under the supervision of the military judge assigned to that installation.

And it's limited to typically search authorizations, confinement reviews. But they don't belong to the military judge. They're not part of the trial judiciary. So we have -- the military judge has no control over that aspect of their job.

JUDGE JONES: So are magistrates sort of -- do they have duty stations where they're available to do search warrants and that sort of thing? And do military judges or
whatever they're called, are they more -- are
they located in particular stations? Or are
they -- I just don't know exactly where they
all come from.

COLONEL HENLEY: They Army has I
think about 21 military judges. We have more
installations then that. So they're populated
at most of the major installations. And then
they travel.

The magistrates I would guess at
least for the Army, almost every installation
has a magistrate available to it to rule or
act on these authorizations. Again I can't
speak for the other services. I would imagine
it's a similar set up.

BRIGADIER GENERAL COOKE: Can I
just add Judge Jones.

JUDGE JONES: Go ahead.

BRIGADIER GENERAL COOKE: My take
is that while this will clearly mean some more
work for military judges. My guess is it
won't mean a tremendous amount of work. In
part because many of these issues are issues that would later come to the judge once the case was referred.

And this, if what we're recommending comes to pass, these issues could come to the judge earlier and be resolved. So there will be some increase in work and here may be some additional -- need for additional judges.

But I don't see it as being a massive increase.

JUDGE JONES: And baring unforeseen circumstances, once a judge is assigned to a case, he or she carries it through.

BRIGADIER GENERAL COOKE: Right.

Right. Yes.

COLONEL COOK: The issues -- sir the issues don't come to the military judge at some point later if it hasn't been resolved in front of the convening authority.

The difference is, when it comes
to the military judge at that point, the
disclosure by the defense becomes useful for
me that if it comes to the judge later on, the
trial counsel gets the opportunity to object
or not object as to whether or not -- you
know, the merits of the request for that
witness.

And whether they should be funded
depending on is it a minor reputation witness
that's going to be in a sentencing position,
or is it going to be major witness that needs
to be an investigator as part of the team
during the merits of a case.

So it's the convening authority
that said no to a particular witness. When he
gets to the judge, defense counsel requests
it, trial counsel responds. And it's with
more of a contest of a particular case at that
point because the case has been referred, the
judge has that information.

I guess the question I have is, if
we're talking about pushing that forward,
which I don't necessarily think is a bad thing, but my -- and now you're saying the trial counsel's not part of it, the convening authority who has access to the information is part of it.

Are you going to allow the military judge access to what the investigation has? What the investigators have?

Or do we leave it completely within a defense attorney to sit there and say hey, I need this witness, I need this witness because, and the judge just says yes or no without any other information about the case yet? And without any understanding of what the costs in terms of that whole case, or the importance of the command or the larger piece of that.

That would be my concern. It's -- I'm fine with the judge being in charge, but I'm concerned about they've got the funds, they've got the context, but they don't have
enough information.

Is an option to maybe make it the military magistrate who is appointed by the staff judge advocate at least within the Army. It's another attorney. Not working in the prosecution or defense roles who does magistrate duties within a scope.

But again, they're not going to have access to all that information either. And they don't have access to the money.

Do you put the money in the defense community and still take it that way and say do you want a witness, you don't to disclose, go back to your own chain of command and they'll go through the scrutiny to make sure that the money that's requested is as important as you think it is for your case.

I just think that early without more is my concern.

BRIGADIER GENERAL COOKE: And I'll give you the classic layer answer. It depends.
I think -- I think when the defense makes a request to the judge or to a magistrate, the magistrate is going to have to evaluate that on its face. In some cases it may be easy, and say yeah, you get it. Or no you don't. Or at least without showing me something more.

In some cases there may be some question. And the magistrate or judge may have to go back and say to the prosecution, I need some information from you.

Ultimately, if the judge is going to order something that's going to cost the command a good deal of money, the command is going to come back and say well, we want more. And the judge is going to have to wrestle with that.

So this is all going to play out in a litigation process. But the point we're making is, the defense, rather than having to lay their cards on the table in front of the trial counsel and the convening authority, has
access to a judge to work through this process.

And it's going to be up to the judge or the magistrate in whom we're putting a lot of confidence anyway, to get the information he or she needs and make a decision.

COLONEL COOK: But you envision them actually having to lay out their cards. And maybe the judge -- even if the trial counsel's not there, but the judge, having the obligation then, to have as much information as they think is needed.

BRIGADIER GENERAL COOKE: Oh yeah.

COLONEL COOK: To determine --

BRIGADIER GENERAL COOKE: They're not just going to rubber stamp a, I asked for these three witnesses and say yes. There's going to have to be, what are they going to say, why do I need them, that kind of thing.

JUDGE JONES: And am I right that if this were to -- if you got a military judge

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at referral, there's going to be a trial
counsel. So even though they'll be an ex
parte defense request, the trial counsel's
available to come in.

BRIGADIER GENERAL COOKE: Yes

ma'am.

JUDGE JONES: And give the

information?

BRIGADIER GENERAL COOKE: Yes.

CHAIR HILLMAN: Judge Jones, if I
could just clarify. Our conception was that
only in some instances would this be ex parte.
That the judge would in fact -- maybe General
Dunn was going to speak to this -- go ahead
General Dunn.

BRIGADIER GENERAL DUNN: Well

that's what I was going to say. In our
discussion, the idea was that the ex parte
communication would be the exception.

But in most cases, when the
defense counsel went in to the judge, the
trial counsel would be there as well
presenting the you know, the accused mother, father and sister are already coming to testify on his behalf. Why do we need his brother, his uncle and his aunt as well? You know, that's cumulative and they're not going to say anything different, so.

So that was our concept that it would be -- the ex parte would be limited.

MR. BRYANT: May I, just as another example to what General Dunn has said, in the use of experts, if the defense were to file with the judge saying we need our own DNA expert, that hopefully would not be an ex parte motion because the prosecution may come in and say your honor we don't have any DNA. So we don't intend to introduce DNA, so you can stop with that right there.

That's the protective system I think that it's great that you pointed that out. That these are not -- we anticipated that an ex parte would be the exception, not the rule.
COLONEL COOK: Can I ask a follow on question then?

JUDGE JONES: Yes, of course.

COLONEL COOK: On recommendation of a 45, the enforcement deals with an Article 32. If you're now saying a military judge presides over the preliminary hearing, do you envision in this recommendation that that military judge continue to be the same judge that's there at -- that's the trial judge?

So a judge alone case, if somebody elects not to have a panel, but have a judge alone try it, it will be the same person that heard the preliminary hearing and made decisions on the admissibility or non-admissibility of evidence later on in that trial?

Or do you envision it being another -- because we do have judges in the different services that can go to different installations. So it doesn't' necessarily have to be the same judge, it may just require
a little bit more travel or assignment book.

What was the recommendation on that one?

COLONEL HENLEY: I think absent extraordinary circumstances, it would be the same individual. Now if you adopt sort of the two tier of full time military magistrate, military judge, and you envision the military magistrate performing many of these pretrial issues, they would not be the presiding judge at trial, they'd simply handle the preliminary issues.

COLONEL COOK: The military magistrates now aren't usually the military judges at all, is that?

COLONEL HENLEY: Right, yes.

COLONEL COOK: Well I guess the question is, it would be interesting if this was implemented, that dynamic of saying that the judge's ruling on a probable cause determination becomes binding and it no longer goes back to the convening authority.
Some of the convening authorities now, if it from my understanding, is that the Article 32 is a discovery tool. And I understand it's more limited now. But it is still a discovery tool for that person to make a decision as to whether the case should go to a court-martial or not.

So that if we put this process into effect, once the charges are preferred, they refer to it -- they used to want to go to the Article 32 pre-referral.

So essentially, they don't have any discretion when it gets to them to refer it to a general court-martial or not. It just becomes -- once a case is referred, it goes to them and says hey, should it be a general or not.

And that would take out some of the discretion of whether it should be general court-martial for certain offenses. It will automatically be a general court-martial. So -- and explain to me if I've missed
something.

It just seems a lot of their discretion, what level of the court is gone, and Article 32, the decision to send to court, after that tool, is gone.

COLONEL HENLEY: Well the discretion of whether or not to refer a case to court has not been removed.

COLONEL COOK: No, but if you -- if the judge finds, no probably cause.

COLONEL HENLEY: Which is a legal determination.

COLONEL COOK: Right.

COLONEL HENLEY: Which is there is no probably cause, there's nothing for a convening authority to refer to trial. There is no case. Now the military judge can still find probable cause, and then the case would be forwarded to the convening authority for disposition.

So the military judge's role in this concept would be limited to a legal
determination of whether or not probable cause
exists. Similar --

COLONEL COOK: To what the Article
32 investigating officers do now, which is a
legal determination by non-lawyers.

COLONEL HENLEY: Right, but --

COLONEL COOK: And convening
authorities sometimes disagree, based on their
assessment of the evidence. That's all I'm
saying.

So that if you have somebody who
says no, I don't want it to go to court,
commander can't do anything with it.

COLONEL HENLEY: I think the -- at
least my experience on the investigating
officer's recommendation not to refer a case
to trial, was one recommendation. I don't
recall many circumstances where an
investigating officer found no probable cause
and the convening authority ended up referring
that case to trial.

There may be some circumstances

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where that happened. I'm not aware of any.

COLONEL COOK: Why is it -- why

would this be better than having a judge
advocate, who's not the judge serving at --
you know, right now an Article 32 officer
doesn't always have to be a judge advocate.

In some cases it does.

But why is this better than having

a judge advocate serve -- then not having a
judge advocate serve, having a military judge
serve?

COLONEL HENLEY: Well if you're
talking about the military judge performing
the duties --

COLONEL COOK: Right.

COLONEL HENLEY: Of the Article 32
investigating officer in their capacity as a
military judge, really was for victim
confidence in the system.

So it is a judicial proceeding.
The judge comes through in a black robe,
addresses objections to evidence. I think
references to privileges 412. The judge would
rule on those objections as they arise rather
than seek advice from a legal advisor.

Would make a binding
recommendation at the conclusion of the
evidence. And then it would be forwarded to
the convening authority for disposition of the
case.

So I think the military judge's
role would address some of the legal issues as
it relates to victim confidence in the process
itself.

COLONEL COOK: Well in the
civilian sector they sometimes have a grand
jury, which is what we always compared the
Article 32 essentially, sort of like, but not
the same. I mean essentially, is there any
civilian sector, or any civilian process that
is similar to what is now being proposed in
this recommendation?

Or would the military become
unique again? I'm just asking for comparison
purposes. I'm not saying it's wrong. I'm just trying to learn more about the -- what's proposed.

Is there any process out there where there's no preliminary investigation? Somebody other than the judge. You've just essentially made the trial a lot earlier.

COLONEL HENLEY: Right. It's not a grand jury, because it's still highly adversarial. So the defense would still have an opportunity to present evidence, stop from having witnesses.

You're right. I'm not aware that we're adopting any --

COLONEL COOK: That anyone else is using.

COLONEL HENLEY: No.

JUDGE JONES: But a preliminary hearing, even in the civilian context can end a case. Is that the question?

COLONEL COOK: So can an Article 32 the way it is now with somebody other than
the judge actually being the one considering it. Again, I'm just looking at it. That's a significant change in the way we do business. And I'm just trying to understand.

JUDGE JONES: I was always under the impression that the investigating officer in an Article 32 was there also to evaluate facts and make recommendations about the strengths and weaknesses of the case. So that's a huge difference from what I gather the new Article 32 is all about.

But I would love to know what everyone's impression is of what we are doing in Article 32s now. Because we later talk about assessing the use of depositions.

So I assume you've talked about that a little bit. And I just don't understand how much -- how much discovery is still going on. Or is there no discovery going on in an Article 32? Or will there be? Beth?

CHAIR HILLMAN: Judge Jones, the
changes haven't been implemented yet.

JUDGE JONES: Right.

CHAIR HILLMAN: To the Article 32.

JUDGE JONES: So we're not sure?

Is that the idea?

CHAIR HILLMAN: I am definitely not so sure. So --

JUDGE JONES: Okay.

CHAIR HILLMAN: To be clear. But if I -- this -- just to frame this a little bit. This Lieutenant Colonel McGovern just distributed this milestones in the investigative process chart.

Just to be clear on what we're talking about with probable cause. It's you know, the standard for probable cause is three steps up from the bottom of your page there. It's a reasonable belief that a crime occurred and the accused committed that offense.

The preferable standard is above that, et cetera. And then all those different milestones in the process are listed here.
So -- but we are suggesting that
the judge preside at the Article 32. And
should the judge find that there's no probable
cause, that means there's no reasonable belief
that a crime occurred, and that the accused
committed that offense.

We are saying that that dismissal
should be binding until -- unless and until
the prosecution comes forward -- the
government comes forward with additional
evidence, in which case they could -- and we
have another recommendation about how to issue
that declination so it doesn't prejudice the
possibility of bringing those charges again,
so.

So we don't -- we didn't think as
a group, that it was a good idea to go forward
when there's no probable cause.

MR. STRAND:  Judge Jones?

JUDGE JONES:  Yes?

MR. STRAND:  I think overarching
goal for this -- for us was, as Colonel Henley
mentioned, victim confidence. Because right now, and we had examples where victims were going through an Article 32.

The defense attorney was drawing everything in there. There was no judicial oversight. Evidence was coming in that shouldn't have gotten in. You know, threat of evidence coming in shouldn't have gotten there.

So we thought also the second part would be that judicial oversight is a very powerful piece. So you don't have the you know, experiences that we were told about you know, happening again.

Because you'd have that judge to make sure that the 412 and everything else was handled appropriate instead of you know, an Article 32 officer, or even a JAG Article 32 officer saying well, okay, I'm going to say this about that, that could be completely wrong. Or they could be completely right.

And then it just pushes down for
months until the trial. And then what's happened to that victim who may drop out because you know, they were being asked all kinds of questions, you know, that should have been protected during that 32 that weren't, that judicial oversight would definitely help.

CHAIR HILLMAN: Colonel Morris had a response Judge Jones. Can we get Colonel Morris?

JUDGE JONES: Oh, sorry.

COLONEL MORRIS: It's just also worth remembering in this that we still have the SJA's pretrial advice. Where the SJA makes an independent recommendation to the convening authority, which includes the SJA's assessment of whether the charges are supported by the evidence.

So that -- you potentially have a foreseeable clash between a determination at the judge at this level and that advice that the SJA puts together.

COLONEL COOK: Okay, but that
advice is prepared at what point? Isn't that usually after the Article -- correct me if I'm mistaken -- after the Article 32.

At this point though, I mean that is the clash. Because essentially what I'm struggling with is generally during the convening authority, if it's a sexual assault crime now, it has to go to a GCM to make the determination to refer it to court, is that right?

Is that what it is at this point? Sexual assault, if that's the charge, isn't that one of the changes that was made?

There's your rape cases, it's got to go --

JUDGE JONES: Um-hum.

COLONEL COOK: Okay. But if it's a company commander that prefers that charge and that's what the charge is, essentially the convening authority's got on say in it. Because an Article 32 will be required if it's a GCM.

The Article 32 will go to the
judge. Pretrial advice is supposed to be to help the convening authority to decide whether to send something to court-martial based on the information that's coming out of the Article 32.

But now it's binding, so there is no reason -- there's limited reason maybe. I'd have to look back at what the requirements of it to say how much use a pretrial advice is to go back to the convening authority.

The reality becomes the role of the convening authority is out once the decision is here's what the charge is. There's enough evidence to charge it and the case is going to go forward.

And that may be the right answer. I'm just not confident. It just seems like a big jump for me at this point based on the information we have now to say that's a recommendation that should be implemented or referred.

Of if that's a particular issue to
say you know, here's a step -- military judges, it's Article 32 officers I think are great. And we've had some really complicated cases. It was completely appropriate. They do lend credibility to the process.

My concern is, if you put them in the process and you say that they are part of that, it just starts earlier. You've essentially written the commander out of the process and maybe taken away some other catch, safeguards that we've had. And maybe that's something the Joint Services Committee should look first.

Unless I'm misunderstanding something.

BRIGADIER GENERAL COOKE: Well, the standard of probable cause is pretty low. And presumably there are not going to be too many cases that get to an Article 32 that the government can't meet a probable cause standard.

If they meet the probable cause
1 standard, the convening authority's right
2 there as always. Then making a disposition
3 decision following the Article 32.
4
5 But it seemed to us that if the
6 government can't establish probable cause in
7 front of a learned judge, then the case should
8 be over. And there shouldn't be a case.
9
10 It raises questions about the
11 credibility of the system if a judge says no
12 probable cause and a commander then says uh,
13 I disagree. I'm going to go forward. It
14 raises questions whether the commander is
15 being influenced by other factors, or just not
16 well informed about the law, or whatever.
17
18 So that's where we came out.
19
20 CHAIR HILLMAN: Judge Jones -- or
21 sorry Admiral.
22
23 VICE ADMIRAL HOUCK: Just to be
24 sure that I'm not missing something. This
25 would be -- this would be a historic change
26 that you're recommending.
27
28 And for the first time, there
would be a lawyer that's inserted into the
decision making process in a potentially
outcome determinative way. And who preempts
a commander from making a decision on a
military justice case.

It just true --

CHAIR HILLMAN: Admiral Houck, the
convening authority could -- can still
proceed. But this is -- we don't think this
is the way -- that wouldn't seem to be a good
decision as the members mentioned.

But the convening authority powers
aren't -- aren't completely undercut in this
way. So as Colonel Morris said, the staff
judge advocate still makes a recommendation.
We are giving the military -- we are
recommending that the military judge have more
authority sooner to make that probable cause
determination.

This is a recommendation that the
Army came forward with. You're hindered by
not having the full discussion of our report.
In 2004, this is -- it's not a -- it's a -- it's not an insignificant change. But it's not a radical alteration of the process that's out there right now in my own estimation.

JUDGE JONES: But it is a situation where you're expecting the military judge's finding of no probable cause to be binding and result in dismissal, right?

CHAIR HILLMAN: Yes Your Honor.

JUDGE JONES: So that doesn't get reviewed by the convening authority.

CHAIR HILLMAN: Yes Your Honor.

JUDGE JONES: Now mind you, criminal justice -- or criminal investigators and trial counsel can decide that a charge is unfounded. So that takes it out of the system at an even earlier stage. So it's --

MR. STRAND: It's also without the prejudice. So we envision that if you don't have a strong case, or the judge thinks it could be -- or there's not enough probable
cause, I think it's a good red flag for the prosecutor and the command and the investigators to say okay, what do we got here? And maybe go back after looking at it and say well, but did you consider this? Or maybe we missed -- you know we didn't introduce this.

JUDGE JONES: You know a preliminary hearing, at least in my experience in the federal system, and maybe they're different in the state. I don't know, I don't have that experience, is a couple of hour exercise. It's one witness who says this is what happened, or this is what I saw happen.

And I mean defense lawyers will get up and cross examine. But frankly, even credibility doesn't usually matter to make a probable cause finding.

There's enough if one person, the victim usually, or an agent gets up and says this is what I saw, this is what I found. So I think we're all -- you know, when you think
about what the old Article 32 was, there's
sort of more to be concerned about.

        But this isn't -- this isn't
weighing much. This is, is there enough
evidence. Is there one person saying I was
there. I saw this. And you decide that's a
crime. And that's it.

        This is pretty straight forward.
And as you say -- or someone said, I can't
even imagine that there will be too many times
where there's going to be a finding of no
probable cause.

        CHAIR HILLMAN: Your Honor, just a
note on the no probable cause determination.
You know, that would be -- for a prosecutor in
the civilian world to go forward after a
finding of no probable cause, would be
baseless.

        JUDGE JONES: It wouldn't happen.

        CHAIR HILLMAN: Right, it wouldn't
be -- it would be in illegitimate act.

        Unethical. So that's -- to take that away
from the convening authority seems a minor imposition on the convening authority's discretion.

You asked about the Article 32 changes. I just asked our legislative specialist to get this for me. So the change envisions the 32 as a preliminary hearing with four purposes.

Probable cause determination.

Jurisdiction determination. The form of the charges being considered. And then recommending disposition. And the change, the reason depositions came up, is because the victim may not be compelled to testify.

So that's -- shall be declared unavailable if the victim declines to participate. Those are -- and then there are some other changes. But those are the big changes I think in the 32.

JUDGE JONES: So recommended disposition would be either dismiss or else probable cause -- I found probable cause for
this offense, this offense, this offense.

Okay.

CHAIR HILLMAN: Yes ma'am.

JUDGE JONES: Thanks. So I guess

I'm down to depositions. There are not --

there really aren't pretrial depositions.

CHAIR HILLMAN: Judge Jones we

heard from different civilians on this. In

Philadelphia they told us that victims have to

-- must testify at preliminary hearings with

some exceptions.

In Washington State -- this is in
finding 45 A if you want to look at it.

Either party can request interview material

witnesses. So civilian practices vary on

this.

JUDGE JONES: Okay.

CHAIR HILLMAN: That was our

assessment of the comparative piece.

JUDGE JONES: And you're only

asking the judicial proceedings take a look at

it?
CHAIR HILLMAN: Yes. So not that that's all crystal clear, let's move on to the next -- okay. This is related. And this had to do with referral.

So this is a recommendation that there be a change in what's already been enacted, which is in the National Defense Authorization Act of fiscal year 14. Where the elevation of review creates undue pressure for referral and prosecution.

We also recommend Congress not enact Section Two of the Victim Protection Act, which would likewise elevate this. And the reasoning here runs to elevating review creates a one way ratchet towards more prosecutions even if referral to trial does not serve the interest of either the victim or justice.

Also elevating review to the level of the Service Secretaries, puts them in the position, and of course they can get the advice that they need, but they're exercising
prosecutorial discretion in a way that they've not been trained or prepared to do more than those that who currently have that authority in the military.

So we don't recommend that that one way ratchet be permitted to continue. If that section is not repealed, this is our recommendation for a format for declining prosecution that would preserve the possibility of future action.

So in this case, there's this elevated review requirement. And then a memorandum that has to be issued if there is a declination to refer to trial.

We looked at civilian offices and the ways in which those declinations are structured. They do not require an analogous lengthy justification. And it's important here that we preserve the possibility that charges could be brought again if the prosecution is declined, if the case is not referred.
So we recommend that there be a standard format for that declination process so that it's a -- so that it preserves the capacity of the system going forward. Doesn't prejudice a later events.

Are there any questions on those?

JUDGE JONES: No, I would just say that for your second reason, with respect to Section Two of the VPA, which is that the role of the commander committee agrees that inserting a senior trial counsel into the process is not wise. That person's likely to be junior.

And so we also do not believe that section should be enacted. Although we did not discuss -- well obviously, we did not discuss the other rational for your two recommendations.

CHAIR HILLMAN: Okay. So those are on -- those are two referral recommendations that we made.

The next one is a not yet
recommendation regarding plea bargaining. This is still under discussion. But we will at least flag this issue as worthy of further study. And perhaps of a recommended change.

And that is, compared to civilian practice, again in the comparative assessment here. Plea bargaining works differently in the military. So in civilian jurisdictions, normally there's a sentence that's specified in the plea agreement, or there's a range of punishments that could be adjudicated.

In court-martial instead, there is just a ceiling and not a floor. And this creates a beat the deal situation that means a service member who does plead guilty can then be sentenced to something less than what was agreed upon in a pretrial agreement in which a victim often participated.

We see this as not good for the confidence of victims in the system. But we haven't recommended a change on this. And this is still under study.
So we'll -- the subcommittee will say something about this in the next final report. This is our interim report. But we're not saying anything even interim on this just yet.

Okay. This is a recommendation about selection of panel members. We heard concerns, especially by defense counsel that it was difficult to seat a fair and impartial panel.

Here we recommend the judge advocates review the training that's happening on sexual assault prevention to make sure messages are not being communicated that undercut our ability to have panel members who are prepared to adjudge -- to function as impartial in that.

We recommend too related to that that military judges do what they do now. Which is to continue to control voir dire in a way that insures that the right panel, fair and impartial panel can be seated.
Okay, we're in the -- I'm happy to take questions on these as we go. I'm going to move through these until we get to the sentencing piece and then we'll pause then. But if you have questions on these as we walk through them, please go ahead and raise them.

Ms. Fernandez do you have a question?

MS. FERNANDEZ: I would mean going back to 45. I don't know if that's possible.

CHAIR HILLMAN: That's possible.

MS. FERNANDEZ: I may have missed this in the discussion here, but Ms. Hillman did you split the proverbial baby here in some ways?

I mean the way I'm looking at it is as much as a judge during pretrial hearing could find insufficient evidence to go forward, it would probably in most cases find sufficient evidence to go forward. Therefore a commander would be in a very tough position to contradict what the judge said.
CHAIR HILLMAN: Agreed. If there's no probable cause and a convening authority decides to go forward, I agree, that would be --

MS. FERNANDEZ: No, if there is probable cause and a convening authority decides not to go forward. The issues often at hand would be the commander doesn't want to go forward for whatever reason. He's prejudiced.

But then you've got a judge that's saying no, there's enough probable cause here to go forward. Am I reading this wrong?

MR. STRAND: Well probable cause and going forward are two different things. You know just because there's probable cause doesn't mean it's a good idea to take it to a general court-martial.

There might be some other things, there might be some problems with the evidence, there might be --

MS. FERNANDEZ: Absolutely, but
it's a big part of it.

MR. STRAND: Well, but it's a very small -- it's such a low threshold. So the judge isn't saying in a 32 here, the judge isn't saying there's enough to go forward as far as this part.

This judge is saying there's probable cause or there's no probable cause. It's different looking at the merits of the case, whether the witnesses are available, all the evidence and everything else.

That's a different -- so if the judge says there's probable cause, it should not compel a commander or a convening authority to say well now I've got to go forward just because there's probable cause.

MS. FERNANDEZ: And I never thought of probable cause as requiring, giving any weight. You're not weighing the evidence in a probable cause hearing. At least that's not my view.

So a commander could obviously
take a look at a whole bunch of facts and
decide I'm not taking this to trial. Or I
don't think it should go to general court-
martial.

CHAIR HILLMAN: I can just say it
is not the subcommittee's intent to lock the
commander into having to move forward on those
cases at all. Nor do I think that's what this
of condition is.

MS. FERNANDEZ: But I wonder if
you have. And that's just my -- and I'm not
saying it's bad or good. It may have been the
split that we've been looking for. It may
have been a good agreement to -- to how do you
get more scrutiny on these cases.

CHAIR HILLMAN: We're not sure
more scrutiny will help us serve the ends of
justice necessarily, to be honest. So -- and
that's partly why we recommend the you know,
somewhat, we push against the elevation of
referral authority for instance.

So, in this -- but we do think we
need the right decision makers and at that
early point in the life of the case, the
military judge in our estimation was in the
best position to decide there.

JUDGE JONES: Jim?

VICE ADMIRAL HOUCK: I think, and
I understand the purpose is not to debate it
now, but I think Ms. Fernandez has a point.
In the sense that now we have a judge making
rulings and decisions in the process before a
commander gets to do that.

And I think it has -- I think we
need to be very careful about unintended
consequences of that because I think it can
cut both ways. It can stop a case from -- it
could make it more difficult for a commander
to refer a case. It could also in a way --
and Judge Jones is of course correct in the
way she's discussing this from a legal
standpoint.

I also think though that there's
another dynamic that enters into it. That
puts a different sort of pressure. You're all making correct statements.

But once the judge is now on the record before the commander saying that there's probable cause, it introduces a different dynamic in the decision making process. Which is different from what we're accustomed to right now.

MS. FERNANDEZ: It goes back to something that we've discussed before, which is I think you put it Dean Hillman, the perception problem. But in reverse.

And I think what we're saying is there is a perception now that if a judge has made a ruling, and the commander goes counter to that ruling, how do you square that? And it would involve much more explanation on the commanders part at a minimum.

Which may be good. I'm not making a -- I'm not -- I'm just pointing out what it looks like.

CHAIR HILLMAN: Understood. Now
that we've finished that for the second time. Are there any other comments on the judge role?

Okay. I don't -- the panel's not finished. Nor has the subcommittee finished actually quite yet. So this is useful. But I'll keep pressing us ahead then. So realizing we'll come back to some of these issues.

So I did voir dire, which was a -- I think I did that one, and now we're on to the good soldier defense.

The Victim Protection Act, Section 3(g) limits some evidence. Attempts to limit some evidence of good military character. And the goal of that is to increase victim confidence.

The existence of something called the good soldier defense, we think does undermine victim confidence. We did want to point out though, that character evidence will still be admitted when it's relevant. And if
foundations are -- if the proper foundation is established.

So the military rules generally parallel the civilian rules. We don't recommend any further changes regarding character evidence. And that's our statement on this particular part of the Victim Protection Act, 3(g).

Okay. All right so, let's see where I am here. This is the prosecution and conviction rate issue. This runs to standardization, so, and collection data.

We recommend the Secretary implement a standard method for calculating prosecution and conviction rates. This runs to some of what we said related to survey data and to different definitions in the process.

We think that once it's standardized, there should be an independent expert who studies prosecutorial decision making in the military. The services currently use different definitions and
different methods, which as we pointed out earlier, makes meaningful comparison impossible.

This is what, if you can see this, is our recommended methodology. And I'll just walk through this.

So it's likely that for each type of Article 120 offense, we would like this sort of data to be kept. So that we actually have under the current Article, the spectrum of prosecution outcomes or investigation outcomes that run through the process, not all compressed together, but actually separated out based on the severity of the offense.

So at first would be the top, unrestricted reports. And it says underneath there in parens, by offense type. So there would be a chart like this for each offense type.

In some cases command action would be precluded. In others there would be military jurisdiction. Now all of this comes
under only those cases where there is military
jurisdiction.

There is not always jurisdiction
as you saw if you were here for the SAPRO
slides this morning. Sometimes it's a
civilian, a foreign national. So if there is
military jurisdiction, then these are the
options in terms of what can happen next.

It can be unfounded. That is
baseless or false. So the sexual assault
offense may be unfounded. It may be
preferred. And we'll get to the what happens
at that point.

There could be an alternative
disposition. And there could be a pending
disposition. So we could be waiting.

So we do have to recognize that at
any point in time, all we can get is a
snapshot of the data that's out there right
now. And we're always in a -- we're always
in that point of having it -- a time horizon
that extends over the point at which we're
actually looking at the information.

Under the preferred, the charges that are preferred, these are the different options. There can be no action or no referral. It could be referred to a court-martial. There could be a resignation or discharge in lieu of court-martial. Or it could be pending.

So if we have the services breakout the disposition of cases in this way, we'll know what -- where they -- how they compare.

And then if it does go to court-martial, we can have an acquittal of the sexual assault offense. A conviction of sexual assault offense. Or possibly some other action at that point.

That could be -- it could still be in trial, it could be -- it's possible there would be a resignation in lieu of court-martial at that point. But most likely, that would be a dismissal. That could be a
mistrial. That's a sort of catch all
category.

But we would generally find that
we would have acquitted or convicted of the
sexual assault offense. We also, by
specifying offense category, would enable more
precise tracking of particular sexual offenses
and sexual assault itself.

Because sometimes there are other
offense that are charged along with sexual
assault. And this would track the sexual
assault offense rather than tracking the other
offenses of which a service member might be
convicted at the end of the process of
investigation and prosecution.

COLONEL COOK: Would you want to
capture lesser included offenses? I mean when
you say conviction in a sexual assault
offense, if somebody's acquitted, that's one
thing.

They're not convicted of the
actual sexual assault offense, but they're
convicted of some sort of assault offense, but they take as a lesser included. Would you want to count -- do you want to put that into the other?

I mean it just seems like that other category could get very big. Just something to consider as you're coming up with the rest of your report.

CHAIR HILLMAN: Right, we're trying to articulate something that would be a rubric that could be probably applicable. Your question points out, since I can't answer it precisely, that -- and perhaps others can. Does anybody on the subcommittee what to answer that one?

I don't think we concluded on that firmly. But we'll make a recommendation that we think encompasses all the options with a rational outcome.

But no matter what we come up with, there will be judgement calls that get made in the reporting of these statistics. We
cannot eliminate all the discretion here. And
Colonel Cook, your question points that out.

So we have to reckon with is what
we want to know whether lesser included
offense, something less than a sexual assault
charge. And you know sexual assault includes
abusive sexual conduct. It's a relatively low
level offense in the scheme of things.

So even if we stuck only to the
120 offenses, we still would capture a lot of
that -- a lot of the conviction rate, the
prosecution rate data for that.

Okay, here's where we got to
unfounded and unsubstantiated. We're on a
vocabulary lesson.

So Congress should amend
legislation that is currently in the NDAAs so
that services provide the unfounded cases,
those that are deemed false or baseless,
rather than unsubstantiated cases.

This is an issue of reporting
requirements causing trouble in interpretation
and comparison of the data. The fiscal year
11 NDAA set out this un -- this substantiated
cases. We think unfounded should mean false or
baseless. And that's what the services should
report on when they're reporting on the cases
that are not -- are not pursued further.

Okay, I'm looking at the time here
Judge Jones. I'll do a couple more of these
and then we'll take a break before sentencing,
does that sound okay?

JUDGE JONES: Sure.

CHAIR HILLMAN: Okay. So

comparing military and --

JUDGE JONES: Sounds like we're
going to get to that.

CHAIR HILLMAN: I feel sentenced,
so.

Okay, comparing what's happening
in terms of prosecution rates. We don't
recommend Congress or the Secretary use only
civilian or military -- and military
prosecution rates to assess success.
Disposition options in civilian jurisdictions vary. Non-prosecution is certainly a reality in civilian jurisdictions. In the military alternative dispositions are also available that are not the same as those applicable in a civilian jurisdiction.

We recognize too the definitions of the conduct that's prosecuted is different in the military versus civilian justice systems. We do realize that these are dynamic environments too, and that last bullet runs to the uniform crime reports broadening of the definition of sexual assault.

So these are changing data collection efforts. But we don't want only the prosecution rate to stand as an assessment of success. We need to embed that into a more nuance understanding of the data.

All right. And let's see. This is about data on sentencing. Maybe Judge Jones we should just stop there. And we can do the sentencing part sort of going forward,
JUDGE JONES: All right, so we're taking a ten minute break?

CHAIR HILLMAN: Yes Your Honor.

(Whereupon, the foregoing matter went off the record at 2:14 p.m. and went back on the record at 2:36 p.m.)

JUDGE JONES: All right you may continue.

CHAIR HILLMAN: So we're on the -- we're in the home stretch here for comparative systems subcommittee. We're turning to sentencing. You have about a half dozen recommendations on sentencing and then I'll wrap up our report.

In order to lead us into sentencing, I'm going to ask one of our subcommittee members, Brigadier General John Cooke, who is the Deputy Director of the Federal Judicial Center, retired after a
remarkable career in the Army. He ended as Chief Judge of the U.S. Army Court of Criminal Appeals, and Commander of the U.S. Army Legal Services Agency.

General Cooke.

BRIGADIER GENERAL COOKE: Thank you Professor Hillman and Judge Jones and members of the panel. I want to start by echoing what several of my colleagues have said about our staff. Colonel Ham, Colonel McGovern and everyone we've worked with has just been fantastic. It's made this work not work. It's made it fun really.

With regard to sentencing. Let me start by laying out just a few of the major differences in the military sentencing process and those in civilian courts generally. Then I'll talk about some of the challenges that we've faced.

There are three key differences I think. The first one being who decides the sentence. In a court-martial, the defendant
once convicted, is tried -- or is -- the
sentence is determined by either the judge or
the members basically at the instance of the
defendant.

If the defendant pleads not guilty
and elects trial by members, then -- and is
convicted, then the members decide the
sentence. If the defendant pleads not guilty
and elects trial by judge alone, the judge
decides the sentence.

If the defendant pleads guilty,
then he or she can elect judge or members.
And of course in most civilian jurisdictions,
regardless of who tries the case on the
merits, the judge is deciding the sentence.

The second major difference is in
the nature of the proceedings. In federal
courts for example, once a defendant is found
guilty, either by plea or by a -- in a
contested case, there's typically a delay of
weeks or months while information is gathered
in a pre-sentence report and to be presented
to the judge for a sentencing determination. And in many civilian jurisdictions, there's a lag as well.

In a typical court-martial, once the defendant either pleads guilty or is found guilty, there is no delay. Or maybe a delay of a day or so. The court proceeds directly into sentencing.

And the information that's presented is largely presented from the accused's personnel file, what's already there. Which is not insubstantial. And then information presented by the trial counsel and the defense counsel that they believe is relevant to the sentencing authority making the decision.

As an aside, it's worth noting that in a court-martial, it's rare for a convicted offender to have prior convictions. That's because of the recruiting standards in the military and because usually if you've got one conviction, you're gone before you're
going to get a second one. So a criminal record is relatively rare in a court-martial.

The third major difference is in a court-martial, they use what we'll call a unitary sentence. In most civilian jurisdictions, if someone is found guilty of multiple offenses, he or she is sentenced for each of those offenses. Sentences may run concurrently, but there is a sentence issued for each offense of conviction.

In a court-martial, there's one sentence regardless how many offenses the defendant was convicted of. So if there were five offenses, the maximum punishment for each one of those is totaled on top of each other. And that total becomes the range, anywhere from no punishment up to that maximum penalty in a court-martial.

Baring the rare case where there's a mandatory minimum. There aren't very many of those in courts-martial.

And that presents certain problems
as we'll discuss later in terms of assessing how sentencing -- how sentences -- what we should think of sentences in courts-martial. Because it's hard to tell in a case of multiple offenses with sexual assault offenses being mixed in there, you can't extract out and say how much of this was for the sexual assault offense. And how much of it was for the rest of it.

So it either masks or distorts assessments of sentences that are given in these cases. And that's one of the challenges that we faced in trying to draw empirical conclusions about sentencing.

In addition to that, beyond the basic question of -- and now I'll get into how we tried to assess sentencing. It's hard to say how well or not well the military system is working. At least if you're judging by the quality of sentences.

To begin with, few of us would agree what the right sentence in a particular
case is to begin with. There's a lot of
different factors that go into it.

But beyond that, the data make it
hard to analyze. It's partly because of this
unitary sentencing quality that I mentioned,
that you can't really compare because the
cases are different. And partly because the
record that comes out of a court-martial, the
record of a sentence, the part that can be
easily extracted is what offense was the
defendant convicted of, and what sentence did
he or she receive.

But there are no other underlying
circumstances that are easily drawn out to try
to make a better qualitative decision about
why did this sentence result in this
particular case. Unlike a pre-sentence report
in the federal system where there's a fair
amount of information in a fairly concise
document that tells you a lot about the
defendant and his or her offense. Here all
you've got is the offenses of conviction and
a sentence without knowing much contents.

And so as we were looking at the various issues we were asked to look at, we had to wrestle with the fact that there's not a lot of -- it's not easy to extract empirical information on which to judge how sentences are occurring in the military.

That didn't' stop us though from making a few recommendations. And we'll go through several of these. I should say that when -- as the issues we were asked to look at like member sentencing versus judge alone sentencing. Use of sentencing guidelines and so forth, we I think decided pretty early on that we couldn't look at those in the narrow context of sexual assault offenses only.

It would be very difficult to change the sentencing procedures in courts-martial just for that single category of cases. And if you're going to make changes to who sentences, or to have guidelines or whatever, those need to be done across the
board.

And that -- that further inhibited us if you will, from making some recommendations in several areas. Let me just speak to the one area where we are recommending a significant change. And not an uncontroversial one. And that's who should be the sentencing authority.

And the majority of the committee, not unanimous, but the majority concluded that we should recommend that all sentencing in courts-martial, laying aside capital cases, completely different animal, should be done by the military judge.

It's not an easy question. There are good reason for going either way. Members bring a sense of community and a sense of -- a knowledge of the context of particular offenses in particular cases to the table. Taking them out of the process risks lessening the amount of investment that people in the line feel in the court-martial
process. And risks diminishing even further their experience levels with courts-martial. Something that's valuable as people move into positions to become convening authorities for example someday.

On the other hand, sentencing by members has long been criticized as more of a lottery if you will in terms of what kind of a sentence might come out. There's a lot more unpredictability with members.

Major General Ken Hodson, who's one of the giants in the military justice business. He was essentially the architect of the Military Justice Act of 1968, subsequently called sentencing by members a lottery.

And in our various meetings with trial counsel and defense counsel and others, one of the things that was cited on both side of the fence was the unpredictability of sentencing by members. There's just more uncertainty as to what they're going to do.

And it stands to reason that
that's the case. The members are entrusted with a very important decision in determining guilt or innocence. But that's a very structured decision.

It's basically a yes, no answer with a given standard of proof. And very explicit elements that have to be established in order for the members to reach that conclusion that a defendant is guilty or not guilty of an offense.

Judging a sentence is a much more open ended determination. There are a variety of factors, rehabilitation, deterrents, punishment and so forth. But there's no real formula to how those should be applied.

And in fact the instruction tells members to use all those in their discretion. Well for people who do this once or twice in their careers, that's a very difficult thing to do.

Most judges that I work with, and when I was in the military, when I was a
military judge myself, will say that sentencing is the most difficult thing they do on a regular basis. And these are people who have tremendous experience with this. The members do not.

So as I say, a majority, a strong majority of our subcommittee concluded that in order to reduce the potential disparities in sentences, and in order to enhance frankly the credibility of the system in terms of people looking at it from the outside, we would recommend sentencing by judge alone.

So with that, let me turn it back to our esteemed leader and she can walk us through all of our recommendations.

CHAIR HILLMAN: Thank you, General Cooke. So Judge Jones and panel members. What I'll do is walk through the recommendations and then I want you to hear another -- an alternative vision as I put it on what might be the right way to go with judge alone sentencing from Colonel Morris
after I walk through this. Then we'll take questions on all of the issues related to sentencing.

So the first one is recommendation 54. This is that the Secretary direct the services to provide data on sentencing for all rape and sexual assault offenses. And for that matter, all offenses in a searchable DoD database.

We found in our efforts to understand sentencing practices, that that data was not easily accessible, although it is maintained by the services. That we suggest the service programs be modified to include sentencing information.

We could not even get this information with the request for information, the RFI's that we sent on this. So this isn't being maintained in a way that makes it possible for us to make a thorough going assessment. And we think that should change.

This is related. We think to improve transparency, the services should
release sentencing outcomes. The Navy is already doing this. Releasing monthly the outcomes of courts-martial. And this would increase transparency and public confidence.

Next we recommend the stuff that General Cooke spoke about. That Congress amend the UCMJ and the president, the manual for courts-martial, to make military judges the sole authority in sentencing. To improve reliability and proportionality in the absence of sentencing guidelines.

And that we set out here that in the federal and state systems, most state systems, judges impose sentences in all non-capital cases. We also recognized that judge alone sentencing is already available. And that the additional cost of this would be nominal, if any.

Sentencing guidelines. We do not recommend adopting sentencing guidelines. We do recommend further study of sentencing based on the data that we could not get. And also
an assessment of the impact of the enhanced role of the military judge.

We put out some information from the slide from our study from comparative -- our attempt to compare the civilian systems. Sentencing guidelines are in place in the federal system and the District of Columbia, and in 20 states. They're also some 24 sentencing commissions.

Guidelines can be complex and can require a substantial support structure. They need not do that. But for now there's not sufficient evidence of disparity in part because we don't have that data for us to assess the current patterns of sentencing and decide on guidelines that ought to be implemented.

Likewise, we recommend not adopting at this point mandatory minimums. We do recommend sending this to the judicial proceedings panel, our follow on panel to review further.
Mandatory minimums are something we heard very different perspectives on. One is that they increase victim confidence and that victim's actually want harsher and more onerous mandatory minimums. On the other hand that they decrease the likelihood of reporting because of the sense that the offenders who are often community members of the victims who would report, would be punished so harshly that it would deter that sense.

So here there are very few mandatory minimums as General Cooke said in the military justice system. Now we do recognize the defense legal policy panel suggested that there should perhaps be further review of one of the few mandatory minimums out there, the mandatory life sentence for premeditated murder.

So it's not clear that the trend is really towards -- is rolling towards more mandatory minimums at all. So we recommend further study there.
Next this one's not specifically to sentencing, but to clemency. We recommend allowing convening authorities to grant clemency specifically for forfeiture protections for the dependents of convicted service members.

So clemency has been changed by the -- by Congress' changes to Article 60 which limit clemency and clemency on sexual assault charges. These changes may limit appellate review in some instances, we're concerned about that.

We also think that the civilian clemency rules that run through executive powers are somewhat of a parallel to some of the military clemency powers. But the convening authority has a unique role.

We recommend that convening authorities retain that clemency power especially in this instance of forfeiture for dependents. A case in which a convicted service members' family, could continue to
receive income for some period of time, a
delay of the imposition of a sentence that
would involve total or partial forfeitures.

And then this is our last --

JUDGE JONES: Liz would you mind
one question right now?

CHAIR HILLMAN: No ma'am.

MS. HOLTZMAN: Are your
recommendations only for sexual assault
crimes, or are they across the board?

CHAIR HILLMAN: Representative
Holtzman, they're across the board. So they
would effect everything.

And then the -- this relates to
that actually question. Their last
recommendation on ending the process of
unitary sentencing at courts-martial.

Right now, sentences is
adjudicated for the entire spectrum of
offenses that are charged for which a service
member is convicted at a court-martial. We
recommend that there be specified punishments
attached to particular counts. Rather than that unitary sentencing.

This would be akin to civilian sentencing practices. We'd also want the court to specify whether the sentences run concurrently or consecutively.

We don't see a reason to have the military sentencing run in this aggregate fashion when there are specified counts for which a service member is convicted. And that they should result in predictable, proportional punishments that we could certainly breakout in the sentencing process.

And we recommend that change. So I think that's the last one. Yes. So that's the last of our sentencing recommendations.

I'm going to turn now to Colonel Morris who wanted to speak about the proposal that we set forth, about having judges be the sole sentencing authority in non-capital cases.

COLONEL MORRIS: Thanks Dean. I
recognize as one against nine that there must be something to the wisdom of my colleagues. And I really do understand the sentiment behind it.

And anybody who's worked closely in the system, is vexed at times by sentences that are not obvious in the reason -- not obvious to figure out what the rationale is behind sentence. Still I would suggest we pause before making a change of this gravity, for three main reasons.

I'm not sure that we can identify exactly what the problem is. Is it a problem based on data? In other words objectively bad sentences? Or is it an inherent inability of lay leaders to get sentences.

Secondly whether this fix solves the problem, or there may be some less drastic remedies short of going to judge alone sentencing. And then have we thought through all of the collateral costs or impacts of this, including potentially a different flavor
of unlawful command influence.

Reduction of confidence by the rank and file in the system. And maybe further erosion of lay and command and leader perspective and input into our system of justice.

So on the first one, on the problem itself, are we -- have we careful looked at a set of data that shows that X amount of sentences by lay panels just can't be correlated to anything sensible. And therefore we need to dispose of that.

And if so would it be worth seeing or seeking that information before making this change. My sense is the argument is that judges are inherently better and uniquely suited, not just better at it, but uniquely suited to sentence people.

And the question there is then what is it about lay jurors, particularly military lay jurors that makes them incompetent to do this. And that makes us
remove this, you know among the protections
that have persisted for a long time, is one of
the balances against command influence.

And all of the implicit indirect
ways that command can take charge of the
process. That would make you take that away.

Even using the term outlier. What
makes a sentence an outlier? To those people
following a judge's instructions, who we trust
to make all the really complicated decisions
on the merits.

Is it an outlier or is it a
reflection of the richness of this system?
This system that remains free of sentencing
guidelines and that sort of thing.

That is the community, on this
occasion, on great particularity, judging this
offense. And remember among other things that
we're not just look at time in jail.

That we have a range of sentencing
options that includes the not trivial matters
of losing rank in two or three different kinds
of discharges from the military that also
factors into jury's decisions.

You look at what we do ask and
trust panels to do on the merits. Only
jurisdiction in America that still says a
panel of five people, by a two-thirds vote can
turn you into a felon.

And that we trust them to make
those decisions. We look at un -- figuring
out complicated version of facts. Technical
evidence on your know THC in your bloodstream.
Or DNA on a vaginal swab. Striations from a
bullet, all of those things.

Then you have issues of
conspiracy, mental responsibility, where
somebody is a principal. The judge can have
a bench book as thick as we do have. And it's
still him imparting that to these lay people
who make those decisions. And we rightly
trust them to make those decisions.

On the command influence
possibility, are we -- is our reason for
moving this way because we believe that right now, the sentences are potentially effected by command influence. And if that is the case, are they too high or too low?

I mean you could make a case for either. That the command is still wafting into the jury deliberation room and essentially saying -- using all the briefings, you've been in this military. You've had this push, so jack up that sentence a little bit.

Or is it the opposite and our belief is that we have almost a counter cultural resistance to, or reinforcement of the worst of our culture. And that this lay jury then isn't getting it the way we need them to get it as reflected by sentences that we consider to be whatever we're calling considering to be, outliers.

One of the justifications is that 44 -- I think 44 jurisdictions, have judge alone sentencing. So obviously there's something to that sentiment there. But do we
even know of those six states that don't, have they had an experience that also says to us, that they have outliers and results that are contrary to justice?

This isn't a defense or a prosecution perspective. But that our sense that justice is less defensible. The result is less right to put in front of the public and in front of society.

On the other hand look at then, what we do in growing our judges. I mean our typical military judge comes into our system at plus or minus the 15 year point more or less. And it's just as common that they've had -- that some might have had a lot of military justice. Some have had a tour or two.

And some have not had recent or intensive military justice experience because they've done' all the other stuff we ask them to do. So they may have done recently or primarily administrative law claims,
operational stuff, wills, taxes.

But we entrust the judging function to them because we look at a range of characteristics. Say age, education, training, length of service, maybe judicial temperament that we think plus 100 hour judge course and the sort of tenure that says we can't really normally take you out of a job for a couple of years, that makes them sufficiently suited to manage a courtroom, but uniquely suited, uniquely and solely suited to pass sentences.

On the other hand, members of the rank and file, you know if the fifth amendment applied to military trials we would call them peers. But bring as Judge -- General Cooke explained so well. You know bring that perspective of the community.

And before we ditch it, we should just be really, really sure that that perspective is irrelevant, or just as distorting. Because otherwise it's something
that has been in our system for a long time.

And the fact that it's been there
for a long time isn't a reason to keep it a
day longer if it contributes to injustice.
But it's worth looking at what the basis for
it is before we throw it out as well.

And could it not on the other hand
be a corrective against command influence.
You consider what command influence is now.
We're not seeing the command influence problem
that we saw 20 and 30 years ago. But it's
probably fair to say that we have mutations of
it that are more subtle but no less invidious.

And also call for systemic
corrections. Call for vehicles that are there
and able to correct against it. So that we
have just results and we have soldiers who
trust it.

You know a lot of people, much
more eloquent than me talk so much about your
system can look, you know, can brief write and
be structurally okay. But if it doesn't have
the confidence of the rank and file, then it's not so effective.

And we do have one. You know you can any, but the closer you are to somebody, the more you'll have some particular view of a trial. But you have most people who will say, well they get it about right. And when they see justice dispensed, most will say they've got it about right.

And the question is, as you start pulling command and pulling leadership from the system, you've removed it from Article 32. Which means that's not a strictly a judicial aspect. So you've lost the lay perspective that's there.

You've lost the opportunity to grow a commander and a leader in the understanding of the system. And if you pluck it out at this stage as well, it should be with the understanding that we're redressing something that as the system is working this afternoon, is giving out inappropriate
sentences anytime that the lay jury is involved there.

So my only thought is to consider all of those factors before making a change that is of this significance. No doubt you gain the predictability. No doubt some computer model will show that the band of discretion, which is what counsel consider so much when they're giving advice to their clients if they do plead guilty and are likely to go judge alone. One of the rightful things that they can consider, the outlier sentences to be much less like there.

But consider overall the reasons that those factors are there. Why we do trust, why our juries have different criteria for selection to begin with. How we populate those juries. And whether there is a substantial articulated basis for removing them from the process.

Thanks.

CHAIR HILLMAN: Thank you Colonel
Morris. Judge Jones?

JUDGE JONES: Jim?

VICE ADMIRAL HOUCK: Do you have any data to support the outlier, the lottery theory?

BRIGADIER GENERAL COOKE: No.

Well if you're looking at hard data, no. We certainly have a lot of testimony that you know, people say there are greater unpredictability with members. The sentences can be high or low.

So but in terms of sentencing data for the reason I mentioned before, no.

VICE ADMIRAL HOUCK: Do commanders venture an opinion on this? That you spoke with?

BRIGADIER GENERAL COOKE: Not that I know of

CHAIR HILLMAN: Admiral Houck, this is another one where we -- this is part -- this came out of our deliberations reckoning with what we brought back from the
site visits. We didn't query commanders about the sentencing process.

VICE ADMIRAL HOUCK: Thank you.

COLONEL COOK: On that same vain do we even know what percentage of the case -- I mean it's the accused's determination of whether or not the case is going to be decided by the judge alone, or by the members.

Do we know what percentage of cases an accused actually elects to be tried by the members and then sentenced by those members?

BRIGADIER GENERAL COOKE: We do have in our data, we have statistics on the numbers of members cases versus the numbers of non-members cases. Those are not broken out though by guilty, not-guilty pleas.

So there's a number of those cases where the defendant asked for members on the merits. We don't know what the defendant would have asked for had they had the opportunity to be sentenced by one or the
other.

So even there, it's a little
difficult to determine how defendants would
elect if were just looking at sentencing.

COLONEL COOK: And that would be
my next point too, with the defendants
electing that. I guess there's a part of me,
as talented and as well trained as our
military judges are, again it's the lawyers
helping to make legal decisions in that
process where with the military unique
structure that's there, it's the -- to the
extent somebody elects to have members
sentence them, or to even determine their
guilt or innocence.

They've been in the units. They
followed the orders -- I'm not saying judges
haven't been, they have, to different extents.
Whether it's been the deployments. Whether's
it's been serving out there in the -- living
in a barracks or understanding the conditions
under which an incident might occur. And why
something might have happened.

Again, not to excuse or anything like that, but to help decide it. And then to decide what's the appropriate sentence based on the number of deployments. The number of hazardous conditions.

The number of the egregiousness of that crime. And to take it all into account. I guess I would caution -- I would be concerned about us changing something. But for right now I'm not sure until I look at your data.

CHAIR HILLMAN: It's about -- sorry Colonel Cook, it's about 15 percent. But it's different across the services. That's about 15 percent of are member sentencing, as compared to judge sentencing, so.

JUDGE JONES: 15?

CHAIR HILLMAN: 15, yes ma'am. So it's a small percentage even now.

MS. HOLTZMAN: Can I just make
sure that I understand the rationale for this. That first that there's an appearance of
improper command influence. When the commanding officer -- the convening authority
has picked quote, unquote the panel.

So that's one issue that you think that this addresses. And the other is quote,
unquote, outlier sentences. Do you have -- just because it said -- I mean here's a point
that concerns me.

Just because a sentence is not the -- you know, is not in lockstep with every
other sentence for the crime, it doesn't mean it's unjust. I mean not every defendant is the same as every other defendant.

Not every -- the circumstances of every crime are not the same. So disparity in sentences is not for me, enough to be a trigger to say there's injustice.

I mean I think we need to have something more than that.

COLONEL COOK: I wanted to clarify
the point of the convening authority picks the panel. The convening authority identified --

    MS. HOLTZMAN: Picks the pool.

    COLONEL COOK: Right, picks the pool. Identifies a group of officers and
enlisted service members who would otherwise be available. And you can correct me if I've got this process wrong, be available to serve as a pool.

    And they'll put them on certain panels. That panel will then go to the court. And during the court, the judge controls that process. But the prosecution and the defense counsel get to ask questions and do the same voir dire that you do in a civilian court.

    And ultimately the panel is decided based on who's got what strikes or not. But it's the convening authority identifies the initial pool of officers who may otherwise be qualified to sit in there based on Article -- is it 69? What is it Beth?
BRIGADIER GENERAL COOKE: 25.

COLONEL COOK: 25. Thank you.

The Article 25 criteria of the judicial temperament, experience, education. All those things that are well laid out.

They'll just say these are people who I'm putting on my panel for this next year or whatever. And then from that the judge and the prosecutor and defense pick the pool from there each individual case.

BRIGADIER GENERAL COOKE: Let me just -- I would say command influence, or the potential for command influence plays a minimal role in our -- in the majority's recommendation for judge alone sentencing.

There's a probably a slightly greater chance for unlawful command influence if you have members then there is with a judge. But that's really not much of a factor.

The bigger -- and outliers is kind of a hot button term. I think we feel that
there will be greater consistency in
sentencing with military judges. For the
reasons that I mentioned. Members do this
maybe once or twice in their careers.

So there's no -- there's no real
good frame of reference when you get in and
you're told you can do anything from no
punishment to 40 years confinement and a
discharge and some other stuff. They just --
and they're told you can think about
rehabilitation. You can think about
deterrents. But you've got to come up with a
number some way.

A judge who hears these cases on a
regular basis has a better frame of reference
as to how this case fits with other cases that
he or she has seen. And so there's likely to
be less of that great unpredictability that
you -- that I think all of us would say, even
Colonel Morris will say, we've seen in courts-
martial.

It's one reason why defendants may
roll the dice sometimes when they've got a
very good pretrial agreement. And say well
I'll go with the members. Because I already
know I can't -- the convening authority's not
going to let me have more than this.

On the other hand, sometimes it
dissuade a defendant who's really afraid that
they're just going to get the book thrown at
them if they get convicted. And they may even
elect trial on the merits by the judge.
Because they're afraid of what's going to
happen on sentencing if the members -- if
they're sentenced by members.

BRIGADIER GENERAL McGUIRE: Judge
Jones.

JUDGE JONES: Harv.

MR. BRYANT: Yeah, if I could add
too. I think one of the things that we
considered along with everything that General
Cooke has said, is that -- and I don't know
the answer for the six states who allow for
jury sentencing.
But whether or not -- I don't know whether or not they require unanimity. Because all states don't require unanimity in jury trials. Some do in felonies, but not misdemeanors.

But at any rate. We know in courts-martial, it's not -- it can be three out of five. And so part of what we heard, and what we also thought on our own and discussed was you may have two members on the panel who didn't even think the person was guilty. Yet now they're involved in the sentencing.

I think the thing that really highlighted it for us in one of our site visits to a major installation, which probably -- I don't know if it's the busiest, but one of the busiest within that service.

In terms of courts-martial, we heard not on a single outlier basis but on a continuing basis, this is a quote, wild disparity in panel sentencing.
BRIGADIER GENERAL McGUIRE: Just an observation, Judge.

JUDGE JONES: Sure.

BRIGADIER GENERAL McGUIRE: And that it's interesting that if -- if only 15 percent of the defendants prefer to have members adjudicate -- or their sentence, determine their sentence. That indicates to me that they're fearful of a more harsh sentence. And that's why they go with the judge.

JUDGE JONES: Russ.

MR. STRAND: Well, I think the notion that -- and I think most service members know that they're not going to be tried by their peers. Because they usually have to be above rank. So they know they're going before the leadership.

And so I think that's part of a chilling effect as well. Because I'm going to be adjudged by the sergeant majors that I don't even know, but I know sergeant majors.
And I know commanders. And you know, so I think that's part of it.

The other part of it was for me was what I got as far as some of our information is that when the judges go to school, to the judge course, and it's a joint course. They actually get several files. And they get trained on how to adjudge sentences.

And they practice that. And I think it's a really good best practice to be able to -- if you're going to have somebody do something so complicated as General Cooke has said, and I agree.

You know, why not train somebody to do it, you know to where you can look at a certain degree of fact patterns here and a certain degree of fact patterns here and actually practice it before you do it. As opposed to the first time I've ever done this very complicated thing, it's going to significantly impact this person's life.

That's what kind of sold me on
this. Plus some antidotal stuff I've seen along the way.

Not only in our visits, but also in my own experience, I've seen juries, military panels you know, basically -- technically yes, this person was guilty of sexual assault. But we really think the victim was at blame as well, because the victim did this, this and this.

So they've given a lighter sentence because they didn't' really want to you know, throw the book at him for whatever reason. And I think those kinds of decisions don't belong in this system as well.

So there's just a couple of thoughts that I have.

BRIGADIER GENERAL COOKE: If I could just say one more thing in response to Colonel Morris' very eloquent defense of the current system. And I learned a long time ago, you don't want to be on the other side of a case from Larry Morris.
But as many of the issues that you are having to deal with in this whole process, this is a 60/40 question with a yes, no answer. There are -- there are good reasons to keep the current system. There are good reasons to move from the current system.

And I think we've laid those out for you. It comes down to a judgement call if you will as to what is best going forward.

JUDGE JONES: And maybe if it's only 15 percent, the system is speaking for itself.

BRIGADIER GENERAL COOKE: To a large degree it is.

JUDGE JONES: So you have choice.

Liz?

MS. HOLTZMAN: Just one other question. I guess another alternative here, is having a pre-sentencing report and a different system for sentencing.

So it's not immediate, you get an experienced agency that's involved in this
process. And it makes a recommendation. Could be to the panel. Could be to the judge.

Did you consider that? And why's that not a better option?

BRIGADIER GENERAL COOKE: Yes.

We'll get to -- we looked at sentencing guidelines. And there's a whole -- other whole set of issues there. And we ultimately didn't make a recommendation on them.

My personal view, I don't think we discussed this, but if we were to move to a guideline system, that would argue more for judge alone sentencing then what we have now.

Because if the guidelines are anything like the federal guidelines, their complexity is such that it would take a long time to instruct the members in a given case how to apply these guidelines.

MR. BRYANT: If I can just add to that. We heard from the experts against guideline sentencing who came to us. That none of the 20 states that have sentencing
guidelines -- in those states the jury's not
even informed what the guidelines are. They
have to -- they have to sentence under the
statute.

So whether or not the military
would necessarily have to be informing panel
members what the guidelines were, that would
be a difference from everything else that we
were told goes on in the state court system.
And certainly, well federal juries aren't
told, because federal juries don't do
sentencing.

JUDGE JONES: Right.

COLONEL COOK: One clarifying
question on recommendation 55, which is the
sentencing data availability.

The recommendation says to release
the sentencing outcome. I know the Navy is
publishing theirs. But you're not advocating
actually --

I mean if somebody wants to
publish I guess my concern would be let's not
become a system that is so results oriented
that we're not emphasizing everything that's
being done with sexual assault. Everything
from prevention to reporting and all that
stuff.

But if this is just recommending
releasing the information, or making it
available, but not advocating that we have to
publish to each of the services. Is that
right?

It says that the Navy's doing it.
But it's not necessarily dictating that
everybody ought to. Because it's not just the
result that hey we got this many convictions.
Because you can create a perception the
opposite way of it's result.

I mean it's the prevention, it's
the protection of service members. It's the
entire process that we're advocating fixing.
And not just -- I mean one indicator is an
increase in convictions or results or things
like that.
But so is the reporting, which is now increased by about 50 percent by the report that came out this month. So if you're going to advocate one, I'd just not -- I would hate to take it out of context and emphasis one piece of the improvements over everything else.

But releasing it or making it available to those that are interested in seeing it, I'm not necessarily concerned about.

CHAIR HILLMAN: Colonel Cook, the Navy releases it for everything. I mean not just for sexual assaults.

So the intent would be to increase some transparency in the whole system and not suggest that the sexual assault cases deserve a different degree of scrutiny then everything else. Notwithstanding that they have in fact been subjected to that additional degree of scrutiny in recent months and years.

So and the idea is that as other
recommendations say, that certainly this
should not be the only thing considered in the
success of this effort to prevent and to
respond appropriately to sexual assault. It
should be considered alone. Agree.

COLONEL SCHOLZ: In response to
Representative Holtzman's question the pre-
sentence reports. I think we did discuss
that. Correct me if my memory's wrong.

But I think we looked at that
possibility, but in terms, I think we were
cconcerned about delay. Because we have this
system that we think is pretty efficient.

We go straight from findings into
sentencing. And then it's the prosecutor's
job to already be ready to -- with a kind of
pre-sentencing information, to jump into
sentencing.

And we were concerned about
waiting to come up with the pre-sentencing
report. Like you said, we'd have to probably
contract out potentially. And there might be
a delay in the system.

So I think we did discuss that as

a panel.

MR. BRYAN: Judge Jones.

JUDGE JONES: Yes Harv?

MR. BRYANT: Just to add another

fact to go in our calculations here. When we
talked about the fact that only 15 percent are
by panel now. When we were looking at the
guidelines issues, which is different, but
separate, we heard from the Department of
Justice Office of Policy and Legislation, that
in the pre-guideline days in the federal
system, there was only 15 percent jury trials
in criminal matters in federal court.

The corollary to that is once they
impose guidelines, it went down to one to two
percent jury trials in federal criminal cases.
So I'm just showing a comparison that at one
point in the federal system, it was only 15
percent going with a jury trial even though
the federal system has never had jury
sentencing.

MS. HOLTZMAN: Well I'm not advocating guidelines.

MR. BRYANT: No, and I'm not either Representative Holtzman. No, our -- as you heard, our subcommittee is not. I didn't put that in there with the guidelines piece I just put it in there that that's how the statistic of 15 percent jury trials, pre-guidelines in the federal system came to us. That dropped down to one to two percent after guidelines.

But no, this subcommittee is not recommending guidelines.

JUDGE JONES: Right. And that meant that defendants were -- opted for certainty. Because when they pled they got a guideline range as opposed to rolling the dice with a conviction where the judge would not -- you know would have a different -- could do what he wanted within the guidelines.

And that just showed prosecutorial
power to give them a better deal than what they might get post-conviction.

MR. BRYANT: We did hear from trial counsel in our site visits, that were in favor of sentencing guidelines. Just so you know, that the panel would know that.

JUDGE JONES: Colonel Morris?

COLONEL MORRIS: Just only one point about the pre-sentence report. You know that would also be a major change in how we operate. And it would logically follow if you go -- might logically follow if you go to judge it on sentencing.

But you know our sentencing process, it's very advocate heavy. And much dependent on both parties preparation of, and presentation of evidence. And it's relatively protective of the accused.

I mean there's information that would go in a pre-sentencing report that would never be admitted in the sentencing phase of our trials. And that's been even enriched
over the last 20ish years where the manual has
codified some of the court opinions that have
further narrowed the scope of opinion on
whether somebody should stay in the military
and that sort of thing.

So to dispense with that, has that
collateral impact as well.

CHAIR HILLMAN: Okay. I think
wraps up. I have a sort of summary slide.

Our goal, and you get to see if we
met that, was to compare all of the civilian
systems we could fathom with the military
justice system. Which itself is complex.

We looked at surveys and started
there. And ran through then the investigation
and prosecution process right through
sentencing, as you just heard. And proposed
legislation.

These are some of the results.

Things that I slide for your early at the
beginning of the presentation. We think we
need better crime victimization data.
Standard terms and rational reporting requirements.

We think we need to continue to focus on training and encourage collaboration. We need to balance resources for defense counsel. Dropped out of our slide.

We also need to balance the needs of the victim and the process. And make sure that those are represented throughout as the models for the multi-disciplinary approach and the integration of new forces. Victim advocates, victim witness liaisons and the special victim's counsel in the process show.

And we also recommend granting military judges more authority to improve fairness, efficiency and confidence in a military justice system for the multiple reasons that we sort of set out throughout.

So with that Judge Jones, barring further questions from the panel. I want to thank the subcommittee members who came today. Those who couldn't. And everybody for
listening to us all day.

JUDGE JONES: Well I can't let you sit down without complementing you and your entire subcommittee, and Kelly for an absolutely amazing job. Absolutely amazing. That was terrific. Thank you.

CHAIR HILLMAN: Thank you.

(Round of applause)

JUDGE JONES: We're going to switch now to the second subcommittee report. Which is the victim services. Ms. Hernandez is the chair of that subcommittee.

The process will be a little different with this subcommittee. I'm going to stay at the table and keep talking. But everybody wants to move and rearrange themselves, that's great.

Because the comparative system subcommittee had not finalized its report, or its recommendations and findings, we discussed it. We did not deliberate and as a panel reach a consensus on accepting, modifying or
rejecting recommendations.

The victim services committee's report, its interim report is final. Their findings and recommendations are final from the subcommittee. And so as we review that report, there will be discussion and deliberation. And if we're able to do it today, the panel will make findings -- our own findings with respect to whether we accept them, want them modified or may reject some of them.

So we'll be looking to do that. Which is going to take us a little bit longer. Recommendation by recommendation. And I just wanted everybody to understand the process.

Why don't we take a five minute break.

(Whereupon, the foregoing matter went off the record at 3:25 p.m. and went back on the record at 3:35 p.m.)

JUDGE JONES: ... already mentioned is the chair of the Victim Services
Subcommittee will now begin their report out to the panel.

MS. FERNANDEZ: Good afternoon, Judge Jones and panel members. Thank you for giving me the honor to present the Findings and the Recommendation of the Victim Services Subcommittee.

I would like to start by introducing the members of the panel who served with me. I had the great honor to be able to work with these ladies and gentlemen who provided great insight into the issues that were confronting victims in the military.

We had very passionate discussions and I think we came to very reasonable Findings and Recommendations.

So let me start by saying that Former Representative Liz Holtzman served on the subcommittee.

Brigadier General Colleen McGuire served on the subcommittee.

Dean Michelle Anderson who is
Professor and the Dean of CUNY School of Law served on the subcommittee.

Lisa Schenck, who's an Associate Dean here at GW is on the subcommittee.

Barbara Jones served on the subcommittee.

Judge Marquardt, who is on the Kansas Court of Appeals served on the subcommittee.

Meg Garvin, who is not here today, is the Executive Director of the National Crime Victims Law Institute.

And Bill Cassara, an attorney at law and also Retired U.S. Army.

As I said, it was a great honor to serve with these individuals and I think that we have created a really good report but we could not have done it without the help of the staff.

So I would like the staff to raise their hand when I mention their names because the incredible work and time and time spent
until two in the morning in the office doing this report, we could not have done it without you.

So, Commander King, Julie Carson, Kristin McGrory, Rachel Landsee and Amy Peele, thank you all very much for your service.

Next, I'd like to go into the mission of the subcommittee was to assess the adequacy of military systems and proceedings for providing support and protection to victims in the investigation, prosecution and adjudication of crimes involving adult sexual assault. The result was 37 Findings and 38 Recommendations.

I'd also like to tell you a little bit about the frame and the lens that we looked upon this issue with.

We realize that military sexual assault is an enormous crime against an individual but it's a crime against the whole military system.

Sexual assault means that our
troops aren't ready and it can drastically impair capacity to move on a mission.

Therefore, we looked and we said what are the barriers for victims to come forward because unless they come forward, we cannot provide them with services. Once they do come forward, what are the obstacles for them to access the services and what are the quality of those service?

What's the knowledge that the victims have of their rights and how are we enforcing them on a consistent basis?

I'd like to quickly go through the terms of reference which is on Page 4 of

Assess the adequacy of military systems and proceedings to support and protect victims in all phases of investigation, prosecution, adjudication of adult sexual assault crimes.

Assess whether military systems and proceedings provide victims the right to a Board afforded by 18 USC and 371 Department
of Defense Directive 1030.1 and Department of Defense Instruction 1030.2.

Assess differences between military and civilian systems and providing support and protection to victims of sexual assault, identify best practices for victim support and protection from civilian jurisdictions that may be incorporated into any phase of the military system.

Assess the effectiveness of the proposed legislative initiatives, modifying military justice process and providing support and protection to victims in adult sexual assault crimes.

Also we were asked to look through the NDAA at the expansion of the role of the Special Victims Counsel and also the expansion of rights provided in the UCMJ to reflect better what's being done in the civilian system.

Our methodology was pretty much the same as the subcommittee before us.
Meetings, we met with victims, with SARC{s}, with VAs, with military and civilian investigators, defense counsel, civilian and military advocacy groups, law professors and statisticians.

We had military site visits at Fort Hood, in Lackland, and then we had multiple requests for information.

We had an extensive document review and report writing where we had many conversations and formal meetings both in person and on the phone, all of which were documented and put on our website.

For purposes of time, two of our subcommittee members that are here today may not be able to be here tomorrow so I'm asking actually to go out of sequence in our recommendations, if that's okay, Judge Jones.

JUDGE JONES: Of course.

MS. FERNANDEZ: And I'd like to turn to Recommendation 2 and 2.a first and then Recommendation 19 after that.
Two and 2.a -- yes, they're in --
we put them in the back thinking that we were
going to save time by having those done in the
back, but we're now putting them in the front
in order to have all the right people present.

Recommendations 2 and 2.a came to
us mostly from the testimony of victims that
said I wanted to go restricted, but somehow
this information got to my commander and we
had to go unrestricted. And so it was the
inadvertent passing on of information that
caused a victim not to be able to control his
or her own case.

So our Recommendation, after a lot
of deliberation, we did get consensus on this
particular Recommendation from the
subcommittee, but it was that a victim can
consult with a special victims counsel prior
to deciding on whether to go restricted,
unrestricted or making no report at all.

And for the military police, and
this is going to sound a lot like what the
Comparative Systems Subcommittee recommended, but the first step of the military police process be to advise the victim that she has a right to speak to special victims counsel in order to determine whether to go restricted or unrestricted.

BG DUNN: So, wait a minute, I'm sorry, because I'm trying to understand that. So do you all see this Recommendation as a putting the genie back in the bottle provision?

So I'm sexually assaulted. I come back to my barracks crying. I tell my three roommates but I don't want to go anywhere and the three of them go to the MPs and report that I've come back, I've said this, I've given them all this detail, this is all I've told them and now I will still have the opportunity to talk to an SVC and put the whole thing back in the box.

MS. FERNANDEZ: That is correct.

BG DUNN: Have it be a restricted
report?

MS. FERNANDEZ: That is correct.

BG DUNN: Which is not the way it works now.

MS. FERNANDEZ: No. That was the problem. The testimony that we heard from victims themselves, what's exactly your scenario.

They go back to the barracks, they tell somebody and that information inadvertently goes to a commander then the commander is forced to then go forward with the case when that individual hasn't had the time -- or maybe already has contemplated or hasn't even had the time to contemplate whether they want to go restricted, unrestricted, or do nothing at all.

COL COOK: So taking that one step further, what doesn't go over to the command for action, or anything like that -- what, if anything, does the investigator who's had this person in front of them, are they supposed to
do anything or just sit there and wait to see
if they come back?

MS. FERNANDEZ: One more time?

COL COOK: You're saying that this
-- okay, the information comes to the military
police of an instance of sexual assault and
they tell them, hey, you can go talk to a
special victim counsel about this and the
person then decides, I want to make a
restricted report.

The military police who have some
indication that something had happened, do
they take any action whatsoever? Do they
report the contact that the person even gave
to them and said that they sent them back to
the special victim counsel? Now maybe not
their name, it's kept anonymous if it's a
restricted report.

What, if anything, are they
expected to do? Do they capture any
information to indicate that the contact was
made even if a return doesn't come back to
show that that process is effective in what you're trying to help them do or a tool that's used?

MS. FERNANDEZ: Therein lies the rub with our Recommendation, is that if there is additional information that an investigator receives other than, you know, the name of the victim, what do they do with that information? And I think on some level, the victim has to retain control over what happens with their case. If there is other information, I think to some degree, it's got to be on a case by case basis of what's done. But what the subcommittee felt was that there really needed to have an ability for the victim to control the case.

COL COOK: And then I would also suggest then, if you're using the system tool to allow that, that maybe you allow that military police office, at least, even if they don't take any other information, to note that the contact was made so that later on, the
Services have some indication, is this a process that victims are using. Is it effectively addressing what you wanted it to effect?

Because if there's no record and there's nothing that's done, the person just sits there, it's also interesting they sit there and they now know that there's a potential victim of somebody who is out there, they are aware of it, but they're doing nothing. And yet, something happens to somebody else.

I understand the concept of making sure the victim controls the case. It's just a different Catch-22 for the investigators who have usually had a different process at that point.

MS. FERNANDEZ: General Dunn?

BG DUNN: This actually might tie in with the Recommendation that the CSS just made that there be a process for a victim to Actually speak with an investigator and then
make the decision that they don't want to go forward. But allow the investigative system to have the name of the alleged perpetrator in case other cases come forward in the future.

So maybe this might be something that would tie in together somehow.

MS. FERNANDEZ: Just for clarification, I don't know if I'm allowed to do this, but was that not the Recommendation that came out of Comparative Systems that the name of the perpetrator go forward? So that would be the consistent.

BG DUNN: Right, but that the victim be -- if she wanted to, or he wanted to, have afforded the opportunity to have a full out conversation with an investigator and then say, okay, I want to make a restricted report.

MS. FERNANDEZ: But the name of the perpetrator is

BG DUNN: Catalogued, because CSS was trying to get to the issue of serial
perpetrators which would, you know, provide
the opportunity just to go back to the victim
in the future and say two other people have
reported on this same guy, would you like to,
you know, would you like to talk to us now?

MS. FERNANDEZ: Liz, did you?

MS. HOLTZMAN: Yes, I think the
genesis I think it's very important for
members of the response panel to realize that
the subcommittee was very concerned about not
interfering with the existing system which
requires the commander immediately to report
any information that comes to his or her
attention. So that is not interfered with at
all because we thought that would be a major
change.

But I think the real question as
Mai mentioned, is what happens if the victim,
after discussing it with -- under the CSS
report and with the MCIO or the military
police decides that she or he doesn't want to
bring the case, but information about that
case comes from other witnesses who were there, now I don't know for sure what the military rules are here, whether the military is bound by the victim's refusal to go forward or if they have independent evidence not from the victim, what do they do and how does this affect that?

BG MCGUIRE: Part of the, ma'am, if I can respond to that?

MS. FERNANDEZ: Yes, please.

BG MCGUIRE: Because part of the discussion that we had during our deliberations and work was that military police and the commander has a mandate to ensure the safety and security of that installation and/or the area that they're responsible for.

And so, in discussing a restricted case without knowledge of who the individual is, is one thing. But once there is an indicator that we know who our potential offender is, the law enforcement is compelled
or mandated to at least initiate an investigation.

But I think what we were talking about was that that was not known at the point. So your recommendations that you had, while similar in giving the victim an opportunity to discuss whether or not to go restricted or unrestricted, I don't think we really fully discussed any discussion about the name of a potential perpetrator.

MS. FERNANDEZ: I think that the Comparative Systems Panel, thank you, had a very good suggestion where it allows, as Colonel Dunn said, to put -- I'm sorry, General Dunn said to put the genie in the bottle, but at the same time, the name can go forward and if this is a serial perpetrator, we can also track what this individual is doing and possibly stop somebody else from getting assaulted.

I don't know if this is correct, if we could amend our own Recommendation at
the table or

BG MCGUIRE: Sure, we'd like to

hear it, yes.

MS. FERNANDEZ: I think our

recommendation would be, first of all, that

the Secretary of Defense implement policy that

a victim will be

The first Recommendation 2 stay

the same but the 2.a be amended to state that

the name of the perpetrator should be put on

file or placed into a data system so that his

or her name can be tracked and further sexual

assaults can be prevented.

In other words, to basically track

the recommended coming from the Comparative

Systems Panel the 2.a would track that.

BG DUNN: A better way to do it

might be just to reference the CSS

Recommendation by its number, perhaps, to just

some how

MS. FERNANDEZ: Adopt it.

BG DUNN: -- at the end of this,
you know

MS. FERNANDEZ: Adopt it.

BG DUNN: Yes, just make some reference. I'm sure the staff can come up with better language than we can sitting here at the table right now, but just come up with some statement that this does not conflict with the CSS report 1-23, whatever it is, CSS Recommendation 1-23 when we get finished with that. Does that make sense?

MS. FERNANDEZ: I would say let's go with General Dunn's

JUDGE JONES: I just have one quick question. If the victim goes ahead and makes a report to someone which makes it automatically unrestricted, is this intended to say that that it's no longer -- it doesn't become restricted or unrestricted until after they've been able to consult a special victims counsel?

MS. FERNANDEZ: Yes.

BG DUNN: That's what it says.
PROF. HILLMAN: Judge Jones, that is what we recommended this morning or at some point a while ago and that's exactly what our Recommendation was, it's 16 on the Recommendations that we made.

So and this would likewise track that same

JUDGE JONES: I don't know, I think my own preference would be to try to educate people on who they can report to as opposed to stopping everything. But I need to think about this some more. It seems a bit complicated to me.

And I worry about what everyone's doing while we're trying to decide about when -- I don't know. Is the special victims counsel going to be available quickly enough to respond to things?

MS. FERNANDEZ: I think that special victims counsel should be available. And again, we have a Recommendation on resources and it was a question that came out.
The more the special victims counsel is employed in different situations, the more that resource is going to run thin.

MS. HOLTZMAN: Judge Jones?

JUDGE JONES: Yes?

MS. HOLTZMAN: My question was a little bit different from what you have all focused on, so I don't know that we addressed it and I don't know what the present policy is with regard to it.

But let's say the victim decides to make a restricted report or after consulting with special victims counsel decides to make a restricted report. Subsequent to that, information from totally independent sources come to the police to the effect that there has been an alleged sexual assault. What happens then?

This is not a report that's triggered by the victim, it's a report that's triggered by independent witnesses. What happens in that case? Do they go forward? Do
they stop? Do they -- what happens? Go back and consult with the victim again?

MS. FERNANDEZ: I think that was the unintended -- it was the roommate scenario where the roommate gets told what's going on, the victim decides that she or he wants a restricted report. That information inadvertently gets to the commander or that the first step has to be going back to the victim and saying, do you want this to remain restricted or do you want an unrestricted report? I think that was our decision.

But then the investigators need to go and that's their first step to go back to the victim.

MS. HOLTZMAN: Right, but maybe I didn't make myself clear. In the case you're positing, the information is coming from the victim. So what we're saying, in essence, what your recommendation is, the victim may have made an inadvertent mistake or it was a spontaneous outburst or it was an emotional
thing, so she or he should be able to control that circumstance.

   I'm talking about a situation outside of the victim where other people witnessed the assault and have come forward, not at the victim's behest, maybe they don't even know the name of the victim, but they were witnesses to the event, not the roommate who's hearing secondhand. I'm talking about someone who actually witnessed it. What happens in that case?

   MS. FERNANDEZ: Representative Holtzman, I think that that was something that we did not deliberate upon in the subcommittee so we could bring it up at the full committee, but we did not deliberate on that.

   MS. HOLTZMAN: Well do we know what the policy would be of the military? Do you mind if I ask that question, Judge Jones?

   JUDGE JONES: No, not at all.

   PROF. HILLMAN: We heard about this at one of our site visits. We heard about
this where at, you know, a third-party reports
an assault. I think it's a routine
circumstance, in fact, that it happens and the
investigation ensues and the victim doesn't
have veto right over what happens but the
victim is consulted. That's my understanding.

General Dunn, do you remember?

BG DUNN: That was my understanding
as well is that the commanders and the MCIOs
must report and open an investigation if they
get the information even if the victim has
already made a restricted report if they get
separate information because they don't know
about it. I mean they don't know about the
restricted report. They don't know about the
facts and circumstances, so they would open an
investigation.

Ultimately, it would come together
and the victim would -- she would have to
decide whether to make -- he or she would have
to decide whether to make a statement to have
presumably
JUDGE JONES: Whether or not to cooperate with the investigation.

BG DUNN: Right, right. But the investigation ensues.

COL COOK: As a point of clarification for both reports, then, the conversation with the special victims counsel would clearly be confidential. If the person goes to a military investigator, it consults with them as you both envision and then makes a decision to make it restricted, then we're not going to pursue the case on behalf of that victim quite to the same degree.

But if they decide later on to make it unrestricted, is the original conversation with the military or the consultation with the investigators, is that considered confidential as well? Because I don't know what state of mind the victims might be in when they have that initial conversation, you know.

If you're saying they should be
available earlier to the special victims
counsel and they go to the investigators,
those investigators are involved early on and
the information that's provided may not be --
once they decide to make an unrestricted
report, it may not be completely the same as
the

I mean is the initial conversation
considered confidential as well? Or if they
come back later, they make their report, there
are changes in the report that's there based
on maybe a period of time, I don't know. What
kind of information is the investigator
supposed to capture at that point?

MS. FERNANDEZ: I think at this
point, is that there would probably be
processes, if in fact this recommendation is
accepted, there would have to be some
processes that we'd have to put in place that
would probably have to go back and revisit
that conversation to see if she wants to still
adhere to what she had said previously or not.
You know, so I think they'd have to address it in some manner so they could at least say that, you know, they can go forward from there. But I mean, at this point, we're talking about, you know, a process to whatever -- if we go forward with this Recommendation.

JUDGE JONES: So you're not talking just about an inadvertent -- well there's inadvertent in two different ways, an inadvertent disclosure through the girlfriends is, I think, the example you gave.

But when the victim herself goes to the military police or maybe to a commander, that's -- she may not know that that's going to cause her to have, you know, an unrestricted report. Are you considering that as well? That's covered as well? I just want to clarify it.

MS. FERNANDEZ: I think what we envisioned here was that the victim would get a hold of an SVC right away and with that consultation, he or she could better determine
whether they want to go restricted and unrestricted.

But that means that a third-party isn't going to go to a commander. So that's what was the second part of the recommendation that said, if I told my girlfriend or somebody else that I had been assaulted and I went restricted, that person going to the commander or an investigation couldn't trigger an unrestricted report.

Now the scenario that Representative Holtzman is positing, we did not contemplate which is the third-party scenario. We were all at the same bar together, we saw the assault take place. It was completely an independent observation from a third-party. We did not contemplate that situation so we didn't have deliberations over it.

But we did want to know that if, at some point, somebody, like you said, was going to make an excited utterance, that that
wouldn't be used against them in their
decision making power.

MS. HOLTZMAN: And to just to
clarify, Judge Jones, if I may, just to
clarify, at least under the Recommendation
that the subcommittee made, the police agency,
if you go, if the victim goes to the police
agency immediately, they are required to tell
the victim that you need to discuss this first
with your special victims counsel.

So that would be a way of ensuring
that the victim, at least, knew that there
were -- that she or he was entitled to talk to
special victims counsel and we're going to
assume that the special victims counsel knows
something about restricted and unrestricted
reports.

JUDGE JONES: Okay, any other
questions?

MS. FERNANDEZ: If we could move to
Recommendation Number 18?

JUDGE JONES: Well, I'd like to
just get a sense of how the panel -- whether
the panel wishes to adopt these two
recommendations 2 and 2.a.

       MS. FERNANDEZ: With the cross-
       reference to the

       JUDGE JONES: Yes, with the cross-
       reference to

       MS. FERNANDEZ: -- Recommendation
       16 in Comparative Systems.

       JUDGE JONES: In comparative
       Systems.

       Could we just -- how many are
       prepared to adopt it as it is with the cross-
       reference? All right. Other -- okay.

       Any concerns?

       COL COOK: On 2.a, the only thing
       I'd want to know, that concept of the
       discussion with the investigators, if they're
       going to investigators to consult with them
       and just discuss the process, you see a
       special victim counsel, I think it's
       confidential.
If you go to the investigator and say okay, how would this work? What would happen and they discuss process, then I'm not as interested in that confidentiality.

But I am concerned if they start talking about what happened during that offense and the merits of it and there's not parameters established up front before saying they can consult fully with an investigator before deciding restricted or unrestricted, then I think we either have to say it is confidential or it's not confidential.

If you say it is confidential, I'm not sure what kind of -- it'll raise other issues from a defense perspective that I think need to be addressed before I say that I would agree to the 2.a language.

Two, I'm fine with. Allowing them to have access to the special victim counsel up front, I agree with. It's just some guidelines of, if they go to an investigator, they talk about process, I have no objection.
If they talk about merits, then I have some concerns that I would like to see addressed before I agree blindly with a cross-reference.

JUDGE JONES: All right. Well then, I think the consensus is to adopt 2 and I have concerns about 2.a as well, so perhaps we could come up with a slight modification. But if that's not accepted, there is a consensus to accept 2.a as well by the panel.

So, Colonel Cook, it's up to you and me to propose some modification.

COL COOK: Okay.

JUDGE JONES: All right. I'm sorry, did you say 18 next?

MS. FERNANDEZ: Yes, 18. We're getting the two hardest out of the way in the hopes of what you think.

So there is no big surprise here, one of our biggest issues was collateral misconduct.

We all realized it was one of the biggest barriers for victims to report. But
many of us felt that we still hadn't heard

enough evidence about what it would mean if we

removed from the ability to prosecute on some

low-level crimes.

Therefore, the majority of the

subcommittee decided that we should study the

issue. So our Recommendation here is, the

Secretary of Defense direct a study of what

constitutes low-level collateral misconduct in

sexual assault cases and assess whether to

implement a policy in which commanders will

not prosecute low-level collateral misconduct.

Dean Anderson had had her own

statement and it was Meg Garvin and Judge

Marquardt that also went along with her

dissent.

MS. ANDERSON: So, thank you very

much, Mai.

I want to thank the staff, as a

civilian, the opportunity to work with

military staff is an extraordinary opportunity

because of the commitment to duty.
The mistakes that I made were corrected at the midnight hour and I really think that their work on this project has been exemplary and I appreciate the work of the staff tremendously.

This separate statement is joined by Retired Judge Christel Marquardt, who's on my left from the Kansas Court of Appeals and also Meg Garvin who works at Lewis & Clark Law School as a Clinical Professor there and is also Executive Director of the National Crime Victim Law Institute. So it's an unusual statement in that sense that it's got a couple of members who are also joining.

The statement is only about three pages long. I would be your indulgence without the footnotes, it's only about three pages long, so I would beg your indulgence. This is an important issue and it sounds like Judge Jones is moving forward on these difficult issues fairly rapidly. So I'd like to be able to read the statement into the
We write separately from our colleagues on the Victims Services Subcommittee to recommend stronger measures on the issue of collateral misconduct and our measures are consistent with the comparative systems subcommittee reports and recommendations from earlier this morning.

The threat that Service Members who've been sexually assaulted will be punished up to and including prosecution for conduct they had engaged in before or during a sexual assault keeps many victims silent. And the ability to punish victims of sexual assault for this conduct creates a major barrier to reporting and prosecuting of sexual assault.

In practice, Actually, victims are rarely prosecuted for such conduct. Yet the threat of prosecution looms large, providing perpetrators with cover and intimidating victims.
Eliminating the criminal prosecution of Service Members who report having been sexually assaulted would remove the leverage that perpetrators continue to have and encourage victims to step forward.

The military, as you all know, criminalizes a range of behaviors that are not criminal in the civilian world such as alcohol offenses, fraternization and adultery.

When Service Members are assaulted, whether by another Service Member or by a civilian, the victim may have engaged in one or more of these activities around the time of the assault. If victims then elect to report having been sexually assaulted, a convening authority may prosecute them for these behaviors or other crimes collectively referred to, as you know, as collateral misconduct.

The civilian world and, Russell Strand mentioned this this morning, has largely abandoned charges of collateral
misconduct against a person who comes forward
to report having been sexually assaulted.

   Even when victim's misconduct
involves offenses such as drug possession or
prostitution, civilian prosecutors rarely
charge the victim with criminal behavior.
They choose instead to focus on the offense of
highest import and consequence, the sexual
assault.

   Civilian prosecutors realize that
a policy of charging the victims with
collateral offenses would deter them from
coming forward to report sexual assault. So
from a public safety perspective, therefore,
it is better to refuse to prosecute minor
offenses in order to encourage and prosecute
sexual assault. This practice works then to
ensure that sexual abusers are brought to
justice.

   The military's policy allowing
commanders the discretion to prosecute sexual
assault victims for collateral misconduct
creates a substantial structural impediment to victims reporting sexual offenses.

The 2002 Department of Defense Workplace and Gender Relations Survey of Active Duty Members indicates that over 20 percent of male and female victims who choose not to report having been sexually assaulted feared that they or others would be punished for infractions or violations such as under-aged drinking, if they reported the crimes they suffered.

These data collected in 2012 are not news to the military. As far back as 2004, the Undersecretary of Defense wrote in a memo to the Secretaries of the military departments, one of the most significant barriers to the reporting of sexual assault is the victim's fear of punishment for some of the victim's own actions leading up to and associated with the sexual assault incident.

Many reported sexual assaults involved circumstances in which the victim may
have engaged in some form of misconduct.

And in 2013, the Department of Defense included an instruction that had the same language.

The Victim Services Subcommittee report finds that the threat of prosecution for collateral misconduct is indeed a structural impediment to the reporting of sexual assault. If the subcommittee only recommends that the Department of Defense study the problem and makes no Recommendation about the wisdom of continuing to vest commanders with the authority to prosecute sexual assault victims themselves, even when the threat of prosecution deters victims from reporting.

Some subcommittee members expressed concern that the RSP did not receive evidence on the consequences of the military policy to discourage or disallow prosecutions of sexual assault victims for collateral misconduct. Since such a policy does not
exist in the military, any testimony about it
would have to be speculative.

The evidence that we do have on
the record suggests that the Services
themselves do not believe that the power to
prosecute victims of sexual assault for
collateral misconduct is critical.

According to the information
Services provided in response to the RSPs
request, the Air Force, Navy, Army and Marine
Corps have not tracked the prosecutions of
sexual assault for collateral misconduct.
When they have tracked it, prosecutions appear
to be few and of minor import.

The Coast Guard, for instance,
submitted information from fiscal years 2007
to 13 showing that it pursued very few
prosecutions of collateral misconduct.

The Army submitted data for fiscal
year 2013 showing that adverse actions against
sexual assault victims for collateral
misconduct occurred in less than five percent
of cases and adverse actions, where they did
occur, were mild.

For example, adverse actions for
collateral misconduct included counseling
statements for under-aged drinking and
nonjudicial punishments for fraternization.

In one jurisdiction for three
sexual assault cases, commanders considered
punishing the under-aged drinking and
fraternization engaged in by victims but in
all three cases, the commanders did not even
administer nonjudicial punishment.

Given these data, one cannot
seriously argue that commanders must retain
the discretion to prosecute sexual assault
victims for collateral misconduct because
military good order and discipline are at
stake.

Despite the fact that commanders
rarely impose punishment upon victims for
collateral misconduct, many victims are so
fearful that they will be punished for this
behavior that they never report to command
having been sexually assaulted.

Sexual predators can exploit this
fear and use the potential criminal liability
of victims to persuade them to remain silent,
and hence, many assaults go undetected and
unpunished, leaving the perpetrators free to
offend again.

Deterring reports of sexual
assault through the prosecution of victims,
collateral misconduct causes a serious
diminution in military good order and
discipline and we believe it's worthy of
reconsideration.

We recommend that the Department
of Defense develop and implement a policy that
commanders will not prosecute instances of
lower-level collateral misconduct against
those reporting credible allegations of sexual
assault.

Lower-level collateral misconduct
would include under-aged drinking or related
alcohol offenses, adultery and fraternization. However, the Department of Defense may go further and define lower-level collateral misconduct as any offense that is less serious than sexual assault itself given that commanders should be willing to forego the pursuit of these lesser charges, these lesser offenses when faced with a very serious crime that too often has gone unreported and unpunished.

Thanks.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: Yes, Judge Jones, as I advised you and Ms. Fernandez and Dean Hillman and now you, Dean Anderson, I am leaving but I assure you it has nothing whatsoever to do with anything we've heard or not heard this afternoon.

Thank you very much and I'll be back tomorrow.

JUDGE JONES: Thank you, Mr. Bryant.
All right. Obviously, we have a
Comparative Systems Subcommittee set of
Recommendations. It's 13.a, b and c that also
discuss collateral misconduct.

I certainly don't have a problem
with your Recommendation 18 that has come out
of the Victim Services Committee to have a
study of what constitutes low-level collateral
misconduct in sexual assault cases and assess
whether to implement a policy in which
commanders will not prosecute which does not
go as far as certainly your statement, Dean
Anderson and nor as far as, I believe, the
Comparative Services statements.

So, I don't know whether we want
to -- why don't we just discuss 18 since we're
only deliberating.

MS. HOLTZMAN: I thought that
Recommendation 13.c, Professor Hillman,
correct me please if I'm wrong which I could
certainly be the case, also calls for a study
in essence. It does not prescriptive. It
just calls for a study of this issue. Am I wrong?

PROF. HILLMAN: No, that's correct.

Thirteen c calls for a study to examine amending Article 31 and then of a procedure and other legislation and policy. But it's additive to 13.b which is really the one that's at issue here which says

MS. HOLTZMAN: Oh, I see, okay.

PROF. HILLMAN: -- a procedure that grants immunity from prosecution for minor collateral misconduct leading up to or associated with the sexual assault incident and promulgated list of qualifying offenses.

MS. HOLTZMAN: Thank you.

VADM HOUCK: So there being a difference between 13.b which would recommend now the establishment of a procedure versus the study, the verb being to examine in 13.c.

PROF. HILLMAN: That's correct, sir.

JUDGE JONES: Well, I don't have a
problem in accepting 13.c as from your committee as we go -- it's broader. I don't know

PROF. HILLMAN: Judge Jones, I guess we should look, since the Comparative System Subcommittee recommendations aren't quite final, so I guess we're not really talking about those

JUDGE JONES: All right, well, okay

PROF. HILLMAN: -- yes, although I'm happy to, but you

JUDGE JONES: I'm happy you're happy I'm moving there.

PROF. HILLMAN: Eighteen recommends study, so the question is do we support 18 sort of as drafted from the Victims Services

JUDGE JONES: I find it pretty easy to support. Is there any discussion about that? Beth?

PROF. HILLMAN: Thank you, Your
Honor.

I don't know what we'll find out by a study because we know what constitutes low-level collateral misconduct. Right? I mean it's the list of things. So I guess if we need to know and this was Admiral Houck's concern earlier, what impact this might have on commanders, I guess perhaps that's what the study would entail, but I'm not sure the study gets us too far in this.

It is a policy issue to decide not to prosecute those relatively minor issues compared to the gravity of the sexual assault. But I'd go further than recommending the study.

VADM HOUCK: Well, and then the question is, I mean there seem to be options about going further that might get considered later.

JUDGE JONES: Right, I mean I don't -- this is a study which may be the minimum threshold for you, your committee and we're
going to go back and look at 13.

PROF. HILLMAN: So we should just take 18 on its face?

BG DUNN: Can I just make one comment here?

JUDGE JONES: General Dunn?

BG DUNN: I kind of object to not the concept but the use of policy, policy, policy. I mean what this really is is going to be the Secretary of Defense asserting his authority under the Uniform Code of Military Justice to grant immunity for certain specified offenses or to issue some policy statement that commanders should consider granting immunity.

But whatever it is, it's going to be a granting of immunity for those offenses unless you just decriminalize them all together which they're not going to do, so unless you change the law, right, right.

So what I'm saying is I think that the CSS Recommendation in 13.c is more
specific and more couched in criminal law
terms and I prefer that to be.

MS. FERNANDEZ: Judge Jones?

JUDGE JONES: Yes?

MS. FERNANDEZ: Is there any way we
can consider 18 and 13 together when we
finalize your report? I mean is that

JUDGE JONES: That's fine because
we're going to actually have to have final
deliberations on 13 anyway. So let's do that
and we can decide.

It's obviously going to be one
Recommendation considering 13.a through c and
18 and we don't know what's going to be in or
out.

MS. FERNANDEZ: My only issue is if
Dean Anderson's recommendation goes further
than either 18 or 13, what additional things
we need to consider.

MS. ANDERSON: Oh, I'm perfectly
fine with waiting for the resolution between
these two. I was surprised, I think, we on
the Victims Services Subcommittee were all interested in where the Comparative System Subcommittee went with its own recommendations dealing with similar issues but in a slightly different route. And it seems to make sense, your recommendation, Mai, to consider then together. So I don't have any problem with that.

JUDGE JONES: All right. And we'll, of course, consider your statement as well which does go further. Okay.

MS. HOLTZMAN: Judge Jones?

JUDGE JONES: Yes?

MS. HOLTZMAN: It seems to me then when we look at the issue of the study, one of the points that Professor Hillman raised was, well, what are we going to look at? I mean I think one of the questions is, what kind of immunity should be granted assuming immunity is granted? So that's an issue, you know, transactional or use immunity or whether it should be immunity at all as opposed to some
kind of directive to military commanders.

So I think there's some issues that need to be examined and I would hope that in the formulation of this Recommendation that it's clear, you know, as it's only a study that we agreed to that that's included.

MS. FERNANDEZ: The issue is comprised in there?

MS. HOLTZMAN: Yes.

MS. FERNANDEZ: I think that's fair.

JUDGE JONES: All right. Then

MS. HOLTZMAN: Judge Marquardt wants to say something.

JUDGE JONES: Oh, Judge?

JUDGE MARQUARDT: Yes, I'm a little concerned about the direction of a study. So I think I would like for you to consider exactly what it is you're going to study as Dean Hillman said that, you know, we know this is a problem and you can't get people to come and tell you about it because they're afraid
to talk. So, what you're going to study is perhaps how the military can deal with this rather than just to study if there's a problem.

VADM HOUCK: I think there are a host of issues that could be addressed in the study and I don't think a study is kicking the can down the road or just punting on the problem.

I think that, and not to belabor it here, but I think a study could be very rich and could examine a lot of really, I think pretty complicated issues that underlie the interaction between first of all, some of the problems that we're talking about, drug use and under-aged drinking and how they relate to sexual assault, as well as the impact per se of things like drug use.

I mean, I was in the service long enough to remember a time when drug use was the issue du jour and we were worried about airplanes crashing and nuclear reactors being
improperly operated because of drug use.

And so I think that we really need
to seriously explore the relationships between
some of these things which are completely
different in the military context than they
are in civilian context.

And I think a study that those are
some of the issues that I would want to see
addressed in a study, which isn't to diminish
the hideous violation of the sexual assault is
at all, but to try to understand the
relationship of these things.

JUDGE MARQUARDT: But prevention
also plays a big part of it and how we're
going to take care of that particular issue as
it relates to this.

JUDGE JONES: All right. I think
when we deliberate 13, we'll have 18 in mind
and all the comments that have been made are
helpful. I mean 13 does go farther actually
calling for the establishment of a procedure
for immunity and so there are obvious things
to discuss.

    I think there's some sense that
there ought to be an examination or a study of
this issue. We may go much farther than that
but I think we need the opportunity when we
finally deliberate on 13 and maybe in the
interim, Mia, you and Professor Hillman can
propose something that combines them.

    MS. FERNANDEZ: Does FACA allow us
to talk to each other?

    JUDGE JONES: Oh, I forgot. Well,
I'll tell you, you propose it in an email.

    MS. FERNANDEZ: I was supposed to
do an email and I sent it to the staff and the
staff can send it around. Okay.

    JUDGE JONES: We'll do it however
we have to under the law. Okay.

    PROFESSOR HILLMAN: We'll advise
each other of our rights in that process.

    MS. FERNANDEZ: We'd better consult
counsel.

    Okay, if we could turn to
Recommendation Number 1. Some of these should be somewhat easier and because we had total consensus on the subcommittee.

We had 150 people testify in front of us and we heard about a lot, a lot of programs that are taking place which is fabulous. But a lot of those programs haven't been fully implemented yet. They haven't had the time to be fully implemented before another one starts up.

So Recommendation Number 1 is to fully implement the programs that have already been started. And then once they've been fully implemented, to evaluate them to see if they're any good. Pretty straightforward recommendations.

JUDGE JONES: I just have one question. Doesn't the law already direct the Secretary of Defense to implement these? Are we telling him to do what they're already directed to do? I don't know.

MS. FERNANDEZ: I think that they
JUDGE JONES: Yes, go ahead, sorry.

MS. FERNANDEZ: I think that we've got to fully implement them in what we're saying, to capture enough data so that we can evaluate them.

I think that they may be started and put forward but they're not -- we don't have enough information coming up.

I'll use the Special Victims Counsel. In the Air Force, it got started over a year and a half ago and in rest of the services, it's been implemented since January 1.

We still don't have enough data and information in order to be able to evaluate that program. We need sufficient amount -- before we start putting out more programs, to see if the ones that we've already done work. So we need sufficient data to be able to look at it to assess it, to be able to say we've come up with some interesting ideas but are these the best to
JUDGE JONES: Isn't 1.a that Recommendation?

MS. FERNANDEZ: Yes.

JUDGE JONES: I just wonder whether we need to tell the Secretary of Defense what he's already been mandated to do by law. I think 1.a is fine. Any other comment?

Okay. Then we accept 1.a and Recommendation 1 is not accepted. Okay.

MS. FERNANDEZ: Recommendation 3 mostly came from testimony that we heard from victims that at least the behavior, if not the assault, happened before as they were entering one of the military services.

The military is obligated to provide information on sexual assault 14 days in but what we found out through our testimony was that it was beginning earlier than that, that the bad behavior and the assaults themselves happened before that.

So our Recommendation is that the
Secretaries of the military department direct commanders in the military entrance processing stations, MEPS, to provide sexual assault prevention information to new recruits that include the definition of sexual assault, possible consequences of a conviction for sexual offenses in the military and information about the DoD self-help line and other avenues of assistance.

JUDGE JONES: I don't know enough about military entrance processing stations. How long are people there?

MS. FERNANDEZ: What we heard was as soon as you came in the door, the behavior started. You have a two week area where you could be assaulted and you had absolutely no information that this was a crime in the military or that you could get assistance or that you had access to services.

So what this does is it pushes the availability of information and services to day one when you enter.
JUDGE JONES: Any questions or objections?

PROF. HILLMAN: Just a clarification. It doesn't say day one, is that what you want to say, so because right now it's 14 days, right, so do you I'm not sure that as written it actually tells them to do anything that's not already happening because they do provide that information but there's no sort of time line on this. Right?

JUDGE JONES: Is the issue that they're not there in the military entrance processing station for 14 days? I don't know.

BG DUNN: Not everyone goes through it.

JUDGE JONES: I see.

BG DUNN: People get assessed different ways. But generally, if you enlist, you go through MEPS generally. And so I think much of the problem is in that age group and category.
MS. FERNANDEZ: My reading on this was it has to come within -- you have to receive the information within 14 days of entering is what it should read.

Thank you, Dean Hillman, for correcting me.

BG DUNN: So you want to really reduce that to 48 hours or

MS. FERNANDEZ: No, no. It happened during what

The testimony we heard was it happened when they were in training, when the recruits were in training and that they didn't get the information early enough but that the criminal acts happened while they were in training.

And so what we're saying is, you've got to receive this information within 14 days of getting into training.

PROF. HILLMAN: Isn't that true now?

BG DUNN: Yes, I thought that
General Snow said the first 14 days of -- he talked about that specifically.

PROF. HILLMAN: So the Finding here, I think, is that DoD requires that it happen with 14 days, Finding 3 there.

BG MCGUIRE: I think that what we're trying to explain is that we found that even on day one as the recruits were coming into their training station, whether it's a MEPS or their first basic training, they could still be in their civilian clothes, there's grooming going on on day one as soon as they are coming off the buses, there's sexual assault grooming.

And so if these recruits, either at the recruiting station or even as they go through the MEPS or of day one, that they get some education, boom, this is what sexual assault is. This is, you know, if you believe that there's this type of behavior, call this number almost day one.

And the concern was is that what
we witnessed was that there appeared to be grooming-type behaviors going on within the 14 days so trying to find that sweet spot will be difficult and I think that's why we want to give the commander the leeway to use the 14 days in order to work it within their training schedule.

But some sort of immediate education that this is what constitutes sexual assault and this is the recourse and information you have available to you to address it, day one.

JUDGE MARQUARDT: Could you do that at the recruiting station?

MS. FERNANDEZ: Well, I think that was the idea that you would receive information at the recruiting station that went beyond a poster on a wall, that you actually got information in your hand about services, about the hotline, about what's a crime, what's an assault, all that information when you walked in the door.
JUDGE JONES: I just wonder what are the sexual assault prevention and awareness campaign materials that we talk about at the end?

In other words, there's already a Recommendation from the Defense Taskforce on sexual assault to make available and visibly post sexual assault prevention and awareness campaign materials.

So that would be make available information and visibly post things. So are we saying we want that at recruiting stations and if MEPS are different, we want them there as well? And then if it's there, timing doesn't matter, it's there. It's visibly posted and the information is available.

MS. FERNANDEZ: But I think this goes beyond having posters on the wall. This is Actually receiving information in your hands.

COL COOK: There's a lot going on to prevent sexual assault. I guess as a part
of day one, I'm coming in, here are your
papers, sign away. Oh, by the way, here's all
the rules on sexual assault.

Instead, is it better than to hand
out the standards? Here are the standards we
expect of all military personnel who, you
know, active duty, reserve, Guard, whatever it
is. Here are the standards we expect our
Service Members to comport to. If you find
that this isn't what's happening, here's where
you can call for some questions and not single
out sexual assault. Because there's a lot of
things that aren't acceptable within the
military that they may come from backgrounds
that it is acceptable.

And I know we're trying to get
around sexual assault, but if you at least get
the standards up front at a recruiting station
for everybody and then when they get to their
MEPS station or wherever it is that they're
going to be accessed from, let the commander
at that point own that training schedule to
teach them the full scope of what they have to
train them on.

But I'm just concerned about day
one, just saying, okay and here, we're
expecting you to be assaulted.

MS. FERNANDEZ: I hear what you're
saying. I think it's what General McGuire was
talking about, is we've received testimony
that as soon as somebody came into the
military, they started getting groomed and
whether that was an assault that actually
happened within those 14 days or it was just
the kinds of things that happened before
somebody's going to assault you.

And so how do you tell a victim,
this is inappropriate behavior? And how do
you tell somebody who may be a perpetrator
themselves entering the military, this is not
allowable behavior and telling them up front
so that they know right away in a way that has
the most impact, probably a poster on the wall
isn't going to do that.
So that was the issue that we were getting to. We heard from victims that they had been assaulted during that time period. So and they just didn't know that this was -- that they had any kind of recourse.

BG MCGUIRE: And, you know, we're talking about young recruits who are coming straight from their neighborhoods and high school where there may have been this type of behaviors that was condoned.

Or they come into a new environment, it's totally strange and you've got a person of authority that's providing them some extra attention and guidance that could be something other than that.

And That's what they're -- they don't perceive it as sexual assault, perhaps, or the grooming to that end. But they don't realize it until unfortunately, it's too late.

MS. HOLTZMAN: I think that moving the date, I support this proposal. I thinking moving it to day one is a good idea. I think
letting the military decide what are the best materials to use, I have no problem with doing that. If they're not good materials, you know, someone's going to speak out about that. So I would basically support this Recommendation.

COL COOK: And that's exactly what I was writing on mine. The only thing, exactly what Representative Holtzman was saying is if you went to the third line of this, it says the Secretaries of the military departments direct commanders at military entrance processing stations, MEPS, to provide -- instead of saying to provide sexual assault prevention information, it says to determine how best to.

Because it's going to be different at the different locations where they arrive. I agree with the need to put it up earlier, but allow the people that know what that environment is there to determine how do you best get it up front into their hands early
packaged the right way?

JUDGE JONES: So are we saying to
determine how best to -- I still want the
temporal thing here, immediately provide? Is
that what we're saying?

COL COOK: Yes. How best to be
right.

JUDGE JONES: Okay. And we get
everything in.

MS. FERNANDEZ: Thank you.

JUDGE JONES: All right, with that
modification, then I think there's consensus
on Recommendation 3.

MS. FERNANDEZ: Moving on to
Recommendation Number 4. FY 14 NDAA requires
that a commander file a report eight days
after a Service Member files an unrestricted
sexual assault report.

The statute does not require the
tracking of or the reporting on Services to
victims who make restricted reports.

The statutory requirement enhances
DoD's requirement for SARCs to inform commanders within 24-hours of both unrestricted and restricted sexual assault reports set forth in current policy.

What we wanted to do here was, in fact, have a way of tracking victim care here. Unrestricted and that report is filed, your victim care, what services you're getting can actually be tracked.

As a restricted reporter, you're still entitled to the services but those services aren't tracked.

So that's the essence of what we were trying to get to in Recommendation 4 is that there be a mechanism to track victim care on a restricted report. But also to be able to maintain the confidentiality of the victim even though that report is being filed.

JUDGE JONES: I think that's -- I mean it's a good idea in terms of all of the kinds of data and information that we want about how things are working.
I guess my only question is who
would be filling these out? The commander?

MS. FERNANDEZ: It would be a SARC
that would be filling these out because if the
name came to the commander, then they would
have to go unrestricted.

COL COOK: Did you get the chance
to ask SARCs whether they think this is
feasible doing it within -- it's great to
collect the information, but the feasibility
of doing it within eight days based -- I don't
know what their other workload is in different
areas, and you had input from them. Do you
know if

MS. FERNANDEZ: This is the
Recommendation that we came up with after
deliberations so we didn't have a chance to
ask the SARCs.

PROF. HILLMAN: The -- sorry,
Judge.

JUDGE JONES: No, no, please.

PROF. HILLMAN: Finding 4.1 says
already the NDAA says it needs to happen within eight days of an unrestricted report. So eight days seems fine for the restricted report to actually have less to say in the restricted report presumably. So they ought to be able to manage this one.

MS. FERNANDEZ: Thanks.

BG DUNN: But I don't understand, the Secretary of Defense direct the Services -- so right now, there's no time limit. There's no eight day time limit, too.

PROF. HILLMAN: There is for unrestricted.

BG DUNN: For unrestricted.

PROF. HILLMAN: For unrestricted but not for restricted.

BG DUNN: So where is this applying the same standard to restricted reports with?

MS. FERNANDEZ: Right. So unrestricted, you're care is tracked.

BG DUNN: Okay.

MS. FERNANDEZ: Restricted, it is
COL COOK: Is the SAPRO that does
the report within eight days for the
unrestricted report as well? A commander does
it for her? Okay.

The difference we're putting it
with a commander at that point, an
unrestricted report, once the commander knows
that they've got the eighth day, they know the
information, the commander may not always have
that information. The unrestricted report,
you're going to put it on whomever receives
the restricted report.

MS. FERNANDEZ: The restricted
report.

COL COOK: Right. And if it came
in from someplace other than the SAPRO, it's
still going to end up in their hands, though,
so eight days from the time that they get it.

MS. FERNANDEZ: Eight days

COL COOK: Yes, right, okay.

MS. FERNANDEZ: -- from the time
that the

COL COOK: From the SAPRO learns it?

MS. FERNANDEZ: Yes.

COL COOK: In case it was the restricted report was made through somebody else. They might not have it if you want it to be the SAPRO that actually files that report.

MS. FERNANDEZ: One more time?

BG MCGUIRE: Well, there's concern about who's actually going to be tracking this report because there's different means to report a restricted report.

MS. FERNANDEZ: So yes, it's eight days from the time that the SARC receives the report. That is a good clarification.

BG DUNN: And you all envision the SARC making that report and doing the updates on the care.

MS. FERNANDEZ: Yes.

BG DUNN: So it would never go into
command channels.

MS. FERNANDEZ: It would not go into command because as soon as it went to the command, it would make it an unrestricted report.

BG DUNN: Right, even anonymously, it would be easy to figure out probably. So, okay, so that's -- so really, now you're going to have unrestricted reports reported and monitored in command channels and you're going to have the SARC's following restricted reports.

MS. FERNANDEZ: Correct.

BG DUNN: But who's going to oversee that since commanders make things happen in the military and are responsible for the means of the discipline to think about. I mean I don't object to that about, you know, trying to track their care to make sure that it's ongoing, but SARC's are not responsible for that from a command perspective.
BG MCGUIRE: I think at this point, the garrison commander would be interested, particularly in trying to determine resources required in order to provide those services to victims on that particular installation.

So, if you've got, you know, ten restricted reports, I think as a garrison commander it would be, you know, helpful to know what kind of services my staff is providing and do I have enough staff in order to provide the kind of services our victims need.

JUDGE JONES: I'm all for figuring out a way to gather that data.

I think the written incident reports need -- the original intention, I would have assumed was for the very top of the chain of command to be able to monitor ongoing investigations of unrestricted reports and it's more investigative than care oriented. So I'm wondering if there isn't just an easier way.
Because this isn't -- I'm assuming that for every

MS. FERNANDEZ: You did your testimony that it was care-related also.

JUDGE JONES: Pardon me?

MS. FERNANDEZ: That is was care-related also, that the report triggered a tracking and the tracking you could figure out if somebody was receiving all the services that they should be getting. So it was both.

JUDGE JONES: I see. Well, I think we certainly have to make it clear who's responsible for

MS. FERNANDEZ: We looked at it as if you went unrestricted, you got a set of benefits of somebody able to actually track what's going on with you and what your needs are rather when you went restricted, you didn't have that level of somebody really guiding you through the system. So it was an additional way to track and to provide services.
COL COOK: I think your Recommendation 4.a is right on point because it does tell SAPRO, hey guys, you've got to figure out a way. We want to make sure that getting the services, we want to make sure that they're available and if they're not getting it, we want a method of knowing that, too, so that we can correct the situation and that's what I think 4.a goes directly to.

JUDGE JONES: And it sort of basically it doesn't encourage and it says they should ensure measures to track the victim's care so they might be able to work this out together where they're dealing with the restricted reports.

I would certainly go with 4.a and I'm just a little hesitant but I may be the only one to require written incident reports on an eight day term.

MS. FERNANDEZ: All it does is it parallels what the unrestricted does. So

BG DUNN: Okay, right, for the
unrestricted.

MS. FERNANDEZ: Correct.

JUDGE JONES: All right. So we just have to say that, it's SAPRO, right?

MS. FERNANDEZ: That's correct.

JUDGE JONES: That's doing this?

MS. FERNANDEZ: Correct.

JUDGE JONES: All right then anyone else have any

COL COOK: Or SAPRO's channels because SAPRO's not going to be at the installation level.

MS. FERNANDEZ: It'll be the SARC.

COL COOK: It'll be the SARC or whoever or their personnel. It's going to be through SAPRO channels.

JUDGE JONES: All right.

Beth?

PROF. HILLMAN: Judge Jones, 4.a seems great. I struggle with what's going to be in that written incident report that's restricted that would be protecting the
identity is in 4.a but it's not so much in 4.
I'm just not sure how much you can detail the
services provided to victims for the
restricted report.

I mean their anonymity needs to be
protected and while the command knows there's
been a restricted report, they don't know more
about that.

I don't know, I worry about
connecting the dots on that and the allocation
of responsibility.

But if you feel confident that
this could happen, the SARC could protect the
identity of the initiator of a restricted
report with an incident report that details
exactly the treatment that they were provided,
then I'd defer to the subcommittee's
recommendation on it. I just worry about
that.

COL COOK: Is it possible to say
4.a becomes the primary Recommendation and
tell SAPRO that in terms of deciding what the
process should be they consider how to capture
everything you have in 4? You know, put it
back to them for their channels to determine
what should be in the report, how best to
process it and who's responsible for it and do
it within the same eight day period that's
afforded to unrestricted reports that go
through command channels, but just let SAPRO
as the people that own that in the field be
the one to determine how best to do it from a
leadership component.

MS. FERNANDEZ: Implement it.

JUDGE JONES: All right, I think we
can use that for 4.a. We would add while
providing a report as details services, etc.
and sufficient to track the victim's care and
we'll add the eight day period.

MS. FERNANDEZ: Yes.

JUDGE JONES: Okay. So for 4.a
with those modifications is accepted. And it
will subsume 4. Okay.

MS. FERNANDEZ: Our next
Recommendation went to expedited transfers.

We heard quite a bit of testimony of the perpetrators living next door to you but you filed a restricted report. You'd like to be transferred but in order to get transferred, you'd have to become unrestricted. So what could be done in those circumstances?

And the testimony we heard and what we talked about in our deliberations is that we'd like to involve, you know, medical personnel, SARCs and VAs should include the medical recommendations without having to really look at the underlying facts of there was a sexual assault involved here. So it allows an individual to still get an expedited transfer without going unrestricted.

Five a was training for medical personnel in these decisions. And commanders can make an expedited transfer decision based on medical recommendations without having to look at the underlying facts of there was a sexual assault involved here.
or effect transfers based on recommendations from medical personnel.

So basically, the training that SARCs should be able to go to a commander and say, look, I've talked to the doctor and the doctor feels that this person should be transferred and the commander can say, yes, I will transfer this person and it avoids the victim living next door to their perpetrator but it also avoids the need to go unrestricted.

JUDGE JONES: It's not clear to me exactly how much information the commander gets in this circumstance.

MS. FERNANDEZ: Under this circumstance?

JUDGE JONES: Yes, where you have a restricted report.

MS. FERNANDEZ: Well, what you try to do is enlist the help of a doctor and the doctor can give you the reasoning to provide for the expedited transfer without having
because the reasoning is usually she is a victim of a sexual assault or he's the victim of a sexual assault, so we want an expedited transfer, but that's in an unrestricted situations.

So you have a restricted situation, so you want to involve medical personnel that can say for medical reasons, A, B, and C, we think that this person needs to be transferred and that provides the commander with the wherewithal to make the transfer. It doesn't automatically make it, but it provides them with the wherewithal.

BG MCGUIRE: I'll just, ma'am, I'll share a little bit about our discussion that we had. While the recommendation, the commanders already have a tool available to them for rehabilitative transfers.

And so if it was the opinion of a reputable medical opinion that this individual needed to be transferred as rehabilitative or call it whatever we call it because we use
rehabilitative for, you know, other reasons as well.

While it might be understood there would probably be, you know, you could probably guess what the issue was, you would not come out forth and say and this is as a result of a restricted report. I mean, that we have reason to believe for her medical or his medical well-being that this individual would be best served for rehabilitative transfer as an option. That was the discussion.

JUDGE JONES: Admiral?

VADM HOUCK: So I'm unclear about whether or not the commander gets to know whether or not -- I understand the objective of protecting privacy but I'm trying to balance the commander's prerogative and authority to know why he or she is transferring a person to another unit.

And what I'm understanding is they won't know. A doctor will come to them and
say, you know what, we think that Seaman Smith ought to be transferred and therefore, you need to do it. I mean is that?

MS. FERNANDEZ: Well, you don't need to do it, the commander can always say no.

VADM HOUCK: But how can I say no? I don't

MS. FERNANDEZ: Well, and I think it wouldn't be like Seaman Smith needs to get transferred. I think you'd have to -- the medical professional would work with the commander and say, we've diagnosed him with A, B, and C which could all be things that you get diagnosed when you've been sexually assaulted.

Seaman Smith has depression.

Seaman Smith has post-traumatic stress disorder.

So you would get a list of -- we'll you'd get a rationale. It wouldn't be like a wink and a nod from a doctor, you'd get
an actual rationale but that would provide
enough reasoning to transfer that individual.

VADM HOUCK: Do we have precedent
for doing medical transfer? I just don't know
enough about it. Do we have precedent for
transferring people under other circumstances
that don't involve a sexual assault like that?

BG MCGUIRE: I'm not sure and
because I think there's probably some
discussion about HIPAA concerns, but I know
that it was of some discussion during the
course of some of the concerns over suicide
and other mental and behavioral health issues
that there was some discussion about that
that, you know, there's a fine line between
defining what's wrong with the individual,
HIPAA concern, but also that the environment
was not conducive for the person's well-being.

VADM HOUCK: I wouldn't want a
person to not get a transfer, you know, be
forced to make an unrestricted report as the
only way to get a transfer. This is one of
those -- it seems like it's one of those devil
in the details things that.

JUDGE JONES: And maybe if you have
a medical professional who's going to say that
let's take the worst case scenario, you're
suicidal, but I think commanders need to know
the context. Maybe we just say that's a
circumstance where you still maintain your
restricted report.

I'm just a little worried about
commanders not knowing what's going on here.
And also, the next commander not knowing.

BG DUNN: I was actually thinking
along the lines of what you just said, Judge
Jones, that we've opened the door here in a
couple of places though we haven't approved
those Recommendations to allow the victims to
make certain disclosures and maintain the
restricted nature of the report, certain
disclosure that involve commanders and perhaps
MCIOs or maybe.

I don't know if we want to look at
some holistic recommendation that revolves
around the victim's ability to control what is
happening with the investigation, you know,
the incident that pertains to him or her with,
you know, the transfer with the, you know, the
discussion with the investigation, the
investigative agency, with, you know, being
able to put it back in the box if a third-
party discloses it before, you know, I mean.

But that seems to be an issue that
we're trying to deal with in many aspects.

MS. FERNANDEZ: Well, yes. And I
think -- I'm sorry, go ahead.

MS. HOLTZMAN: No, I was just going
to say that if it's not the policy now, we can
recommend that it be the policy. And that, I
guess the real question here is, if the
commander is able to deduce from the
information that's given by the doctor what's
happened, well, you know, we could say also
that it the report has been a restricted
report that's the basis of the medical
opinion, that if for any reason the commander finds out about that as a result of the disclosure by the medical officer then it remains restricted.

JUDGE JONES: I would go further and say that the medical officer should be able to give the entire context and the report still remains restricted.

The commander is going to know under any circumstance that he's being asked to move somebody.

MS. FERNANDEZ: I mean that goes a step further than our Recommendation. I don't think the subcommittee would have a problem with that.

BG DUNN: I mean, I don't know why we have to have all the folder along with the medical officer. If you file an unrestricted report, you can ask your commander to transfer you, so why can't you ask your commander to transfer you and keep your report restricted?

MS. HOLTZMAN: Well, because you
have -- Judge Jones

BG DUNN: Well, yes, I mean

MS. HOLTZMAN: We have a policy now
which is based on a long time where commanders
push stuff under the rug and the minute you're
going to make an exception for that, you
create the possibility that we're going
backwards in time which is why I think that
the medical officer creates some protection
for the situation in which a commander might
just want to push something under the rug.
That's all.

So if the person goes to the
medical officer, I mean or the SARC had
suggested going to the medical office. The
medical office says this is a serious problem,
maybe they disclose to the commander. The
commander has to give an expedited transfer
and it's not disclosed. But we're not
disrupting

What I'm concerned about is giving
commanders the license to go back to, you
know, status quo ante ten years ago, 15 years
ten years ago, five years ago.

BG DUNN: So what you're saying is
you think it's not just between the victim and
the commander. You need a third-party in
there, I'm just not sure it's a medical,
that's all I'm saying. I'm just not sure it's
a medical. I have no objection to it being
somebody else but

PROF. HILLMAN: General Dunn, what
about the special victims counsel?

BG DUNN: I think that the issue is
that the commander would know that the report
would remain restricted.

PROF. HILLMAN: Would that satisfy
the concern about having the commander be the
solo sort of the apply for expedited transfer
from a commander and not having that? If we
have that structure for special victims
counsel, if we put that here, it seems

JUDGE JONES: Well, I think your
problem, Liz, is you don't want the commander
to know because if he knows, the old fear or
the current fear is that he'll do something to
retaliate. Right? Isn't that

MS. HOLTZMAN: Retaliate or --
that's the point of restricted- or do
something, right. We just -- right, we want
to keep -- I want to keep pristine the
obligation under the law right now which is
that if a commander finds out that there's an
allegation of sexual assault, he or she has to
do something pronto about that. That I don't
want to interfere with. That's my concern.

JUDGE JONES: Well, okay.

MS. HOLTZMAN: And maybe that's NOT
a valid concern.

JUDGE JONES: Yes.

MS. HOLTZMAN: I mean I'm willing
to acknowledge that. But I think and maybe
special victims counsel is the right solution.

I think this is a, you know, it's
an important issue, the expedited transfer,
but how we do it is, you know
MS. FERNANDEZ: Only victims of sexual assault get special victims counsel, so if you go if the special victim counsel says, Mai Fernandez needs an expedited transfer, you're going to know that I was sexually assaulted. So

VADM HOUCK: But that's the case with a doctor, too, though, right?

MS. FERNANDEZ: No, there could be a million reasons

VADM HOUCK: The doctor can go to a commander now and say, I'm going to tell you that Seaman Smith needs an expedited transfer and I'll give you some medical reasons and you need to do that or I'm recommending that you do that for other things?

BG MCGUIRE: Conceivable. I mean it could be, you know, the climate is such that the individual, you know, you know, I mean it's conceivable.

BG DUNN: I think we're making a great assumption about the ability of the
military medical system and the -- well, I 
mean really, I mean, we're putting this burden 
on these doctors now to, excuse me, to follow 
this through the system. 

I mean I think we all agree 
absolutely in principle that we need to sort 
this out. We just don't have a good 
methodology for doing it. 

But, I know, I mean, you know, 
military doctors are in large hospitals seeing 
patients every, you know 15 minutes or 30 
minutes and I don't 

VADM HOUCK: If this is like a 
bunch of other situations and doctor goes to 
my commander and says Houck needs a transfer 
because he's got this medical situation and 
this medical situation and this medical 
situation, that that happens across the 
spectrum of different activities and so all 
that we're saying is that we want a restricted 
sexual assault report to now be in that basket 
of things that can result in an expedited
transfer, then maybe it's not a big deal. But I'm just not

BG DUNN: I mean doctors are only transferring people to get specialized medical care somewhere else which could work in these circumstances. But that would sort of limit the transfers to places where there were major medical centers as opposed to -- by getting that close to home where the victim wants to go or something. I'm just

BG MCGUIRE: I think at this point, we're at a pass where, you know, the only resources we have is either, if you file a restricted report, you're in an environment that's not healthy to you or whatever, or you're forced to make an unrestricted report to get out of that environment.

And so we're forcing the victim's hand at this point if we don't offer an option of some sort of how do we get them out of that environment if, in fact, that environment is what caused her to want to do a restricted
MS. FERNANDEZ: And you want to maintain what Representative Holtzman said. You want to keep the commander out of it.

BG MCGUIRE: Right.

MS. FERNANDEZ: So we were trying to use the buffer of medical personnel that they could make the call. I don't know if there's another individual that would be better, that we didn't contemplate nor did we discuss.

COL COOK: If the victim is already going to see the SARC, or whoever, you know, then ultimately, we're already saying the SARC would probably be the one that has to look at the this.

I don't know, we've gotten briefings on the SAPRO channels. The restricted reports are usually made through chaplain or a SARC-type channel. We're even asking the SARCs to be the ones to track what kind of victim services they get.
Just like what we did with Recommendation Number 4, is that we send it back to SAPRO from a DoD level to look within there because they are sitting there waiting to handle these restricted reports and make sure there are the services that are provided.

Do we figure out a way to allow them a means of asking for that expedited transfer from outside the commander channel without sharing that information with anybody else?

It's still going to have to get back to the commander that they're losing a troop. How it gets back is going to be, you know, does it come back through personnel channels? Or does it come back through something else?

But it's not going to be that SARC that makes the decision, they're going to have to coordinate through somebody higher to get what needs to be done.

MS. FERNANDEZ: You know, if the
BG DUNN: Well, what if it goes in SARC SAPRO channels into the service level human resources? So in the Army, it would go into Army human resources command in a confidential chain and they would just reassign the individual. And then it comes down as a reassignment and that could happen across all Services. The commander's completely out of it.

MS. FERNANDEZ: The commander's don't have a say in that?

COL COOK: They get the Service Members and they don't use them within their unit, but they don't assign or reassign them out of the individual unit. So if the assignment orders come down from higher the opposite way, then it could be for any reason. It's their time to go, compassionate reassignment, it can be a lot of things that it would be, it's not necessarily just -- but you've kept it through the SARC channels, again, not letting that person at
the administration level do anything about it except take the request.

Say what if I want to be transferred and having that person come up with some kind of communication channel and let them decide how best to get that into personnel channel if it's appropriate.

But if the conscious decision that's going to have to be made but that would also keep it out of the command channels.

JUDGE JONES: It's all kind of convoluted to me.

If somebody's made a report, even though it's a restricted report and SARC has it and they're getting care, then I don't think we're in a situation where if the commander finds out that they need, you know, a transfer that the commander's going to be able to sweep anything under the rug at that point Because we already have somebody who's on record without a name, but getting care and will be transferred to another SARC presumably
and get more care.

So I'm just -- I personally think we should just say that that doesn't change the nature of the report. It remains restricted.

And the commander has to have a record unless we really try to go this whole different method of transferring people and commanders not knowing why.

BG DUNN: Well no, but see, there's a level. For example, if you are in a military unit at Camp Swampy and you're reassigned to another military unit, there is a whole U.S. Army system up to the top that cuts the orders and reassigns you. I mean at a level above whoever your command is.

So, I mean if you stay within your unit, it might be at a lower level, but this would not be that hard to do through SARC channels up to a level designated far enough above the command who owns the soldier that you don't need to worry and then just have the
reassignment come down. Either you're
reassigned across post or you're reassigned,
you know, to Mississippi where your family is.

JUDGE JONES: So a commander would
know.

BG DUNN: Yes, a commander would
know but it could be at a level

JUDGE JONES: The unit commander.

BG DUNN: -- far enough above to
avoid any concern.

COL COOK: The risk with going up
through SARC channels in the personnel, you
know, going up and coming around is probably
a little bit of a delay.

If the commander at the local
level's got some idea, then they could
probably work with, you know, if it's a
company level command, one of the smaller
ones, there's a personnel person at the
battalion or the brigade level, you can have
somebody get moved the next day and at least
temporarily reassigned while a personnel move
is done. So you risk delay if you don't get the commander involved.

But if the fear really is any command involvement, then going up through SARC channels is an option.

BG DUNN: Or go in at a higher level of command where you can get the same speed, but

COL COOK: But a command would know still.

BG DUNN: Right, but above. I mean if you're at the company level, you go to the division level. I mean there's some options here.

MS. HOLTZMAN: I guess I don't understand the objection to having a medical officer. It doesn't have to be a doctor, it could be a psychologist, it could be somebody, you know, somebody like that who writes a letter saying this person needs a transfer and that's what happens.

BG DUNN: I just -- based on my
experience, that would be a six month process.

MS. HOLTZMAN: Oh, that would be?

All right.

BG DUNN: That that would be putting that inside the military medical system, I think would be much more difficult than figuring out how to get up higher in the level of command and handling it.

MS. HOLTZMAN: Oh, okay.

COL COOK: And if the victim doesn't otherwise elect to go to see a particular doctor or to get that service, then you may be requiring them to go discuss an issue in an outlet where they hadn't planned on doing it.

The SARC might be one place to report it and they're looking for help but you're on the outside and they have to go through a process they didn't contemplate.

JUDGE JONES: Last comment?

PROF. HILLMAN: May I make a friendly amendment?
JUDGE JONES: Yes.

PROF. HILLMAN: I think that the goal is to include in the range of services that are available to those who make restricted rather than unrestricted reports the option of expedited transfer and that the issue is the process by which that expedited transfer might happen and we have concerns about whether we know enough about the smoothness and the wisdom of the particular medical personnel solution that the Recommendation and the subcommittee report proposes.

So I'd amend that we adjust the Recommendation to say Service Secretaries should craft a means by which expedited transfer is available to a person to make restricted reports and then leave it up.

Actually, I don't think you have to do the same thing in each of the services and at each installation. I think there could be different ways to do this.
I also think that the sharp line between restricted and unrestricted reports is something that we are reckoning with modifying somewhat because of our Comparative System Subcommittee saying we'd like some contact with law enforcement with the special victims counsel to still be able to preserve a restricted rather than an unrestricted report.

So it feels to me that if we simply recommend that the Service Secretaries craft a means by which individuals who make restricted reports if they're service members, not dependents. I don't know what dependents -- dependents aren't going to be able to request an expedited transfer so that's another set of issues.

But the active duty Service Member who would make a restricted report could get an expedited transfer and then leave it to others not so late in the day to work out.

MS. HOLTZMAN: Yes, but it should have a clause saying without undoing the
restricted nature of the report.

PROF. HILLMAN: Agreed.

JUDGE JONES: All right. We're past our time.

Five is in limbo officially at the moment. With your friendly amendment, we'll rewrite something and see everybody, I think it's 8:30 tomorrow.

MS. FERNANDEZ: Great.

JUDGE JONES: Well thank you.

(whereupon, the foregoing matter went off the record at 5:13 p.m.)
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Neal R. Gross and Co., Inc.
202-234-4433
CERTIFICATE

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: 05-05-14

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

______________________
Court Reporter