

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT  
CRIMES PANEL

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SUBCOMMITTEE REPORT BRIEFINGS AND  
PANEL DELIBERATIONS

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MONDAY  
MAY 5, 2014

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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

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

8:49 a.m.

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

1 investigate, prosecute, and adjudicate crime  
2 involving adult sexual assault and related  
3 offenses under the Uniform Code of Military  
4 Justice for the purpose of developing  
5 recommendations regarding how to improve the  
6 effectiveness of such systems.

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

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

22 There are four Response Systems

1 Panel members on each of the three  
2 subcommittees, plus other subject matter  
3 experts. I serve as the Chair of the Role of  
4 the Commander Subcommittee, Ms. Mai Fernandez  
5 chairs the Victims Services Subcommittee, and  
6 Dean Elizabeth Hillman -- where are you, Dean  
7 Hillman? -- chairs the Comparative Systems  
8 Subcommittee.

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

14 Since their appointment in  
15 September, the three subcommittees have worked  
16 incredibly hard in their subject matter areas.  
17 In addition to being able to attend Response  
18 Systems Panel meetings, hear the many  
19 witnesses who appeared before us, and review  
20 all other information the panel has received,  
21 including public comments to the panel, the  
22 subcommittees held numerous meetings, heard

1 from numbers and numbers, hundreds of  
2 witnesses, and received and reviewed thousands  
3 of documents.

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

11 Military personnel, both uniformed  
12 and civilian, who spoke to the Subcommittee  
13 during these site visits did so in a non-  
14 attribution environment to encourage them to  
15 candidly express their views to the  
16 Subcommittee members.

17 Just to give you an idea, the  
18 witnesses the subcommittees heard from in  
19 their meetings included military and civilian  
20 investigators; military and civilian  
21 prosecutors and defense attorneys; current and  
22 former Commanders; military and civilian

1 medical professionals, including the Centers  
2 for Disease Control and Prevention;  
3 statisticians, including the former Director  
4 and current Acting Director of the Bureau of  
5 Justice Statistics; social scientists;  
6 academics; military and civilian forensic  
7 examiners; military and civilian victim  
8 counsel, military and civilian victim  
9 advocates and other victim support personnel;  
10 sexual assault survivors; victim advocate  
11 organizations, and many, many others.

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

17 The subcommittees have also  
18 engaged in numerous deliberation sessions in  
19 order to formulate and finalize their reports  
20 and findings and recommendations to present to  
21 the Response Systems Panel. Those are also  
22 transcribed verbatim and posted to the

1 website, and the reports will also be posted  
2 to the website after the meeting concludes  
3 tomorrow.

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

19 Each Subcommittee operates  
20 independently, so has not in the formulation  
21 of its report and findings and recommendations  
22 reviewed or compared each other's reports.

1 And the Response Systems Panel has not  
2 discussed these reports before today.

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

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

15 Before the Subcommittee  
16 presentations begin, however, I requested that  
17 the panel hear from Major General Jeffrey  
18 Snow, the Director of DoD's Sexual Assault  
19 Prevention and Response Office, so that he  
20 could present the latest data and information  
21 to us, so we have all of it for the Response  
22 Systems Panel's final report.

1                   Thank your very much for joining  
2                   us today, General Snow. And without further  
3                   delay, hello, and welcome, and would you  
4                   proceed?

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

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

14                  As you know, have witnessed  
15                  firsthand from your extensive work on this  
16                  issue over the past year, our mission is to  
17                  reduce, with the goal of eliminating, sexual  
18                  assault from the military. It is an ambitious  
19                  goal and it will be tough to realize, given  
20                  the realities of this crime. But, as you have  
21                  learned from your research and data-gathering  
22                  in each of the subpanels, and on this panel,

1 we are intensively and aggressively pursuing  
2 that objective.

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

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

19 I followed that initial foray into  
20 this mission by working intensively for a  
21 month or more with the White House, the Joint  
22 Chiefs, and the Secretary of Defense on

1 developing the methodology and the content of  
2 our progress report to the President that is  
3 due in December of this year.

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

11 I have visited our first  
12 responders who are on the frontlines of our  
13 prevention and response efforts, visiting  
14 SARCs, victim advocates, healthcare  
15 professionals, and sexual assault nurse  
16 examiners. I visited with the specially-  
17 trained investigators and prosecutors, our  
18 teams that represent our special victims  
19 capability, a capability that became fully  
20 operational in December. It is now showing  
21 promise in our ability to hold offenders  
22 appropriately accountable.

1           I have visited with the specially-  
2 trained attorneys who now provide dedicated  
3 legal service/legal advice to victims in an  
4 our attorney-client relationship, a resource  
5 that the Department of Defense provides to  
6 victims of sexual assault crimes and a  
7 capability that, from what I have learned, is  
8 unmatched anywhere in our country.

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

16           My team and I have personally  
17 participated as informal advisors to the  
18 President's Task Force on Protecting Students  
19 from Sexual Violence. I attended the ceremony  
20 last week with Vice President Biden, Secretary  
21 of Education Duncan, Secretary of Health and  
22 Human Services Sebelius, and Deputy Attorney

1 General Cole. And they talked about the  
2 recommendations they are making to improve  
3 prevention and response on college and  
4 university campuses across the country.

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

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

22 We have seen this commitment

1 manifested in his efforts to improve safety  
2 for our newest Service members, enhance our  
3 military justice system, expand the rights for  
4 victims, and in providing oversight of the  
5 response system.

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

13 Still, we know we have a long way  
14 to go, which is why we announced our intent to  
15 intensify our focus on prevention. We did so  
16 by publishing an updated prevention strategy  
17 that capitalizes on the best practices of  
18 experts and stakeholders from around the  
19 country and with the publication of six more  
20 Secretary of Defense Directives, bringing to  
21 28 the total number of initiatives he has  
22 directed in the past year alone.

1                   My introduction to this difficult  
2                   issue and widely-misunderstood topic brought  
3                   me to the National Organization for Victim  
4                   Assistance who is operating our certification  
5                   program, ensuring our victim advocates meet  
6                   and exceed national advocate certification  
7                   standards. The civilian advocate community is  
8                   now working to achieve the standards of  
9                   excellence that we have established in our  
10                  Department of Defense program.

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

22                  Finally, and most important, in my

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

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

19 Let me have the next slide,  
20 please.

21 Let me begin today by sharing with  
22 you a broader perspective, one that is shaped

1 by our leadership on other difficult societal  
2 issues, such as leading our nation's right on  
3 integration and our recent efforts to repeal  
4 the prohibition on gays openly serving in the  
5 military.

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

15 As I mentioned in my opening  
16 comments, I had the privilege of being in the  
17 White House last week for the release of the  
18 first report of the White House Task Force to  
19 protect students from sexual assault and was  
20 encouraged by the fact that a number of their  
21 recommendations are consistent with the tenets  
22 of our program.

1                   Although we were not a formal  
2 member of the Task Force, on the day the  
3 President signed the presidential memorandum  
4 establishing the White House Task Force,  
5 Secretary Hagel was asked to share his  
6 thoughts on this issue with the President and  
7 his fellow Cabinet members in a meeting in the  
8 Oval Office. These principles formed the  
9 foundation of his remarks and are the  
10 foundation of our program.

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

19                   We commend this initial report to  
20 the Committee and recommend you consider  
21 commenting on how the elements of our program  
22 that are being touted as national best

1 practices by the White House.

2 Next slide, please.

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

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

15 I also want to provide you our  
16 program update and a brief overview of our  
17 implementation of provisions of law found in  
18 the recent National Defense Authorization Act.  
19 And then, I will close by discussing our  
20 recently-released prevention strategy and our  
21 plans to complete the progress report to the  
22 President.

1                   Next slide, please.

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

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

20                  While we see indications that our  
21                  effects over the last year and a half are  
22                  having an impact, it does not mean that we are

1 satisfied with our progress. We will continue  
2 to encourage greater reporting while reducing  
3 the occurrence of this crime by improving our  
4 prevention measures.

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

13 Next slide, please.

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

22 As you can see from this chart,

1 reports of sexual assault have increased on  
2 average about 5 percent per year since 2006.  
3 This year's overall increase in reporting was  
4 an unprecedented 50 percent.

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

15 In fiscal year 2013, just over  
16 half of the matters investigated by military  
17 criminal investigators involved an initial  
18 allegation of a penetrating offense, such as  
19 rape or forcible sodomy. The remainder of the  
20 allegations involved non-penetrating offenses,  
21 which are sexual contact crimes such as  
22 groping.

1           The proportions of these crimes,  
2           and really highlighted in the circle on the  
3           right, have stayed somewhat constant over  
4           time. In order, the top three crimes reported  
5           to the Department in FY13 were abusive sexual  
6           contact, sexual assault, and rape.

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

16                 Next slide.

17           For incidents that occurred in  
18          military service, there were 3,235 female  
19          victims and 878 male victims. Of the women  
20          who indicate experiencing an incident of  
21          unwanted sexual contact, about 28 percent are  
22          accounted for in unrestricted or restricted

1 reports to DoD, up from 18 percent in fiscal  
2 year 2012. And again, it is important that  
3 the panel understand that there was no survey  
4 associated with this report. So, what we did  
5 is we mapped it against the 2012 findings.

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

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

16 Next slide, please.

17 There were 3,234 military subjects  
18 with reported dispositions in FY13. Of the  
19 3,234 subjects with case dispositions reported  
20 in FY13, the Department of Defense had legal  
21 authority over 2,149 of those cases, so about  
22 66 percent.

1                   Of the 2,149 cases where the  
2                   Department had jurisdiction, Department of  
3                   Defense authorities had sufficient evidence to  
4                   take some kind of action against 1,569  
5                   subjects. That was 73 percent.

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

11                  Next slide, please.

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

18                  This chart answers the question,  
19                  when military commanders have legal authority  
20                  over the offender and sufficient evidence of  
21                  the sexual assault, what form of disciplinary  
22                  action do they take against the offender? As

1 you can see, this year Commanders had  
2 sufficient evidence to prefer court-martial  
3 charges on 71 percent of the accused Service  
4 members. That has not always been the case.

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

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

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

22 Next slide, please.

1           In summary, we are encouraged by  
2           the increase in reports being made by victims  
3           of this crime. Given historical data, we  
4           believe the increase in reporting reflects  
5           senior leader focus and improved victim  
6           confidence, not an increase in crime.

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

18                        Next slide, please.

19           We have defined strategic SAPR  
20          objectives and synchronized the Department's  
21          multidisciplinary approach around five lines  
22          of effort, reflected on this slide:

1 prevention, investigation, accountability,  
2 advocacy and victim assistance, and  
3 assessment. This SAPR plan provides  
4 authoritative guidance to all Department of  
5 Defense stakeholders and does two things.

6 No. 1, it tasks the Department and  
7 the Services to develop objective criteria for  
8 measuring progress and it tasks my  
9 organization to manage and update the plan  
10 using existing oversight mechanism.

11 Next slide, please.

12 This slide highlights our policy  
13 and program enhancements. I would tell you  
14 that things began to dramatically change when  
15 senior leaders turned their focus to this  
16 problem. Two years ago, Secretary Panetta  
17 heightened the focus on sexual assault in the  
18 military. Secretary Hagel has sustained that  
19 progress and persisted in directing 28  
20 initiatives since May 2013 to enhance  
21 Commander accountability, ensure an  
22 appropriate command climate, improve victim

1 support, and enhance safety. All 28  
2 initiatives have been implemented or are in  
3 progress to date, representing reforms to our  
4 organization.

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

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

17 Another reform: we put in place  
18 new methods of assessing the performance of  
19 military commanders and enlisted leaders in  
20 establishing command climates of dignity and  
21 respect. This is done through a system of  
22 unit surveys and performance evaluations.

1                   And the last example I would like  
2                   to highlight for you is we fielded a special  
3                   victim capability in each of the Services.  
4                   This is a program designed to improve  
5                   collaboration between specially-trained  
6                   investigators, prosecutors, and legal  
7                   personnel who respond to allegations of sexual  
8                   assault, child abuse, and domestic violence.  
9                   This capability improves our ability to  
10                  identify evidence, support victims, and hold  
11                  offenders appropriately accountable.

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

17                  Next slide, please.

18                  Our initiatives and policies are  
19                  making an impact, and we are encouraged to see  
20                  this reform enshrined in law by Congress. We  
21                  are focused on implementing more than 60  
22                  provisions of law included in the past three

1 NDAAs.

2 We have fully implemented the FY12  
3 National Defense Authorization Act. We are  
4 tracking 18 substantive provisions and six  
5 congressional reports in the FY13 National  
6 Defense Authorization Act, and the vast  
7 majority of these are complete.

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

14 Next slide, please.

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

22 Using this strategy, we will

1 intensify our efforts at every level of  
2 military society to prevent the crime. This  
3 strategy was developed collaboratively with  
4 the military Services and civilian experts,  
5 such as the Centers of Disease Control and  
6 Prevention, the FBI, and colleges and  
7 universities with innovative programs and  
8 research.

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

17 Next slide, please.

18 Our goal is to develop military  
19 leaders and commanders at every level who are  
20 informed by the latest evidence-based  
21 prevention practices and empowered to  
22 establish appropriate climates while holding

1 members appropriately accountable.

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

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

14           This chart depicts the Department  
15 of Defense social-ecological model which  
16 adapts the Center for Disease Control model to  
17 a military environment. The DoD model  
18 emphasizes leaders at all levels, both formal  
19 and informal. It recognizes that leaders are  
20 accountable for establishing a healthy command  
21 climate, and it recognizes that everyone, from  
22 the Commander-in-Chief to the Secretary of

1 Defense, to the newly-enlisted Service member,  
2 can influence each sphere/level.

3 Next slide, please.

4 In response to the direction from  
5 the President, we are developing a SAPR  
6 Progress Report to be delivered in December of  
7 this year. This report will capture the  
8 Department of Defense's SAPR efforts since  
9 2011. It will include a past-year prevalence  
10 rate for FY14 using a workplace and general  
11 relations survey of nearly one-third of our  
12 force, conducted by RAND, and it will provide  
13 an assessment of victim satisfaction and  
14 confidence in the system through our newly-  
15 developed survivor experience survey.

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

22 For the first time ever, we also

1 now have a means of gaining direct and  
2 confidential feedback from victims who have  
3 selected a restrictive reporting option  
4 without compromising their privacy or  
5 privileged communication with their SARCs and  
6 victim advocates.

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

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

18 Next slide.

19 This slide just reflects what we  
20 believe will be the report content. This is  
21 pretty straightforward. The first part will  
22 just be the scope, and it will highlight

1 selected initiatives from 2011 to September  
2 2014. And then, the second part of this slide  
3 just highlights what we believe to be the  
4 projected format of that report.

5 Next slide, please.

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

15 Next slide.

16 As part of this, we will also have  
17 focus groups. And you can see those will be  
18 conducted between May and July -- excuse me --  
19 May and August of this coming year. The  
20 reports will be due the middle of October, and  
21 you can see the populations are reflected on  
22 this side.

1                   So, our intent is to get a look at  
2 Department-of-Defense-wide analysis of common  
3 themes. So, these will not be broken down by  
4 Service.

5                   And then, the next slide, please.

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

10                  Next slide, please.

11                  This reflects the report timeline.  
12 I will just tell you that we are adhering to  
13 a rigorous schedule to develop and deliver the  
14 published report by the 1st of December 2014.  
15 As I stated earlier, this report will include  
16 results and analysis of the workplace and  
17 general relation survey, due from RAND on the  
18 15th of October, 2014.

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

1 on the 1st of May, and the Military Service  
2 Academy Report for Academic Program Year 2013  
3 to 2014, to be released in January of 2015.

4 Next slide, please.

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

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

19 First, we know that there are  
20 thousands upon thousands of women and men in  
21 our Armed Forces who are working hard to  
22 create an environment that is based on our

1 values, that holds our troops to high  
2 standards, and reject sexist behavior, sexual  
3 harassment, and crude or offensive behavior.  
4 They are the standard-bearers, and their  
5 efforts are making a difference.

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

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

20 Finally, I sought to make it very  
21 clear last week to the offenders committing  
22 this crime that we don't care who they are or

1        what rank that they hold.  If they don't  
2        understand our core values and are not  
3        prepared to live by and enforce those values  
4        every day, then we don't want them in the  
5        military.  That is the position of the senior  
6        leadership of the Department, and it is a  
7        measure we are communicating across the force.

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

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

20                   And with that, I look forward to  
21       your questions.

22                   JUDGE JONES:  Thank you very much,

1 General Snow.

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

7 MG SNOW: Thank you, ma'am.

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

10 Mai?

11 MG SNOW: Yes, ma'am?

12 MS. FERNANDEZ: Good morning.  
13 Thank you for being here.

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

18 MG SNOW: Yes, ma'am.

19 MS. FERNANDEZ: And there was over  
20 6,000 reports. That would mean that currently  
21 there's roughly about a caseload of about 32  
22 cases per Special Victims Counsel.

1 MG SNOW: Uh-hum.

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

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

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

16 MS. FERNANDEZ: Sure.

17 MG SNOW: -- was started as, you  
18 know, an initiative in the Air Force. But we  
19 are tracking the workload because this is a  
20 case of in this particular case we can look at  
21 that workload and, if need be, we can, as you  
22 said, develop and train more folks for this

1 particular capability. And it is something  
2 that the senior leaders are sensitive to.

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

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

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

22 There is a command climate survey

1 that we have added questions specifically to  
2 address both sexual harassment and sexual  
3 assault. And there was a series of questions  
4 that added that. And I can get you a copy of  
5 the instrument, but we call it DEOCS 4.0.

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

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

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

1 recent history.

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

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

1 do so.

2 MS. FERNANDEZ: Thank you.

3 MG SNOW: Sure.

4 JUDGE JONES: Yes?

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

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

9 Oh, microphones? There you go.  
10 Thanks.

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

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

22 And I just wondered if you could

1 explain that. Take us through the number of  
2 reports and the disposition --

3 MG SNOW: Sure.

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

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

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

20 Each of these crimes is unique,  
21 okay? If there is a report of sexual assault,  
22 it is mandated it has got to be investigated.

1 So, occasionally, you will read reports that  
2 Commanders are doing this investigation. The  
3 minute I read a report like that, I know it's  
4 not right because Commanders do not report  
5 reports of sexual assault. They have got to  
6 be turned over to a military criminal  
7 investigative organization.

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

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

19 So, we have a chart in the report,  
20 and I don't have it in front of me, ma'am, but  
21 I would just tell you that it breaks down and  
22 it walks through the numbers. And ultimately,

1 it gets to the denominator where we have  
2 jurisdiction over, and then, we further break  
3 that down by what happens to that. And I  
4 tried to hit it, but I know I ended up  
5 throwing a lot of percentages and numbers at  
6 you.

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

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

14 MG SNOW: Yes.

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

17 MG SNOW: Okay.

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

1 the disposition, we can account for what is  
2 happening.

3 MG SNOW: Uh-hum.

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

7 MG SNOW: Right.

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

13 MG SNOW: Okay.

14 MS. HOLTZMAN: -- user-friendly.

15 MG SNOW: Okay. Two things I  
16 would encourage.

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

20 MS. HOLTZMAN: I did read it, but  
21 I am giving you the opportunity to explain to  
22 the American people --

1 MG SNOW: Okay. Thank you.

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

4 MG SNOW: Okay. Thank you.

5 MS. HOLTZMAN: The second thing is  
6 a little bit outside of your immediate  
7 purview, but I want to make an argument here  
8 that there is a little bit of outside-the-box  
9 thinking that has to go on. And that is, you  
10 talked about changing cultural attitudes.  
11 Well, there's still attitudes in this society  
12 that demean women, and even within the  
13 military.

14 MG SNOW: Uh-hum.

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

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

22 The third issue I would raise with

1       you, and this is really tough, what do you do  
2       about the bombardment of attitudes through the  
3       media that condone violence in sexual  
4       relations?

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

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

19                      And I am just wondering why this  
20      guy is still there at HBO. But those  
21      attitudes come from the outside and bombard  
22      people who are young and make them think that

1 violence against women is okay. What do you  
2 do about that?

3 I mean, that is not in your  
4 report.

5 MG SNOW: Right.

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

11 MG SNOW: Right.

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

14 MG SNOW: Well, first of all, I  
15 cannot agree more with you that what we are  
16 dealing with is a societal issue. And one of  
17 the things and the challenges for the  
18 Department of Defense is that the individuals  
19 that actually sign up to come into the  
20 military in many cases -- I would like to  
21 think that they are coming from wonderful  
22 families with a mother and father that have

1 high standards who have inculcated them with  
2 a set of values that are consistent with the  
3 Department of Defense. But I have got to tell  
4 you, that is just not the case.

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

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

22           If the cause is a sexual assault,

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

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

13 If I could make one other comment,  
14 it was interesting to me -- again, a number of  
15 my team participated with the White House, the  
16 Task Force, and their report. What was  
17 interesting to me is the amount of learning on  
18 this particular issue. I think they recognize  
19 some of the aspects of it, and I would like to  
20 think it is going to cause them, to cause the  
21 Department to have seen it in a different  
22 light.

1                   We are not saying we have the  
2                   answer to this. We are not. okay? We are  
3                   not resting on our laurels. You can see it is  
4                   a multi-pronged approach. It is going to take  
5                   all; it is going to take your efforts; it is  
6                   going to take the partnership with Congress;  
7                   it is going to take our efforts. I don't see  
8                   anybody saying we have the answer.

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

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

21                  JUDGE JONES: Are there any  
22                  further questions?

1                   Beth?

2                   PROF. HILLMAN: Thanks, Judge  
3 Jones.

4                   General Snow, glad to hear from  
5 you, and it is great to hear you crystalize  
6 your sense of the responses that we need to  
7 it, apart from the numbers.

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

19                   And I wondered if you see in the  
20 numbers a sense that there are worst problems  
21 with sexual violence now in the military  
22 because of some degradation of culture or a

1 glamorization of violence that takes place in  
2 the media. Do you see that? Do you see  
3 sexual violence increasing because of broader  
4 attitudes?

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

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

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

19 Let me just say this: the  
20 remarkable consistency in terms of the  
21 prevalence in women has fallen between 4 to 7  
22 percent and for men between 1 to 2 percent.

1                   If you go back and look over time,  
2                   even at the height, when you go back when the  
3                   prevalence was estimated at 34,000 reports of  
4                   unwanted sexual contact, the number of reports  
5                   that particular year was over 2,000. So, that  
6                   is one of the reasons why I don't believe,  
7                   even though there is no survey, that it is not  
8                   an increase in crime associated with this  
9                   year.

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

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

19                   The Centers for Disease Control  
20                   and Prevention helped us with the National  
21                   Intimate Partner and Sexual Violence Survey in  
22                   2010, where we found that there is no greater

1 risk for sexual assault in the Department of  
2 Defense than there is in the civilian  
3 community. Dr. Dean Kilpatrick's work, Dr.  
4 Christopher Krebs' work on sexual assault all  
5 point to the fact that we are right with those  
6 groups, whether you look at college or  
7 university groups, that we are on par.

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

17           But the real work, though, begins  
18 when they are in their advanced school, in  
19 their A school or where they are learning  
20 their military operational specialty or their  
21 Air Force Specialty Code training. And that  
22 is when we really begin to have much more

1 conversational training with them, to begin to  
2 shape and mold those attitudes that are there.

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

19 So, I think that we are dealing  
20 with a problem that we can't entirely see, but  
21 we are not dealing with one that is actually  
22 increasing because of cultural -- at least

1 from the data that I have seen -- because of  
2 cultural changes.

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

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

12 MG SNOW: It's '4, right?

13 DR. GALBREATH: '3.

14 PROF. HILLMAN: '3?

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

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

18 MG SNOW: Right.

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

22 MG SNOW: Thank you, ma'am.

1 COL COOK: Just one question?

2 JUDGE JONES: Yes.

3 COL COOK: Thank you for being  
4 here this morning.

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

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

20 So that, as we become more aware  
21 of, not become more aware, but as we recognize  
22 and better address the problems of sexual

1 assault, we are not doing it at the expense of  
2 an accused constitutional rights on the other  
3 side. We want to make sure that it remains  
4 balanced, and that is a hard balance to draw  
5 when the perception is it has been so heavy in  
6 favor of an accused and the defense community  
7 within the military, if that is true in fact.

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

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

22 I think the other thing that you

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

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

18           And I would argue it goes back to  
19 Ms. Fernandez's comment that, when you are  
20 talking about cultural change, we could say  
21 the right things, but you have got to drive it  
22 down and it takes time.

1                   On the flip side of that, on our  
2 system, I think inside and outside, we have  
3 got to continue our efforts to educate folks.  
4 I think we have done a very good job in the  
5 case of Commanders and senior leaders, but we  
6 have got to continue to assess it.

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

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

22                   Because, you know, if we identify

1 we have got an issue, then we will take the  
2 appropriate action. But you have to have some  
3 ability to assess it, and I do think we are  
4 doing that.

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

16 So, it is not just within the unit  
17 getting that sense of understanding and trust  
18 in the process on all sides, but it is also  
19 the community-at-large that needs to  
20 understand that, and understand some of the  
21 steps that have been taken. So, it has got to  
22 be simplified and communicated as well.

1                   MG SNOW: Well, listen, I like  
2 your comment. I mean, this is just not a  
3 woman's issue, although, you know, the report  
4 is clear there are men and women, but it is  
5 also a men's issue. Ultimately, it is a  
6 leadership issue for the Department.

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

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

1 the amount of effort that is going into it.

2 Now let me bookend that, though.

3 I will tell you right now, I had the  
4 opportunity to spend time with six victims,  
5 okay, five women and one man that accounted.

6 And these are victims within the last 24  
7 months. And I will tell you, it breaks my  
8 heart because each of them joined the military  
9 to be about something more than themselves.

10 And an incident has happened that has violated  
11 that trust, okay? And that saddens me, that  
12 they have made this decision, you know, to  
13 join, to be part of, which I am probably  
14 biased here, but I do think we are the  
15 greatest military in the world.

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

22 But the courage that they

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

12 COL COOK: Thanks.

13 MG SNOW: Thank you.

14 JUDGE JONES: Anything further?

15 (No response.)

16 Thank you very much, General Snow.

17 MG SNOW: Thank you, ma'am.

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

21 (Whereupon, the foregoing matter  
22 went off the record at 9:51 a.m. and went back

1 on the record at 10:08 a.m.)

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

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

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

18 The reason I can do that is I can  
19 start at the top of this and walk you through.  
20 So when we say fiscal year, it's exactly that:  
21 fiscal year. And so if you look at it, that  
22 number, the total subjects, you see the 3,858.

1 The number that comes out of that, and that's  
2 why we call it the waterfall, 624 of those.  
3 Each of these have got to be investigated  
4 impartially. In some cases, that  
5 investigation is not complete during the  
6 fiscal year. So in this case, 624 of these  
7 the investigation is still pending. And that  
8 will be detailed in our next report. So that  
9 gives you the 3,234.

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

21 I made the comment some of these  
22 remain under civilian jurisdiction. And so in

1 this case, it's 145, so that gives you the  
2 2,149. And then what we do is we break that  
3 down. So if you look at the corresponding  
4 number of that 2,149 where command action was  
5 considered, then you see the breakdown. So  
6 838 the court-martial charges were preferred,  
7 210 were non-judicial punishment, 139 were  
8 adverse action or discharge, and 382 you can  
9 see some type of action was taken but it ended  
10 up not being on a sexual assault crime, other  
11 than that.

12 Okay. And then you had a number  
13 there, the 580 where command action was not  
14 possible, and you see that was broken down  
15 into insufficient evidence, the 382; 189 where  
16 the victims declined. And I have to say, and,  
17 again, maybe a much more experience as I am,  
18 really hopeful or optimistic that the legal  
19 counsel now will begin to drive that number  
20 down so that they're getting the advice that  
21 they need so fewer of them will decline to  
22 participate. But, unfortunately, that

1 happens. And then nine of those you can see  
2 statute of limitations exceeded.

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

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

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

20 I wanted to know are you looking  
21 at those numbers and trying to create programs  
22 that can address those individuals?

1                   MG SNOW: The answer is, yes, I'm  
2 going to do the first part and just tell you  
3 that, I mean, when I make the call on 10  
4 percent, I mean, that happened prior, those  
5 are not reflected -- they are, but they fall  
6 outside, they fall under the category of under  
7 civilian jurisdiction because it happened  
8 prior to them coming in. So that's the 10  
9 percent.

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

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

20                   One of the challenges is is that  
21 when folks come in they want a new life. They  
22 want something different. And a lot of times

1 the military is that bridge. And so trying to  
2 -- we have to be able to offer those services  
3 in such a way that allow them to, number one,  
4 is to deal with their past and their history  
5 but at the same time is remain somewhat  
6 anonymous and stay out of the system because  
7 no one wants to jump up and say me, me, me, I  
8 was a victim earlier in life. It's just part  
9 of that sensitivity that we want to be sure  
10 that we're paying attention to.

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

15 JUDGE JONES: Anything else?  
16 General, thank you once again. We're going to  
17 now go to the report out of the Comparative  
18 Systems Subcommittee. And, Beth, while you're  
19 setting up, let me just explain, as I did in  
20 my opening remarks.

21 This is an interim assessment  
22 that's being presented by the Subcommittee to

1 the RSP, to the full panel. This assessment  
2 will be deliberated and finalized by the full  
3 panel. It is not the report of the panel.  
4 Our purpose today is to accept and be able to  
5 begin to discuss and deliberate the findings  
6 of each of our subcommittees.

7 Maria, is there anything you  
8 wanted to add to that, or does that cover it?  
9 Okay.

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

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

21 I am going to throw up a lot of  
22 information up here, even more than what you

1 heard in the SAPRO slides. We had a lot of  
2 information, and could not have done it  
3 without the support of our staff.

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

19 So the Subcommittee, Comparative Systems  
20 Subcommittee, there's four members of the  
21 panel. That's Judge Jones, General Dunn, Mr.  
22 Bryant, and me, and then six subject matter

1 experts. Four of them are here today, one  
2 more will join us later, and one who could not  
3 be here today who brought expertise in  
4 military investigations, prosecutions, defense  
5 and civilian investigations, prosecutions and  
6 defense, sentencing, the entire process of  
7 responding to sexual assault.

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

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

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

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

1 you. Okay.

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

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

18 So before I start, I want to  
19 encourage questions from the panel as we walk  
20 through these. I also want to emphasize this  
21 is an interim report. Unlike our sister  
22 subcommittees, we haven't finished, but we're

1 close. And these do represent a very close to  
2 final version of the recommendations that  
3 we'll submit to the panel, but we haven't  
4 quite finalized those. And as we've seen in  
5 plenty of our deliberations and in the  
6 presentations of witnesses, the devil is,  
7 indeed, in the details sometimes, and we do  
8 have to hammer out some of the terminology and  
9 some of the precise avenues we think should be  
10 followed going forward.

11           Before I start, too, I do want to  
12 note that this is a complex and tragic and  
13 intimate subject matter to tackle. The nature  
14 of it makes it very hard to see clearly. That  
15 means it's hard to see the problem, and it  
16 means it's hard to see the solutions. And I  
17 want to emphasize that we are not alone in  
18 trying to devise solutions here or trying to  
19 understand the problem, and we stand on the  
20 shoulders of many researchers and military  
21 officers, civilian jurisdictions, and  
22 different agencies that are now engaged in the

1 review of military justice practices, military  
2 response systems, and civilian response  
3 systems to this overall problem.

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

13 So here's our mission, which is a  
14 little bit big to do in not 18 but 12 months:  
15 to assess and compare military and civilian  
16 systems from the beginning through the end of  
17 the military justice response to sexual  
18 assault. So, specifically, investigation,  
19 prosecution, and adjudication for adult sexual  
20 assault and related offenses. And we did have  
21 nine objectives. I'll lay those out for you  
22 next.

1                   So the end result here that you'll  
2 see today in this interim phase of the  
3 Subcommittee's work is 77 recommendations, and  
4 we split those into six different categories.

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

18                   The second, compare military and  
19 civilian systems. Third, this was a specific  
20 request that we examine advisory sentencing  
21 guidelines that are used in civilian  
22 jurisdictions to assess whether those would be

1 appropriate in the military justice system.

2 That included mandatory minimums.

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

15           Number five there, another  
16 objective was to look at conviction rates for  
17 adult sexual assault and compare it, to the  
18 extent possible, with similar civilian  
19 numbers. Six, identify best practices from  
20 civilian jurisdictions. As you heard this  
21 morning, there are some best practices from  
22 the military that civilian, interested

1 civilian institutions, not just criminal  
2 justice systems, are adopting, too.

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

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

16           Number eight. This is a very long  
17 objective that we set out for you in text, but  
18 really this is about collecting information to  
19 populate a database of potential sex offenders  
20 that would enable investigators to be more  
21 effective going forward, even if the victim  
22 who identifies that suspected perpetrator in

1 a report decides not to pursue an  
2 investigation. So we make a recommendation  
3 about that in the -- that you'll see later.

4 And then, finally, assess  
5 opportunities for clemency, appropriateness of  
6 clemency and the way it's used. So this  
7 assessment of clemency has also arisen because  
8 of changes that Congress has made in the  
9 convening authority's power to alter the  
10 findings of a court-martial after sentencing,  
11 and we'll talk about our reaction to those  
12 changes and our suggestions for moving  
13 forward.

14 So just to be clear on what the  
15 format is here, we're reporting out to the  
16 panel with an interim assessment of what the  
17 Subcommittee thinks are the right, sets out  
18 the right path for going forward here. The  
19 final report of the Subcommittee will be  
20 submitted in a couple of weeks, as Judge Jones  
21 set out, and then the panel will deliberate on  
22 that Subcommittee report.

1                   So how do we do this? Thirty  
2                   panel meetings and then Comparative Systems  
3                   Subcommittee meetings and preparatory sessions  
4                   to gather information. And in those meetings,  
5                   we heard from more than 380 presenters, and  
6                   the list there gives you a sense of all the  
7                   different parts of the response that exist out  
8                   there and our effort to try to hear from as  
9                   many interested and as many expert individuals  
10                  and agencies as we could. So it runs from  
11                  statisticians, experts on social science and  
12                  statisticians, right down to people on the  
13                  ground in the military justice system and in  
14                  civilian jurisdictions where they're  
15                  responding through sexual violence units as  
16                  special victims units to respond to sexual  
17                  assault.

18                  And the last bullet there, we did  
19                  this, we managed this flow of information with  
20                  a website that posted much of it due to  
21                  efforts of our staff and then also multiple  
22                  and progressive deliberation sessions where we

1       tried to break down the different parts of our  
2       scope, assign them to expert members of the  
3       Subcommittee, bring it back to the  
4       Subcommittee to deliberate, and then hammer  
5       out our final recommendations.

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

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

16               So the members of the Subcommittee  
17       committed to making these site visits, and  
18       just about everybody participated in these  
19       site visits and our staff participated in  
20       every one, which made it possible for us to  
21       go. So we went to -- the first few there are  
22       the civilian agencies or locations we visited:

1 the Defense Forensic Science Center and the  
2 Georgia Bureau of Investigations Laboratory to  
3 make sure we understood the forensics side of  
4 the investigative and successful prosecution  
5 part of this.

6 Next, Dawson Place and the  
7 Philadelphia Sexual Assault Response Center to  
8 understand the ways in which civilian  
9 organizations are integrating the various  
10 aspects of responding to a report of a sexual  
11 assault. And then the rest there are military  
12 installations that we visited. Army and Air  
13 Force, Navy and Marine Corps posted  
14 installations we visited, and we talked at  
15 those installations to people from all the  
16 different aspects of the response to a report  
17 of sexual assault. We heard about prevention.  
18 We heard about the reporting process, to whom  
19 these are reported. We saw some reports  
20 happening in action. We talked to the first  
21 responders. We talked to investigators. We  
22 talked to defense counsel. We talked to

1 prosecutors. We talked to commanders. And we  
2 tried hard to get a sense of the entire chain  
3 of events that happens when a report triggers  
4 these responses in the military.

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

20 In the site visits, as Judge Jones  
21 specified earlier, we made clear that the  
22 comments that we received were not for

1 attribution, hoping to get as clear and  
2 unvarnished a look at what was really  
3 happening as we could in those visits. And  
4 then, finally, we transcribed the meetings.  
5 So all of our deliberations were transcribed  
6 verbatim so that our staff could understand  
7 where we were headed as they attempted to  
8 bring all this information together into the  
9 report and so the public can see how the  
10 deliberations went in the process of crafting  
11 the final report.

12           And then the last piece of  
13 methodology here, we also looked at a lot of  
14 documents. So as I mentioned earlier, we're  
15 not the only ones to look at this problem. A  
16 lot of others have looked at it, and our  
17 analysis would be incomplete were we not to  
18 reckon with those reports. Those constitute  
19 much of value, much information of value and  
20 a lot of recommendations from the past, many  
21 of which have already been implemented, some  
22 of which have been left hanging. We looked at

1 those in analyzing the recommendations. We  
2 also reviewed the transcripts of witness  
3 testimony, and we assessed the data that was  
4 available, getting updates from the military  
5 and from civilian organizations whenever  
6 possible on the numbers that we could possibly  
7 compare.

8           So this is the structure of the  
9 recommendations that I'll set out for you  
10 today. The findings and recommendations are  
11 in six categories. We start with trying to  
12 define the problem. I said this was complex  
13 to see. It's tough to see the problem. We'd  
14 like to share with you our perspective on how  
15 we do and don't understand what the problem is  
16 right now. That's the survey section at the  
17 top here because it's really the surveys on  
18 which we relied. That is, in assessing the  
19 extent of the problem in the military, the  
20 surveys on which we've relied we heard a lot  
21 of testimony about and we want to characterize  
22 what that testimony taught us about how the

1 surveys work in the military compared to  
2 civilian surveys to which they're often set  
3 next to.

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

15           So, first, crime victimization  
16 data is difficult to collect. We need it to  
17 compliment the workplace assessments and our  
18 understanding of the environment and the  
19 culture that's out there on the ground that  
20 some of the public health surveys that we do  
21 give us more information on. So without crime  
22 victimization data from the military, it's

1 tough for us to compare the victimization  
2 numbers from the military to civilian  
3 jurisdictions.

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

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

19 Third, we need to balance the  
20 emphasis on prosecuting the cases that should  
21 go to trial with resources for defense  
22 counsel. This is important to protect the

1 rights of the accused and to protect the  
2 legitimacy of the military justice system  
3 itself. We can't have a system that tilts so  
4 far towards prosecution that runs roughshod  
5 over the rights of individuals who are accused  
6 and who are prosecuted for crimes.

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

21 Number five is a little technical,  
22 but we just have the standardized terms here.

1 We need an easier way to understand what's  
2 happening across the services and compare it  
3 to what's happening across civil sector. The  
4 same problems plague, comparing what's  
5 happening to Los Angeles to what's happening  
6 in New York or comparing what's happening in  
7 Iowa to what's happening in Florida. But we  
8 have an advantage in the military in that we  
9 can actually establish what the reporting  
10 process ought to be, and we can create data  
11 that will, in fact, be comparable.

12 In order to do that, though, we  
13 need to set that out and we make some  
14 recommendations on how we can do that because,  
15 although we have a uniform code of military  
16 justice and a single Department of Defense, we  
17 have a lot of commitment to different ways of  
18 counting that are out there in the branches of  
19 service and a lot of different missions that  
20 our very big military is addressing that leads  
21 to what are reasonable distinctions in  
22 reporting and in terminology but actually

1 leave us unable to make the distinctions and  
2 understand success and assess progress, given  
3 the way it is right now.

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

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

22           Okay. So I'll tackle -- this is

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

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

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

1 drawing comparisons.

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

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

15           Second, we want to define some of  
16 the terms in these surveys. We think we  
17 should use the Uniform Code of Military  
18 Justice because it exists and it sets out what  
19 sexual assault constitutes. This would enable  
20 us to actually have data that we can compare,  
21 unless we change the statute again, which will  
22 make it difficult to compare and which we

1 think might be a good idea.

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

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

19 Next on the surveys, the workplace  
20 gender relations assessment, which is the  
21 survey that the military has used to which  
22 General Snow referred and I did, as well,

1 earlier this morning, is what the numbers  
2 about the actual incidence of sexual assault  
3 in the military have been drawn from. That  
4 survey is intended to assess attitudes,  
5 identify areas for improvement, and then  
6 revise workplace policies, as needed. It's  
7 not structured in a way that gives us reliable  
8 and comparable crime victimization data. Its  
9 definitions don't match the definitions of  
10 crimes.

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

19 Okay. The next thing on surveys  
20 that we recommend here. This is a not  
21 surprising recommendation. We want to  
22 continue to improve response rates and perhaps

1 actually not only improve them but keep them  
2 from getting worse because of the extent to  
3 which we use surveys to understand critical  
4 things that are happening.

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

15           So, in general, the social science  
16 experts tell us that response rates under 80  
17 percent require a non-biased analysis. And so  
18 you can see the bias that's apparent in that  
19 limited response rate to the workplace gender  
20 assessment, gender relations assessment. That  
21 leads us to some unreliability of that data,  
22 and the unevenness of that data over time

1 leaves us really not knowing quite what the  
2 actual incident rate has been.

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

12           And related to that, we want more  
13 help from outside analyzing the data that we  
14 do collect. Many of the behavioral scientists  
15 to whom we spoke who study crime were excited  
16 about the extent of data that's actually been  
17 collected in the military surveys. If we  
18 release that data and we publish the non-  
19 response bias analysis that's been done by  
20 SAPRO, we will enable more independent  
21 researchers to better understand what's  
22 happening in and outside of the military

1 because that information and the way in which  
2 the questions have been set up has been done  
3 in accordance with a lot of the best practices  
4 out there. We'd like that information shared  
5 so that we can collectively get better at  
6 understanding this problem.

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

18           Okay. Number six on the survey  
19 recommendations. Not only do we want to  
20 release the data that's already been  
21 collected, but we want an expert advisory  
22 panel. General Snow referred to RAND, that

1 the SAPRO has outsourced to RAND, if RAND  
2 constitutes outsourcing -- that's probably the  
3 wrong term -- had assigned to RAND, selected  
4 RAND to do the next survey, and they're  
5 developing that. We think they should consult  
6 with experts, especially the experts who came  
7 from the Bureau of Justice Statistics, the  
8 Committee on National Statistics there,  
9 specialists in studying sexual violence who  
10 can help us make sure we're tracking best  
11 practices there.

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

20 Okay. The terminology slide.  
21 I'll just let this wash over you for a moment.  
22 The terms that we use here are not consistent

1 across the services, the branches of service,  
2 so you may see some that are unfamiliar to  
3 you, even if you have a book of military  
4 acronyms already in your head.

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

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

21           Okay. Here's the special victim  
22 capability slide. I'm not sure you can read

1 that from where you are, but let me just  
2 summarize. The top line is the civilian  
3 general approach, and the lower line is the  
4 military's general approach. And it starts  
5 with an advocate for the victim. So in the  
6 civil sector, the advocate is from a non-  
7 profit organization who is sometimes a medical  
8 person, sometimes is from the police  
9 department, sometimes is a sexual assault  
10 nurse examiner. They get support there, too.  
11 So that's the victim advocate.

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

22 The victim witness liaison, which

1 is listed both in the civilian and military  
2 lines of this slide, is designed to make sure  
3 that the prosecution process, the criminal  
4 justice process gets translated to the victim  
5 in a way that makes sense and keeps the victim  
6 engaged in the process. And you can see the  
7 individuals that the military assigns  
8 throughout these different processes.

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

17 Okay. So I'm going to turn to  
18 Russ now to talk more about this because he's  
19 our investigative expert. So Mr. Russell  
20 Strand has almost 40 years of law enforcement  
21 experience in education, investigation, and  
22 consulting. He's right now chief of the U.S.

1 Army's Police School Behavioral Sciences,  
2 Education, and Training Division. And he has  
3 been an important leader on these issues for  
4 some time, has been the architect of some of  
5 our responses, not only in the military but in  
6 the civil sector, as well, to investigations.  
7 And I'd like for him to flag some of the  
8 issues he thinks are most important here.

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

15 MR. STRAND: Thank you, Dean  
16 Hillman. It's been a real honor and privilege  
17 to work not only with the Subcommittee but  
18 also with the great staff and the leadership  
19 of Dean Hillman as we've moved along. What's  
20 been equally fulfilling is to be able to go  
21 across our nation and look at all the  
22 professionals, both military and civilian,

1 that are really working hard every single day  
2 to get after this most difficult scourge that  
3 we call sexual assault.

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

17 What we're realizing and what  
18 we've realized over the last several years is  
19 that investigating sexual assaults is far more  
20 complicated, far more difficult, and many more  
21 biases than the average homicide case.  
22 Homicide cases, in my opinion, are actually

1 much easier to work than your typical alcohol-  
2 facilitated sexual assault and your typical,  
3 you know, one-on-one sexual assault. One of  
4 the things I hate is that term "he said, she  
5 said" because there is no such thing, never  
6 has been and never should be a he said, she  
7 said case at the end of an investigation  
8 because there's far more information, there's  
9 far more victims, far more offenses, far more  
10 offenders that we need to look to.

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

1 even in our recommendations.

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

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

18 The second tier is what we call in  
19 the Army military police investigators, what  
20 the Air Force call security force  
21 investigators, what the Navy calls their  
22 master at arms, and also what the Marine Corps

1 and the Navy call CID investigators. Now,  
2 there's a difference between CID investigators  
3 and U.S. Army CID agents.

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

18           I'm going to highlight just a  
19 couple of things that I really feel strongly  
20 about in some of our recommendations.  
21 Certainly, the volume of cases from even the  
22 last several years has increased exponentially

1 at a time when the Air Force and the Navy were  
2 told, you know, you're going to shift a big  
3 portion of your sexual assault investigations  
4 only to the MCIOs. And so our reports have  
5 significantly gone up. And my hope, and I  
6 think it's the hope of everybody in this room,  
7 is that we're going to continue to see a  
8 significant rise in reports of sexual assaults  
9 because until we get even close to that  
10 prevalence we've got a lot of work to do.

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

1 sharing of some of the resources.

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

16 I will say that the Navy Criminal  
17 Investigative Service, the Air Force Office of  
18 Special Investigation, the Army Criminal  
19 Investigation Division, and also the Coast  
20 Guard investigators have all done a tremendous  
21 job in meeting these training requirements.  
22 The big difficulty we have is, oftentimes,

1 advanced training is taken out of hide.

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

6           So one of our concerns is that, as  
7 we progress and the need for advanced training  
8 continues, when we take the eye off the ball  
9 -- and someday we will. Someday, we won't be  
10 having hearings and all kinds of interesting  
11 committees and everything else to try to get  
12 at this problem. We're going to move  
13 somewhere else eventually. What our concern  
14 is that funding may also move somewhere else.  
15 So very much like in the family advocacy  
16 arena, when back in the 80s when we were  
17 talking about child abuse and domestic  
18 violence, Congress decided that we're going to  
19 give specially appropriated funds to family  
20 advocacy to be used and only specifically for  
21 family advocacy. We're asking for the same  
22 consideration in the area of training for

1 advanced training for investigators, for  
2 agents, because if we don't have that, our  
3 concern is, now that we're taking some money  
4 out, you know, as we're actually shrinking the  
5 military, the budgets are shrinking, there's  
6 going to be a lot of competitiveness, and so  
7 we don't want some of the money we're now  
8 using to go back into the operational  
9 requirements of the services to meet other  
10 needs. So we're asking for specific  
11 congressional mandates for funding.

12           Victim collateral misconduct was a  
13 huge issue, as we've seen and we compare  
14 between civilians and military. In a civilian  
15 world, you know, if I'm a detective and I'm  
16 interviewing somebody about underage drinking  
17 or if I'm interviewing somebody about smoking  
18 marijuana or if I'm interviewing somebody  
19 about some other misconduct that I really  
20 don't care about as a detective, I'm not going  
21 to do anything with, I'm not going to stop and  
22 read that person their rights. Generally, I'm

1 not going to for a couple of reasons. One is,  
2 under Miranda, they have to be in custody, and  
3 victims generally aren't in custody.

4 Under the military system, under  
5 Article 31, custody doesn't matter. If I'm an  
6 official of the government and I suspect  
7 misconduct, I must read somebody their Article  
8 31 rights if they're a member of the Armed  
9 Forces.

10 So that creates two problems. One  
11 is they're not in custody but they might feel  
12 like they're in custody when they're having  
13 their rights read to them. The other issue is  
14 when we read somebody their rights, imagine  
15 this for a moment and it's not hard to do, I'm  
16 talking to a victim who's sharing the most  
17 difficult thing, the most intimate thing  
18 that's ever happened to him or her, and right  
19 in the middle of that they might bring up  
20 something that I now suspect that they might  
21 have been involved in the commission of a  
22 crime, a minor crime. Excuse me, I just need

1 to stop here for a moment and I need to advise  
2 you of your rights. The chilling effect that  
3 that has on every single human being, on every  
4 single person, is amazing. And what that does  
5 to that victim at that point in time creates  
6 just a profound overwhelming sense of what do  
7 I do now? What do I do? Where do I go? I  
8 reported a major crime, I reported a crime  
9 that the Department of Defense wants to know  
10 about. I'm volunteering my information, and  
11 now you're reading me my rights.

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

1 for minor misconduct in the area of sexual  
2 assaults.

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

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

20 So what we're recommending is that  
21 we look at the Uniform Crime Report, which  
22 almost every single law enforcement agency in

1 the United States uses for case  
2 determinations. We think that will clean up  
3 some problem areas. We don't believe that all  
4 the unfounded cases that we're getting are  
5 baseless or false, but what do most people  
6 think when they hear the term "unfounded?"  
7 What we want to do is rely on what civilians  
8 rely on in the Uniform Crime Report for making  
9 those determinations.

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

20 As we looked at small, medium, and  
21 large installations, if we looked at the Navy  
22 with the ships and everything else, that's

1 virtually impossible. Even some of our  
2 medical centers don't have SANE nurses at  
3 large installations, Fort Hood for example.  
4 But they have a very good, capable system with  
5 off-posts where they can go to these qualified  
6 SANE nurses and get the same product  
7 experience, and we were even told that those  
8 SANE nurses will travel to Fort Hood if  
9 requested to do those examinations.

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

15 And along the same lines, we went  
16 out to the Defense Forensic Science Center,  
17 and we went to the crime lab in Georgia, and  
18 we talked to a lot of experts. And I will  
19 tell you our Defense Forensic Science Center  
20 is nothing short of amazing in what not only  
21 they're doing but in the research that they're  
22 doing for touch DNA and for some other DNA

1 things that we're going to have in the future.

2 But all of the people that we  
3 talked to, all the experts we talked to said  
4 no more plucking. Currently, in the  
5 Department of Defense sexual assault kit  
6 there's a requirement to pluck pubic hairs and  
7 pluck head hairs and pluck body hairs. And  
8 the lab people that we talked to, the experts  
9 that we've talked to said there's no need for  
10 that. There was back in the 60s and 70s and  
11 maybe even the 80s, but no more plucking.

12 That's one of our themes. We'll get a bumper  
13 sticker for that maybe as we go along the way.  
14 But we'd recommend that that be taken out.

15 And then the last recommendation  
16 before I turn it back over to Dean Hillman is  
17 this: In restricted reporting, you know, we  
18 want to hold offenders accountable, but  
19 there's two recommendations that we made on  
20 that offender accountability. We know that  
21 many sex offenders are serial offenders. And  
22 currently under our database with victim

1 advocates, they don't put in subject data,  
2 they don't put in offender data. So if we  
3 have a multiple victim case at an  
4 installation, maybe in basic training or  
5 something, we have no way to go back and say,  
6 hey, has there been some restricted reports,  
7 has there been some unrestricted reports? And  
8 so we're making some recommendations on those  
9 lines.

10 But another thing that we're going  
11 to recommend is on restricted reporting.  
12 Currently, if a victim reports to law  
13 enforcement in any way, shape, or form,  
14 there's an automatic investigation. And we  
15 went out -- in Ashland, Oregon and several  
16 other police departments have some really good  
17 best practices, whereas if a victim wants to  
18 come and talk to a detective, after they talk  
19 to a detective they may determine that they  
20 don't want an investigation, and these police  
21 departments will not conduct an investigation.  
22 We think we should have that same opportunity

1 for victims to come forward, ask us questions  
2 about the investigation, ask us questions  
3 about how we're going to do this, and maybe  
4 gain some confidence with them.

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

22           And so that's a very important

1 aspect. And what we have found, in a sense,  
2 is that victims do want to get more  
3 information and we want them to make a more  
4 informed decision before they go forward, move  
5 forward.

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

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

18 JUDGE JONES: That would be a  
19 great idea.

20 PROF. HILLMAN: Okay. About the  
21 surveys or the investigative part before we  
22 move on to the rest of this. So the slide

1 that was up here behind Russ as he spoke, and  
2 he actually highlighted much of this so you  
3 have a good framework for understanding our  
4 recommendations.

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

17 This does, as well. This is  
18 another point that Mr. Strand mentioned which  
19 runs to the importance of training. The  
20 secretary should direct continued careful  
21 selection and training of supervisory agents  
22 and investigators for the special victim

1 units, utilizing civilian agents because of  
2 their experience whenever possible. And in  
3 particular, we want to make sure that we have  
4 competence and commitment in those who are  
5 investigating; that we have supervisory agents  
6 to ensure continuity that could otherwise be  
7 lost; and, finally, that we do have, we are  
8 attentive to the need to reassign when  
9 necessary because of the challenge of  
10 investigating these cases can certainly create  
11 burnout, and we need to protect the people who  
12 are responders to this, too, so that they can  
13 be there for the victims who come forward.

14 This runs to our point about the  
15 importance of funding. We recommend Congress  
16 appropriate centralized funds for MCIOs to  
17 provide advanced training because these are  
18 complex and difficult crimes to investigate  
19 and prosecute. Already military investigator  
20 training is more robust than our civilian  
21 counterparts, for the most part. However,  
22 continuing that and maintaining it is

1 important. We also want to make sure that we  
2 continue training on the importance of  
3 reducing bias and eliminating bias because  
4 that has so long been a challenge to victims  
5 who come forward and encounter that in  
6 investigators.

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

15           Next, this is about the response,  
16 the different types of responders to incidents  
17 in the military. We recommend the secretary  
18 direct the role of military police  
19 investigators to continue to protect the crime  
20 scene, to ensure safety and well-being, and to  
21 report to the military criminal investigative  
22 office.

1                   So civilian patrol officers have  
2                   some discretion here. Military police do not  
3                   have discretion and have to refer. This  
4                   ensures a specialized processing right from  
5                   the outset that should improve the experience  
6                   for the victim in what's inevitably a trying  
7                   process and improve the response overall and  
8                   the potential success of a prosecution.

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

22                  So the increased reporting and the

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

7           Next, here we're getting into the  
8 details, but this came up repeatedly as we  
9 talked to investigators. We need a  
10 standardized procedure to streamline and  
11 expedite the military criminal investigative  
12 officers use of this investigative technique  
13 in accordance with the law. So these are very  
14 effective, this is very effective. You know,  
15 we mentioned our visits to the forensic labs,  
16 and we mentioned how impressive the Defense  
17 Forensic capability is. But we need to  
18 recognize, too, that forensic evidence is not  
19 available in many, many cases and that getting  
20 information from the individuals involved is  
21 a key part of what the investigators need to  
22 do.

1                   These pretext phone calls and text  
2                   messages, the social media investigations that  
3                   need to ensue are an important way to get  
4                   evidence that will enable successful  
5                   prosecution. Right now, the process isn't  
6                   standardized. There's different approval  
7                   procedures. We want to streamline an  
8                   expedited way to make this happen in the  
9                   military, as it does in civilian agencies, so  
10                  we can investigate properly the many cases in  
11                  which a sexual assault is not reported so fast  
12                  that there's actually forensic evidence that's  
13                  available.

14                  And, next, this goes to a critical  
15                  point in the investigation of a sexual assault  
16                  and the success of responses altogether  
17                  because this also runs to the confidence of  
18                  victims in reporting and our efforts to  
19                  increase the reporting rates for those who  
20                  experience sexual assault in the military.  
21                  This goes to collateral misconduct, which Mr.  
22                  Strand mentioned.

1                   So we recommend the secretary  
2                   standardize the policy regarding rights  
3                   advisement during the interviews of victims of  
4                   sexual assault when they disclose minor  
5                   misconduct. The first bullet points out  
6                   civilian investigators do not advise of rights  
7                   because the law does not require them to.

8                   The potential prosecution for  
9                   collateral misconduct is a barrier to  
10                  reporting and is a barrier to effective  
11                  investigation. The current policy affords the  
12                  convening authority discretion to waive  
13                  liability, criminal liability for minor  
14                  misconduct, and practices right now vary as to  
15                  how Article 31b is actually implemented by  
16                  investigators. We believe there should be a  
17                  standard policy. We believe we should make it  
18                  clear to our investigators what they're  
19                  supposed to do and make it clear to victims  
20                  what they can expect if they come forward with  
21                  the courage it takes to report a sexual  
22                  assault and then there's also, as there often

1 is, collateral misconduct that's associated  
2 with the incidents around that assault.

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

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

20 Next, on the site visits we  
21 realized that the sequestration and the  
22 furlough had had a negative impact on the

1 effectiveness of investigations, and we  
2 recommend that, to the extent possible, the  
3 secretary should exempt DNA examiners and  
4 other examiners at the Defense Forensic  
5 Science Center from furloughs in the future.

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

17           So this means that the SARC, the  
18 sexual assault response coordinator, would  
19 enter information on restricted and  
20 unrestricted sexual assault reports into the  
21 existing database. It would then be available  
22 if that alleged offender is identified in

1 another report of assault. Right now, that  
2 doesn't happen, and there's no information  
3 that gets provided, and we think this would  
4 enhance our ability to build on the  
5 information that we get through both  
6 restricted and unrestricted reports.

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

15           So right now, a victim cannot talk  
16 to a law enforcement agent or investigator  
17 without making an unrestricted report. This  
18 would allow the victim to speak to that  
19 investigator with the protection, the advocacy  
20 of a victim advocate or a special victim  
21 counsel, this innovation in the military  
22 response to sexual assault which gives a

1 victim an attorney early in the process.

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

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

19           We also think there should be an  
20 external audit of DoD sexual assault  
21 investigations. We do internal checks right  
22 now. Some civilian police agencies use

1 external audits. We think that would enhance  
2 our understanding of what we're doing right  
3 and what we're not.

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

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

22 Next, this runs to our definitions

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

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

22 Okay. We're almost through

1 investigation recommendations. Three more  
2 here, and then we'll take some questions.

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

13 So the integration and the  
14 leveraging that we think needs to happen with  
15 civilian facilities and civilian experts  
16 applies to SANES. And we think that the  
17 authorization, the NDAA, right now,  
18 requirement is too narrow to enable the  
19 military and victims to find the best services  
20 they can going forward.

21 That last point is an important  
22 one. Although we're talking about this as a

1 very big problem, and it no doubt is, we also  
2 need to recognize that smaller civilian  
3 jurisdictions and small military installations  
4 may not have enough incidents of sexual  
5 assault that they maintain personnel with  
6 appropriate expertise. You may be trained as  
7 a victim advocate in your unit and you may  
8 have that job for two years and never meet a  
9 single victim. That doesn't make you a good  
10 victim advocate.

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

19 Okay. Russ talked to you about  
20 this already. This is the plucked hair  
21 recommendation. So in order to protect  
22 victims from unnecessary intrusiveness in the

1 sexual assault investigation process, we need  
2 to end this process, and we recommend the  
3 Secretary of Defense do that now.

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

13           We think that there could be a  
14 joint force at the joint Medical Education and  
15 Training Center. There could also be portable  
16 forensic training. There could be joint  
17 refresher courses that run. We have different  
18 programs to try to meet the same goals here,  
19 and we recommend collaborating here through  
20 whatever working group would recommend so that  
21 we don't duplicate our efforts in each of the  
22 services but, instead, build a common ground

1 of expertise that will enable us to be  
2 effective in the different branches of service  
3 and the different types of installations and  
4 the different types of cases that come forward  
5 to us.

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

10 JUDGE JONES: Jim?

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

17 A couple of questions. Three  
18 questions, actually. One more than a couple.  
19 On slide 34, you talked about audits and  
20 outside auditors. Any idea who that might be  
21 who's qualified to come in and sort of sit in  
22 judgment on what DoD will do? Did you have --

1 just sort of seeking additional information on  
2 what you had in mind there in terms of who  
3 outside auditors might be.

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

13 So much like in our collaboration  
14 with prevention, like with RAINN and with PCAR  
15 and some of these other, you know, nationally-  
16 known organizations, perhaps reaching out to  
17 some of them and, you know, some of the victim  
18 advocacy groups, some of the other folks who  
19 do multi-disciplinary training, some advocacy  
20 there, taking a look, not any specific  
21 organization but some organization, some  
22 nationally-known organization, to periodically

1 look at our cases, look at a sample of our  
2 cases, much like the DoD IG does, pick a  
3 sampling of the cases and see if they see any  
4 trends that we might have missed within the  
5 Department, whether it be from the  
6 investigative side, the prosecution side,  
7 because really, right now, when DoD IG is  
8 looking at an audit, they're looking at  
9 procedures, they're looking at making sure  
10 that we followed the rules. But we don't have  
11 any real good outside organization looking at  
12 it to make sure that, you know, from another  
13 perspective, to see if we've missed anything  
14 on the victim side or the health side or  
15 something like that.

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

19 VADM HOUCK: Thank you. I do  
20 wonder if audit is exactly the right term to  
21 describe what you're describing there, but the  
22 idea of collaboration with outsiders seems

1       like a good one.

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

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

22                     Certainly, in the military, every

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

14 Other things, like in a combat  
15 operations area, having consensual sex with  
16 somebody is a violation of general orders  
17 oftentimes. And so they might be involved  
18 with a consensual relationship that went non-  
19 consensual. There's a huge barrier then  
20 because now they have to come in and admit  
21 that they had, you know, a relationship that  
22 led into rape and led into some of these other

1 things which now they can't come forward  
2 without, you know, fairly consistent, you  
3 know, reviews of that misconduct and  
4 potentially, even if it's not just from the  
5 criminal justice side but administrative  
6 repercussions from those.

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

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

17 The last question I had was, slide  
18 36, the conclusion that MCIOs and trial  
19 counsel should make the decision about whether  
20 something is unfounded, and I wonder what role  
21 do you see for the commander in that decision-  
22 making process? It doesn't mention a

1 commander, so I wondered how you all were  
2 thinking about that.

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

14 We don't see any utility in the  
15 commander weighing in on whether it's founded  
16 or unfounded because that commander has to  
17 make other decisions, not whether the offense  
18 occurred but what to do now when an  
19 investigation substantiates an offense. One  
20 of the problems that we've seen along the way  
21 is in the variety of ways that we determine  
22 unfounded. If a commander determines

1 something to be unfounded, does that mean it's  
2 baseless? Not necessarily. Does it mean it  
3 didn't happen? Not necessarily. And, again,  
4 it just goes to the whole spectrum.

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

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

20 So we want to standardize that and  
21 just take a look at it. But we didn't see any  
22 need for the commander to be part of that case

1 determination process. We want to run the  
2 same we do with civilians because when we  
3 compare civilian founded and unfounded rates  
4 it's much cleaner and it's much easier to  
5 grapple with.

6 VADM HOUCK: Thank you.

7 MR. STRAND: You're welcome, sir.

8 JUDGE JONES: Liz?

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

14 MR. STRAND: Yes, ma'am.  
15 Generally, in most of our services, in one of  
16 our recommendations that we quantify when that  
17 happens, but, generally, within 24 hours for  
18 most services that trial counsel will be  
19 notified. We've got a recommendation to  
20 ensure that's consistent across the service,  
21 but, generally, within 24 hours that trial  
22 counsel will get notified, be involved with

1 the case. In most of the services, that trial  
2 counsel is involved from the very beginning.  
3 In fact, in many cases, that trial counsel  
4 will go to the office and maybe even view the  
5 interview, start, you know, looking at the  
6 evidence that we have from the very early-on  
7 stages.

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

10 MR. STRAND: Yes.

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

13 MR. STRAND: Yes, ma'am.

14 MS. HOLTZMAN: -- the trial  
15 counsel --

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

18 MS. HOLTZMAN: And with regard to  
19 the collateral misconduct, what do you see as  
20 the -- or did you look at, a better question,  
21 did you look at any possible downside of  
22 eliminating the collateral misconduct,

1 prosecution for collateral misconduct in all  
2 cases?

3 MR. STRAND: Yes, ma'am --

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

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

21 So that is a risk. That is  
22 something that we've considered and something

1 that we should continue to consider. But I  
2 don't think it should be a barrier to --

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

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

8 BG MCGUIRE: If I could --

9 JUDGE JONES: Yes. Thank you.

10 BG MCGUIRE: Along that vein,  
11 prevention efforts are going to be tied into  
12 some level of accountability. So I think  
13 that, during the course of, you know -- I know  
14 that Major General Snow had mentioned that  
15 they were going to put greater emphasis on  
16 prevention. But if prevention efforts kind of  
17 highlighted the, you know, the dos and dont's  
18 in behavior in order to ensure that you do not  
19 assume greater risk to yourself, do we lose  
20 some level of accountability and teeth to  
21 those prevention efforts if we fail to  
22 highlight that?

1 MR. STRAND: That's a great  
2 question. Ma'am, what I've seen the services  
3 start to do is when they're trying their  
4 prevention efforts they're not just trying  
5 prevention efforts, okay, if you don't want to  
6 be a victim don't do these things. What  
7 they're doing now is they're starting to tie  
8 the prevention efforts in if you don't want to  
9 be a victim or accused of sexual assault, you  
10 know, excessive drinking, underage drinking.  
11 So we're looking at not only just one party  
12 but we're looking at all parties involved to  
13 where, if you want to reduce your risk, these  
14 are the prevention efforts you're going to  
15 take.

16 So I don't see that as  
17 undermining. I would have three or four years  
18 ago. But the way the prevention efforts are  
19 now going, it's cumulative to where we're not  
20 just looking at a gender, we're not looking  
21 at, you know, the victim or the suspect.  
22 We're putting our prevention efforts into both

1 at the same time. So I think that might  
2 mitigate some of that.

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

22 Is that what's going on now with

1 or without victim's counsel? What's actually  
2 happening here?

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

12 JUDGE JONES: Does not?

13 MR. STRAND: Does not.

14 JUDGE JONES: Right.

15 MR. STRAND: So if you're sitting  
16 in a room, basically, you have to get the  
17 chain of command involved right away. And so  
18 when you get the chain of command involved,  
19 then you've got, you know, basically, you have  
20 to stop what you're doing, you have to stop  
21 all the process and procedure. We're right in  
22 the middle of what sometimes can be a very

1 emotional interview, a very emotional thing,  
2 and we have to stop them because they were  
3 underage drinking. That, basically, would  
4 stop the process and does stop the process  
5 until you get some other people that can make  
6 those decisions and those qualifying remarks  
7 involved, and that's very problematic.

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

20 COL SCHOLTZ: Ma'am, I'm with you  
21 and agree that I think the special victims  
22 counsel will aid in this problem and try to

1 help us sort some of this out.

2 JUDGE JONES: Could you speak up  
3 just a little?

4 COL SCHOLTZ: Sure.

5 JUDGE JONES: Thanks.

6 COL SCHOLTZ: Sure. I'm with you.  
7 I definitely agree that the SVCs will aid in  
8 this problem. It's a complex issue. I also  
9 think we're making a recommendation about  
10 involving the judge earlier in the process.  
11 That might help, too. Getting requests for  
12 transactional immunity early in the process is  
13 going to be critical, and I think -- so I  
14 think that's where we -- we're, I think,  
15 identifying a very complex issue.

16 I think it needs to be studied by  
17 the Joint Services Committee to look at how to  
18 do this. Whether or not we're going to be  
19 able to identify a list I have some concerns  
20 about because I think each case is so  
21 factually specific that you're going to have  
22 to deal with those facts. And with trial

1 counsel and the special victims counsel,  
2 they're going to have to decide whether this  
3 is something that we can deal with early in  
4 the case and whether or not there may be some  
5 sort of immunity that needs to be granted  
6 early or a decision made not to pursue the  
7 collateral misconduct.

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

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

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

18           PROF. HILLMAN: Just to be clear,  
19 your Honor, the Subcommittee's recommendation  
20 is that the secretary establish a procedure to  
21 grant immunity and that be accompanied by a  
22 list of all minor offenses because what we see

1       happening on the ground right now is actually  
2       a very uneven process that sort of grants  
3       immunity to victims in a way that's actually  
4       not in accordance with what the law requires  
5       with rights advisement and the way the  
6       investigative process is ensuing.

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

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

22                      PROF. HILLMAN: We struggled with

1 the terms to apply to this. Some Subcommittee  
2 members didn't like the term "automatic," some  
3 worried about a shift away from the convening  
4 authority's power. But to have the convening  
5 authority make this decision so early, it  
6 happens too fast to get that far away from the  
7 interview and the initial contact that the  
8 victim has with the response of the system.  
9 And so our recommendation was that the  
10 immunity happened in a way that's transparent  
11 to the victims and investigators.

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

1 somebody is in the wrong barracks, and that's  
2 minor collateral misconduct.

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

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

16 PROF. HILLMAN: Judge Jones, this  
17 is to Admiral Houck, too. I mean, we do have  
18 a list, the finding which is on page seven of  
19 the interim report where it says for the last  
20 ten years DoD policy documents use the  
21 following list, and here's the list for the  
22 most common collateral misconduct in reported

1 sexual assaults: underage drinking or other  
2 alcohol-related offenses, adultery,  
3 fraternization, or violations of certain  
4 regulations or orders, the like of which Mr.  
5 Strand referred to about consensual activity,  
6 for instance. So it is a short list.

7 JUDGE JONES: Mr. Bryant?

8 MR. BRYANT: Yes, thank you. I  
9 was going to point that out, too, so thank  
10 you, Professor Hillman. And the other comment  
11 I wanted to make for our panel members is that  
12 on this recommendation 13, it's three-pronged.  
13 It's a three-prong recommendation once you get  
14 to the actual narrative part. So it's not as  
15 flat a directive as that may appear on the  
16 slide. There's a process which we recommended  
17 in the three recommendations.

18 And the other thing that I think  
19 did appear in Mr. Strand's presentation and I  
20 want to reemphasize is that we already know  
21 the Naval Criminal Investigative Service in  
22 these cases does not advise. They are not

1 following Article 31. They do not advise  
2 their victims of their rights when collateral  
3 misconduct comes to their attention, and we  
4 did not hear anything that their  
5 investigations or good order and discipline  
6 was being adversely affected because they  
7 weren't making those advisement of rights.

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

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

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

1 or you have an immunity process.

2 The only comment that I would make  
3 on that immunity is if you're going to come up  
4 with this list, it's not just within law  
5 enforcement, it's not just within the legal  
6 community, it's not just the commanders that  
7 have to understand where that line is. It's  
8 going to be every service member that's in a  
9 barracks or coming into a unit, so what's your  
10 communication plan? If you don't have it of  
11 just saying, look, if you're talking about a  
12 sexual assault that potentially involves  
13 drinking, that's not what we're concerned  
14 about when you walk through the door. If you  
15 were in somebody else's barracks, whether it's  
16 because you're in a service that says you can  
17 never be in another person's barracks of the  
18 opposite sex or if you're in a deployed  
19 environment and there's usually a general  
20 order that says you can't or it's the same sex  
21 type of a crime, you have to be able to, if  
22 you don't keep that list really short and

1 really clear, one, you're going to have a  
2 communication problem with the victim that  
3 walks in and says I thought I had immunity if  
4 I came to talk to you and you haven't clearly  
5 explained it to them. At that particular  
6 time, they're underneath the initial  
7 investigation. It's traumatic. They remember  
8 things vaguely. You don't know what shape  
9 that person is in.

10 So I understand the concept of  
11 wanting to protect them. I also understand  
12 the concept of not wanting to violate  
13 somebody's rights just because you don't think  
14 it's that important and you'd rather have an  
15 immunity. I would just suggest you've got to  
16 keep that really, really short because you've  
17 got to make sure the service members  
18 understand exactly what lines we're willing to  
19 draw on that process. Otherwise, you're going  
20 to create another problem and some more stress  
21 for a potential victim as they walk through  
22 the door.

1                   MR. BRYANT: Well, I think it's  
2                   equally important to respond to that that the  
3                   investigators know what they don't have to  
4                   stop and advise rights for because it's more  
5                   important for them to know, okay, this is the  
6                   list that I have prepared by the service  
7                   secretaries in conjunction with the Secretary  
8                   of Defense. We ought to let them decide we're  
9                   recommending that they decide and also whether  
10                  or not we just need to make some fundamental  
11                  changes to Article 31.

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

18                  COL COOK: Yes, but it's in effect  
19                  in a way that doesn't comply with the laws as  
20                  they're currently written. So what you're  
21                  saying, I mean, it's a suspect is what  
22                  triggers it --

1 MR. BRYANT: Well, our very first

2 --

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

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

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

19 MR. BRYANT: About founded and  
20 unfounded?

21 COL COOK: Right.

22 MR. BRYANT: In the UCR, what the

1 civilian community does, it must be baseless  
2 or what's the other word I'm looking -- false.  
3 Baseless or false. That's it.

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

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

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

12 MR. BRYANT: Yes.

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

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

18 JUDGE JONES: Okay.

19 VADM HOUCK: I forget the  
20 statistics on the number of witnesses that you  
21 interviewed, but it was staggering. It was a  
22 lot. With this particular issue, to what

1 extent were commanders, was this discussed  
2 with commanders, the issue being collateral  
3 misconduct? Was that, for commanders, a part  
4 of your information gathering on this issue?

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

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

22 JUDGE JONES: I'm sorry. You go

1 ahead, Ms. Fernandez.

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

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

17 PROF. HILLMAN: It's a great  
18 question. We do have evidence that this is a  
19 problem for successful investigation and  
20 prosecution and a problem for potential  
21 victims feeling confident enough to come  
22 forward. For me personally then, not speaking

1 for the reasons that everybody came to this  
2 conclusion on the Subcommittee, but for me  
3 personally that's enough evidence to decide  
4 there should be something taken, not to  
5 mention we actually see this as not having a  
6 huge impact on actual practice because the  
7 actual prosecutions for collateral misconduct  
8 in sexual assault cases are vanishingly small.  
9 Commanders actually are not prosecuting  
10 collateral misconduct in most cases right now.

11 This could potentially -- this is  
12 Admiral Houck's concern. This could tie the  
13 hands of some commanding officers in some  
14 instances where they would want to prosecute  
15 a person for a violation of orders that was  
16 part of a series of events that led to a  
17 sexual assault. I don't want to pretend that  
18 that couldn't possibly have that effect, but  
19 the huge majority of cases are alcohol-  
20 facilitated sexual assaults where we're  
21 talking about underage drinking or violating  
22 orders related to the drinking policies, which

1 will increasingly become an issue because of  
2 the more aggressive alcohol policies that I  
3 think we're likely to recognize as a panel  
4 going forward. And because of that, we need  
5 a list that communicates to investigators and  
6 to victims and to everybody else out there,  
7 including offenders, who see the collateral  
8 misconduct of victims is a way to prevent them  
9 from disclosing what happened and coming  
10 forward.

11 So we did think we had enough  
12 evidence on that.

13 MR. STRAND: I also had the  
14 unfortunate opportunity to have to stop a  
15 victim in the middle of talking about rape and  
16 advising that person of their rights, and it  
17 is just, and I speak for all the agents that  
18 I work with and talk to, it is one of the most  
19 difficult things that we can do, you know.  
20 There's no way to make it easier. There's no  
21 way to say, well, you know, I just got to  
22 follow this procedure, I'm not really thinking

1 you're a bad person, because we're not allowed  
2 to do that. We just have to whip out that  
3 rights advisement and talk about it.

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

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

20 PROF. HILLMAN: Judge Jones, I  
21 think that we've sort of closed the loop on  
22 these first two sections. I think that,

1 first, let me mention that I compressed the  
2 recommendations and our staff helped me  
3 compress the recommendations to put them on  
4 the slides. So the actual text of the  
5 recommendations, in the interim nature as they  
6 are, is actually in the documents you have.  
7 As Mr. Bryant and Colonel Scholtz pointed out,  
8 those are more precise elaborations of exactly  
9 what we're thinking. The slides don't have  
10 all that level of detail, which was a decision  
11 to not put too much on the slide.

12 JUDGE JONES: Understood.

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

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

21 (Whereupon, the foregoing matter  
22 went off the record at 11:41 a.m.)

1                   and went back on the record at  
2                   11:53 a.m.)

3                   JUDGE JONES: Go ahead, Professor.

4                   PROF. HILLMAN: Thank you, Judge  
5 Jones.

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

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

1 to us about the recommendations made on  
2 training.

3 Colonel Morris?

4 COL MORRIS: Thanks.

5 Good morning, Your Honor and Panel  
6 Members.

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

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

18 I think there are five overall  
19 concepts in the training area, the first being  
20 competence, the second being standards, the  
21 third being methodology or the way we do it,  
22 the fourth being sustainment or figuring out

1 if we are doing it right, and the last one  
2 being the inherent tension in the military  
3 between expertise and breadth.

4 To the first one --

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

7 COL MORRIS: Breadth, with a "D".

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

9 COL MORRIS: Yes.

10 MS. HOLTZMAN: Oh, breadth?

11 Sorry.

12 (Laughter.)

13 COL MORRIS: I apologize for my  
14 accent.

15 (Laughter.)

16 So, in the first, you know, our  
17 assumption has to be that justice is a product  
18 of competence in all three parts of the  
19 courtroom, prosecutors, defense counsel, and  
20 judges. So, all that we do to prepare them  
21 officially by putting them in seats or have it  
22 in practice, and unofficially by all of the

1 ways we develop them when they are not  
2 formally in training, we have to assume, then,  
3 that means that the justice that occurs in the  
4 courtroom is the best-possible product.

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

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

22 Civilians had a mix. There is

1 some amount of formal training, generally not  
2 as much, not as routinely available, not as  
3 easy to mandate; tend to be busier people.  
4 And also, though, greater intensity of on-the-  
5 job training and a greater reliance in on-the-  
6 job training. Also, with certain relatively-  
7 shared baseline of experience, at least in big  
8 places.

9           Where there was a three-to-five-  
10 year threshold before you tend to be trusted  
11 with a sexual assault case of much complexity,  
12 some talked about a baseline of 50 or 60 cases  
13 as considered new experienced enough to be  
14 have launched on your own. I think we know in  
15 the military a relatively-small number who  
16 have that level of experience. We don't have  
17 any kind of formal criterion there, but we do  
18 have an expectation that on-the-job training  
19 occurs in every job all the time. And so, we  
20 have a formal structure as well as kind of an  
21 informal training that goes on through each  
22 level of supervision.

1           As far as sustainment, there is  
2           discussion about some way, and there are a  
3           couple of recommendations in there about  
4           looking for some common evaluative instrument.  
5           We don't have it now. Different Services have  
6           begun to look at them, and to the extent that  
7           we are looking to unify and standardize some  
8           amount of training, then it makes sense to  
9           look at some way to measure that without just  
10          getting tricked into what is the conviction  
11          rate, and that sort of thing, as a baseline or  
12          controlling metric.

13                 And then, the area that would  
14                 always keep this complicated in the military  
15                 is the tension that I am sure you all have  
16                 discussed, and everybody wrestled with,  
17                 between the ideal world of deep competence in  
18                 a particular area, at least deep competence in  
19                 trial work as a prosecutor or a defense  
20                 counsel, as a trial advocate, and the  
21                 militaries need to have you do other stuff,  
22                 and to have to grow people through a career,

1 so that they can supervise people in those  
2 realms and in other realms; they can go to  
3 war. They have sufficient versatility to do  
4 things beyond that area.

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

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

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

21 Is there a way, is there something  
22 on the continuum between the concentrated

1 current expertise that the Navy is encouraging  
2 and some of the informal practices that grow  
3 up among the Services where there is not a  
4 formal track, but they do tend to manage and  
5 cultivate groups and subgroups of people, so  
6 that you don't have an utter randomness to the  
7 development of expertise and you don't have  
8 such an atomizing of that, that you don't at  
9 least take and encourage and cultivate it in  
10 the right people at the right levels?

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

19 But we also need to remember here  
20 that, although that is important, to be  
21 equivalently-resourced, that most of the  
22 training happens in the other 50 weeks of the

1 year that you are not sitting in a class  
2 somewhere. So, though that is important, it  
3 also is more important, as important, to look  
4 at the people who are put into those roles.  
5 So, you could go to the best class in the  
6 world and, then, come home to an indifferent  
7 or distracted or unprepared or not terribly  
8 competent boss of this person as a trial  
9 advocate, and therefore, that person doesn't  
10 get the coaching, doesn't get the development,  
11 doesn't get the intensity of the supervision,  
12 doesn't have somebody sitting in the courtroom  
13 watching them, debriefing them, and all that  
14 kind of stuff.

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

22           Our next recommendation, No. 27,

1 talks, then, about ways to manage the tension  
2 we talk about between the institutional bias  
3 toward touching a lot of areas of practice and  
4 concentrating hard while you are in the job.  
5 And one of the recommendations we have is to  
6 sit for two years in place. As a defense  
7 counsel, we make that an equivalent argument  
8 on the government side. So that you go and do  
9 that job and resist the temptation that exists  
10 between this person is pretty good at this.  
11 Let's do a new thing.

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

22                   We mentioned the metrics and

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

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

19           You have important competencies in  
20 dealing with victims, in preparing your  
21 witnesses, evaluating scientific evidence,  
22 looking at the evidentiary complexity of rape

1 shield and other matters, and dealing with the  
2 dynamic of preparing and arguing about such a  
3 fundamental human interchange.

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

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

16 That has been, I think by most, I  
17 think by all Services who have used them, an  
18 enriching capability, for a couple of reasons.  
19 One is these are people who have been career  
20 trial advocates mainly or exclusively in the  
21 sexual assault area. So, recognizing we are  
22 not likely to have that, we are not going to

1 have it soon, and we do have people who have  
2 done it for a career's worth of time, they  
3 bring a depth and perspective that is not  
4 present or not present in any significant  
5 amount in the Services.

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

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

20 I can answer your questions then.

21 PROF. HILLMAN: So, thank you,  
22 Colonel Morris.

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

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

19                    The next is about funding for  
20 training of Judge Advocates and our  
21 recognition that we need the Secretary's  
22 support to make sure this is sustained or

1 increased, in order to maintain the expertise  
2 we need in this difficult and challenging  
3 arena of litigation.

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

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

19           This is about only experienced  
20 attorneys. So, this is a recommendation to  
21 say we need those two years. We would like  
22 counsel to be in place for two years rather

1 than the short tours that they sometimes have,  
2 not always, in order to make sure they have  
3 the experience and the chance to develop the  
4 expertise they need to be effective.

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

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

18           This is about evaluations, and it  
19 is a recommendation that we consider setting  
20 some standards and engaging in a formal  
21 evaluation there, similar to the Navy's  
22 judicial evaluations of military counsel's

1 advocacy skills, recognizing that feedback for  
2 our counsel would be helpful to them and our  
3 judges have expertise in reckoning how the  
4 attorneys are performing who are before them.

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

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

22 So, I am going to go ahead, Judge

1 Jones --

2 JUDGE JONES: Please, go ahead.

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

8 JUDGE JONES: That's great.

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

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

19 So, here we recommend co-location  
20 when the caseloads justify consolidation and  
21 where resources are available. Because we did  
22 see evidence that that worked effectively.

1                   There is no single model that we  
2 think is best here. There is no single model  
3 among the civilian organizations and  
4 government and non-government defense or  
5 prosecutors' offices and investigators. There  
6 is no signal model there.

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

12                   Here is an example of some of the  
13 different models that we looked at. The first  
14 block there is Dawson Place in Everett,  
15 Washington, which is close to a military  
16 version of an interdisciplinary co-location  
17 model, at Joint Base Lewis-McChord, both of  
18 which we visited, both of which have really  
19 extraordinary and dedicated teams of people  
20 working together to bring into one location  
21 the different strands of effective response to  
22 sexual assault, from the victim advocate, the

1 SANE or the SAFE, the forensic support, and  
2 the support through the medical process, the  
3 Special Victim Council, in the military that  
4 is, not in the civil sector, the investigator,  
5 the prosecutor, and then, the victim witness  
6 liaison who serves as the guide through the  
7 process of prosecution for the victim.

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

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

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

1 questions.

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

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

18 And we think the definition of  
19 covered offenses ought to be changed because  
20 the terms that are used there don't match,  
21 actually, the terms that we are using now to  
22 define these kinds of conduct. So, that is a

1 recommendation about using resources  
2 effectively and, also, defining terms.

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

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

15 We recognize the Services might  
16 need additional SVPs if there is a continuing  
17 trend, especially if we don't change the  
18 requirement that they actually prosecute every  
19 120 case, and that we need to fund the case  
20 preparation requirements, the investigation  
21 and the preparation of the case there.

22 Let's see, I will do, I am going

1 to do through 36 here, Judge Jones, and then,  
2 I am going to pause for questions.

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

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

22 And then, the last one I will do

1 right now, prosecuting sexual assault cases.  
2 A prosecutor's initial involvement, this is  
3 something that Representative Holtzman  
4 mentioned. We want to maintain the 24-to-48-  
5 hour standard for coordination between the  
6 investigation and the special victim  
7 prosecutor. And we want to add a requirement  
8 that the prosecutor gets in touch with the  
9 victim as soon as possible.

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

18 The best practice from the  
19 civilian jurisdictions with whom we spoke was  
20 clearly that the prosecutor gets involved from  
21 the start. One of our Subcommittee members  
22 who is not here is Rhonni Jaus, who is the

1 King's County District Attorney in Brooklyn,  
2 New York, and who has many years of experience  
3 as a prosecutor in special victims cases, in  
4 sex crimes, and lectures and speaks about  
5 this.

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

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

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

20 JUDGE JONES: Well, let me just  
21 ask. Are there any questions relating to the  
22 last five or six?

1 (No response.)

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

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

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

17 But we need to make sure defense  
18 counsel are adequately resourced, too. So,  
19 the challenge has been that military defense  
20 organizations don't have their own budgets,  
21 and that that limits their abilities in some  
22 cases, they think -- they told us during site

1 visits, and it has been raised before -- to  
2 prepare their cases. So, we have some  
3 recommendations around that, but they aren't  
4 right here yet. We will get to those, though,  
5 about how the defense, we can do a better job  
6 supporting defense counsel.

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

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

22 Right now, the military defense

1 counsel rely on the Military Criminal  
2 Investigative Office, and that is insufficient  
3 for them. Independent investigations could  
4 make things go faster.

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

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

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

20 PROF. HILLMAN: Okay. In addition  
21 to providing investigators for defense  
22 counsel, we recommend that the Secretary

1 direct the Services to assess the performance  
2 of defense counsel in sexual assault cases in  
3 particular. We don't have any metrics that  
4 are standard that we sort of assess  
5 effectiveness. It is never a simple process  
6 of evaluating the effectiveness of counsel,  
7 but we do it in many other instances, and we  
8 need to do it here, too, using the ideas that  
9 Colonel Morris set out at the start about how  
10 to measure competence in representing clients  
11 in the military justice system here.

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

18 This runs to the trial counsel's  
19 role in protecting the rights of victims.  
20 Right now, there isn't on the record a  
21 military judge inquiry into whether or not the  
22 prosecutor has actively done the things that

1 are require. So, we want to ensure that trial  
2 counsel do comply with their obligations to  
3 afford victims their rights, and require the  
4 judge to ask on the record whether the trial  
5 counsel complied with the statutory and policy  
6 requirements related to victim's rights. So,  
7 that is another safeguard for the victim's  
8 rights in the process, by putting it on the  
9 record that the trial counsel did actually  
10 ensure the victim's rights were protected,  
11 which they are required to be under the UCMJ  
12 and which they are now. We just want it on  
13 the record, another safeguard there.

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

22 The Special Victims Counsel, they

1 are lawyers who are going to work hard and  
2 pick up the tools that are available to them.  
3 That is what we expect them to do. But we  
4 don't know what impact that is going to have  
5 on the rest of the system.

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

13 These include issues of privilege,  
14 confidentiality, and delays, because the  
15 government's interest and the interest of  
16 victims will not always precisely align. And  
17 the Special Victims Counsel is now able to  
18 assert the demands, the concerns, the needs of  
19 the victim in a way that will change the  
20 process in an appropriate fashion going  
21 forward, but we need to be prepared to adjust  
22 and adapt to that. So, we need some feedback

1 on it. So, we recommend we assess that  
2 interaction and keep track of it, as this  
3 Special Victims Counsel Program matures.

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

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

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

1 that choice of military or civilian  
2 prosecution.

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

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

13 So, this is Article 120. Article  
14 120 has been changed significantly twice since  
15 2007. We recommend that the follow-on panel  
16 to our panel, the Judicial Proceedings Panel,  
17 study the wisdom of future changes.

18 And especially, we recommend that  
19 -- and this is laid out in the recommendation  
20 that is actually in the text there -- that we  
21 either narrow the spectrum of things that we  
22 call sexual assault or split things out in 120

1 in a way that doesn't compress so much  
2 behavior that is in a spectrum of things that  
3 we call sexual assault, in a way that obscures  
4 what is happening, and makes it difficult to  
5 respond effectively.

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

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

16 The last line there I added to  
17 this slide. We would like follow-on study of  
18 this, in part, because it is very difficult to  
19 decide to change again a statute that has been  
20 subject to so much revision in recent years  
21 and under which prosecutors are effectively  
22 bringing to justice persons now. And yet, the

1 statute itself has some problems in it. So,  
2 we are not sure it should be changed, but we  
3 do recommend further study, with an eye  
4 towards breaking out what is a very broad  
5 spectrum of different offenses that are now  
6 charged under Article 120.

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

11 The charging decision. So, this  
12 is a no recommendation. So, we did look at  
13 whether there should be a change in the  
14 discretion to draft the charges, and we  
15 compared the civilian practice to military  
16 practice. And we found both have broad  
17 discretion, and we do not recommend there be  
18 a change right now in that, because we  
19 currently allow both sets of prosecutors to  
20 respond to the situation before them and draft  
21 appropriate charges, given the law, even when  
22 the law is Article 120.

1                   And then, 45, okay, this is  
2 another. This is a finding rather than a  
3 recommendation.

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

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

18                  These are the ones, some of the  
19 ones, that are distinctive in the military  
20 system, and those continue to exist. We do  
21 not recommend that they go away, that the full  
22 spectrum of disciplinary actions continue to

1 be available, and that we continue to track  
2 how they are used, which we are now, which the  
3 SAPRO report does this morning, of how they  
4 are used in responding to the different  
5 incidents of misconduct, including sexual  
6 assault to come forward.

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

12 JUDGE JONES: I think that makes  
13 sense.

14 Any questions with respect to  
15 these last few?

16 COL COOK: Two more questions.

17 JUDGE JONES: Colonel?

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

21 In terms of all the training that  
22 is in here, first, I think this is a great

1 layout of the issues, and I applaud all of  
2 you. Thank you for the time and the effort  
3 that went into it.

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

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

19 PROF. HILLMAN: It was an  
20 intention distinction that runs to our  
21 understanding that, for instance -- and Mr.  
22 Strand can talk more to this -- that

1 discretionary funds for training are easily  
2 lost, and an imperative to do that, an  
3 imperative to have them set out separately  
4 exists.

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

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

22 But the Family Advocacy Program

1 was successfully funded and stood up through  
2 funds that were appropriated specifically for  
3 that and were not discretionary.

4 Mr. Strand?

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

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

19 The other question I have, Mr.  
20 Strand, is more towards you, when you talk  
21 about the investigators for defense counsel.  
22 The way the defense counsel can get an

1 investigator now is they go to the military  
2 judge and ask for an investigator to be  
3 appointed as a member of their team, and they  
4 get that resource.

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

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

18           Back when I was first an agent, we  
19 used to have investigators over at the defense  
20 offices. Usually we would put MP  
21 investigators there. Where we had CID agents,  
22 I am talking about the Army who had CID agents

1 investigating the cases and MP investigators  
2 who had less training, less experience,  
3 working less complicated cases, doing that.  
4 So, then, we fell out for a while.

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

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

19 Basically, defense investigators  
20 are looking for holes in our cases. They are  
21 looking for holes in the investigations. They  
22 are looking for things that we didn't do right

1 and exploiting things, along with contacting,  
2 you know, recontacting witnesses or  
3 identifying other witnesses.

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

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

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

22 COL COOK: And if a defense

1 counsel calls them, it is not something that  
2 is successful to that site? Okay. I just  
3 wanted to understand what you were suggesting.

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

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

18 But, in other ways, the federal  
19 public defender model we talked about as well.  
20 We talked about systems where you could  
21 contract with retired investigators, who,  
22 then, would have -- you would have none of the

1       aura of less than total independence because  
2       they would have to lean back into the system.

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

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

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

12              COL COOK: Okay.

13              COL MORRIS: It shouldn't be ad  
14       hoc.

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

18              COL MORRIS: You're welcome.

19              JUDGE JONES: Any other questions?  
20              Yes, General?

21              BG DUNN: I had one comment I  
22       wanted to make to clarify the discussion on

1 the Victim Protection Act. And the reason  
2 that we came out like we did, well, there are  
3 two reasons we came out like we did.

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

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

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

19 PROF. HILLMAN: Just to underscore  
20 General Dunn's point, that means that a victim  
21 who would say, "I want a civilian prosecution"  
22 could be routing the prosecution to a much

1 less-prepared and less-resourced authority  
2 than the military would be. And hence, not  
3 serving the needs of the victims.

4 JUDGE JONES: Then, I think we are  
5 ready to break for lunch. See everybody at  
6 1:30, 1:00? No, no, I mean, when do we come  
7 back? One o'clock.

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

10 JUDGE JONES: All right, go ahead  
11 Professor Hillman.

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

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

22 For this section, Colonel Steven

1 R. Henley, who brings another nearly three  
2 decades of military justice experience to our  
3 subcommittee. He retired as the chief trial  
4 judge of the trial judiciary in the Army. So,  
5 Colonel Henley

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

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

17 So one of the criticisms that we  
18 heard of the military justice system is the  
19 length of time it takes from the date of the  
20 alleged offense generally to the date of  
21 trial. And I think one of the reasons we  
22 attribute that is that the military does not

1 have standing courts like the civilian system,  
2 the federal and state judiciaries.

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

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

22 So the suggestion would be while

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

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

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

19 So these are all recommendations  
20 numbered 45 in your findings and  
21 recommendations. But they're 45 A through F  
22 because they're all parts of what we recommend

1 about the military Judge's role. So there's  
2 a few slides on these, I'll walk through  
3 those.

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

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

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

22 Right now defense counsel go

1 through trial counsel, which means going  
2 through the convening authority in order to  
3 get the witnesses for instances that they  
4 want. This requires a disclosure of  
5 information to the trial counsel that many  
6 defense counsel to whom we spoke, did not  
7 appreciate.

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

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

18 We also recommend that military  
19 judges be able to issue subpoenas on behalf of  
20 defense counsel. Many defense counsel told us  
21 that they struggled because they didn't have  
22 symmetric authority to what trial counsel

1 have, because trial counsel do have subpoena  
2 power.

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

8 In terms of the changes to the  
9 Article 32. Congress has changed the Article  
10 32 into what closely resembles a preliminary  
11 hearing. The changes have made the pretrial  
12 processes in the military more similar to  
13 civilian processes.

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

22 So this is a -- this is a

1 recommendation that would not allow a  
2 convening authority to go forward with a  
3 prosecution if a judge presiding at a  
4 preliminary hearing made a determination there  
5 was no probable cause.

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

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

20           I think, okay. So those are our  
21 recommendations related to the military  
22 judge's role. So I'd like to give the panel

1 a chance to ask any questions about the  
2 military judge. You have a couple of military  
3 judge -- former military judges there before  
4 you there. General Cooke, Colonel Henley and  
5 other experts too, so.

6 JUDGE JONES: Admiral Houck?

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

21 Do you all feel that the purposes  
22 behind those rules have gone away? That they

1 don't exist anymore? Is the question clear?

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

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

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

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

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

1 the money is.

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

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

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

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

22 But again, balancing the reasons

1 why it's been the way it has been, and the  
2 concerns we have about making sure the defense  
3 has equal access, we concluded that the  
4 defense ought to have that avenue directly to  
5 the military judge.

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

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

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

21 So I think there is an actual  
22 detriment to the defense in the way the system

1 works now.

2 MR. STRAND: Plus the Article 32  
3 process has obviously changed significantly  
4 over the last couple of years, especially this  
5 last year, to where I think the original role  
6 was to have you know, another non-legal person  
7 involved, look at it for the commander.  
8 That's changed significantly with the last  
9 NDAA.

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

16 So the government can still go  
17 back at any point in time and say we've got  
18 this additional evidence, or thank you your  
19 honor for you know, this. And then go back  
20 and either find additional evidence, have  
21 additional evidence, so they can go back  
22 again.

1                   There's also been a lot of  
2                   scrutiny over the legal system as far as 412,  
3                   you know, and some of those other things. You  
4                   know, when you have a non-judge making  
5                   decisions on those, which eventually then can  
6                   complicate the trial in the future. So those  
7                   were some of the considerations that we had as  
8                   well.

9                   BRIGADIER GENERAL DUNN: May I add  
10                  just one comment.

11                  JUDGE JONES: Go ahead.

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

19                  And we did hear quite a bit from  
20                  defense counsel about their you know, their  
21                  fear that they'll be sort of a complete  
22                  inability to bring witnesses in and talk to

1       them in that environment.  And we saw it,  
2       aside from you know, fairness to defense  
3       counsel, we also saw it as a -- or the  
4       discussion also centered on speeding along the  
5       process of the case a little bit.

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

11                      JUDGE JONES:  Yes?

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

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

21                      CHAIR HILLMAN:  Judge Jones, may I  
22      just respond briefly to that?

1 JUDGE JONES: Yes, go ahead.

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

8 MS. FERNANDEZ: Exactly.

9 JUDGE JONES: Liz?

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

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

19 I think in this situation where  
20 the defense doesn't have to worry about the  
21 money, the money's coming out of a different  
22 pocket, there is a danger that goes the other

1 way. That the defense will make requests for  
2 witnesses that would run the costs way up.  
3 And the witnesses may not be -- or whatever  
4 assistance is being asked for may be of  
5 marginal value.

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

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

20 So this way, rather than the  
21 defense having to go through the trial counsel  
22 and the convening authority and tip his or her

1 hand on the case, and leave it up to them  
2 whether the witness should be produced, or the  
3 other assistance should be provided, we think  
4 a neutral judge is the one who ought to make  
5 that decision.

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

12 CHAIR HILLMAN: Representative  
13 Holtzman, we didn't ask commanders about this.  
14 This particular piece, this was a result of  
15 what -- of the site visits that we went to.

16 They didn't -- staff can correct  
17 me if I'm wrong. I don't remember anybody  
18 talking particularly about the need for the  
19 command to retain control of the discretion  
20 for funding these sorts of requests. They  
21 come through the trial counsel.

22 Essentially what this ends up

1 being, the trial counsel plays this role. But  
2 the convening authority is the authority  
3 through which the funding comes.

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

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

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

22 MS. HOLTZMAN: Okay, thank you.

1                   JUDGE JONES:  So is this going to  
2                   mean that we'll need more military judges, or  
3                   have we thought about that?

4                   CHAIR HILLMAN:  Colonel Henley?

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

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

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

21                  COLONEL HENLEY:  No.

22                  JUDGE JONES:  Okay.

1 COLONEL HENLEY: The military  
2 judge is a occupational speciality which you  
3 get upon graduating the military judges course  
4 and the certification by the service Judge  
5 Advocate General. The magistrate program  
6 varies amongst the services.

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

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

19 JUDGE JONES: So are magistrates  
20 sort of -- do they have duty stations where  
21 they're available to do search warrants and  
22 that sort of thing? And do military judges or

1       whatever they're called, are they more -- are  
2       they located in particular stations? Or are  
3       they -- I just don't know exactly where they  
4       all come from.

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

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

16                   BRIGADIER GENERAL COOKE: Can I  
17       just add Judge Jones.

18                   JUDGE JONES: Go ahead.

19                   BRIGADIER GENERAL COOKE: My take  
20       is that while this will clearly mean some more  
21       work for military judges. My guess is it  
22       won't mean a tremendous amount of work. In

1 part because many of these issues are issues  
2 that would later come to the judge once the  
3 case was referred.

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

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

12 JUDGE JONES: And barring  
13 unforeseen circumstances, once a judge is  
14 assigned to a case, he or she carries it  
15 through.

16 BRIGADIER GENERAL COOKE: Right.  
17 Right. Yes.

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

22 The difference is, when it comes

1 to the military judge at that point, the  
2 disclosure by the defense becomes useful for  
3 me that if it comes to the judge later on, the  
4 trial counsel gets the opportunity to object  
5 or not object as to whether or not -- you  
6 know, the merits of the request for that  
7 witness.

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

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

21           I guess the question I have is, if  
22 we're talking about pushing that forward,

1       which I don't necessarily think is a bad  
2       thing, but my -- and now you're saying the  
3       trial counsel's not part of it, the convening  
4       authority who has access to the information  
5       is part of it.

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

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

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

1 enough information.

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

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

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

18 I just think that early without  
19 more is my concern.

20 BRIGADIER GENERAL COOKE: And I'll  
21 give you the classic layer answer. It  
22 depends.

1                   I think -- I think when the  
2                   defense makes a request to the judge or to a  
3                   magistrate, the magistrate is going to have to  
4                   evaluate that on its face. In some cases it  
5                   may be easy, and say yeah, you get it. Or no  
6                   you don't. Or at least without showing me  
7                   something more.

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

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

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

1 access to a judge to work through this  
2 process.

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

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

14 BRIGADIER GENERAL COOKE: Oh yeah.

15 COLONEL COOK: To determine --

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

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

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

5 BRIGADIER GENERAL COOKE: Yes  
6 ma'am.

7 JUDGE JONES: And give the  
8 information?

9 BRIGADIER GENERAL COOKE: Yes.

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

16 BRIGADIER GENERAL DUNN: Well  
17 that's what I was going to say. In our  
18 discussion, the idea was that the ex parte  
19 communication would be the exception.

20 But in most cases, when the  
21 defense counsel went in to the judge, the  
22 trial counsel would be there as well

1 presenting the you know, the accused mother,  
2 father and sister are already coming to  
3 testify on his behalf. Why do we need his  
4 brother, his uncle and his aunt as well? You  
5 know, that's cumulative and they're not going  
6 to say anything different, so.

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

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

18 That's the protective system I  
19 think that it's great that you pointed that  
20 out. That these are not -- we anticipated  
21 that an ex parte would be the exception, not  
22 the rule.

1 COLONEL COOK: Can I ask a follow  
2 on question then?

3 JUDGE JONES: Yes, of course.

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

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

18 Or do you envision it being  
19 another -- because we do have judges in the  
20 different services that can go to different  
21 installations. So it doesn't necessarily  
22 have to be the same judge, it may just require

1 a little bit more travel or assignment book.

2 What was the recommendation on  
3 that one?

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

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

16 COLONEL HENLEY: Right, yes.

17 COLONEL COOK: Well I guess the  
18 question is, it would be interesting if this  
19 was implemented, that dynamic of saying that  
20 the judge's ruling on a probable cause  
21 determination becomes binding and it no longer  
22 goes back to the convening authority.

1           Some of the convening authorities  
2 now, if it from my understanding, is that the  
3 Article 32 is a discovery tool. And I  
4 understand it's more limited now. But it is  
5 still a discovery tool for that person to make  
6 a decision as to whether the case should go to  
7 a court-martial or not.

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

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

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

1 something.

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

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

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

11 COLONEL HENLEY: Which is a legal  
12 determination.

13 COLONEL COOK: Right.

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

21 So the military judge's role in  
22 this concept would be limited to a legal

1 determination of whether or not probable cause  
2 exists. Similar --

3 COLONEL COOK: To what the Article  
4 32 investigating officers do now, which is a  
5 legal determination by non-lawyers.

6 COLONEL HENLEY: Right, but --

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

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

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

22 There may be some circumstances

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

2 COLONEL COOK: Why is it -- why  
3 would this be better than having a judge  
4 advocate, who's not the judge serving at --  
5 you know, right now an Article 32 officer  
6 doesn't always have to be a judge advocate.  
7 In some cases it does.

8 But why is this better than having  
9 a judge advocate serve -- then not having a  
10 judge advocate serve, having a military judge  
11 serve?

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

15 COLONEL COOK: Right.

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

20 So it is a judicial proceeding.  
21 The judge comes through in a black robe,  
22 addresses objections to evidence. I think

1 references to privileges 412. The judge would  
2 rule on those objections as they arise rather  
3 than seek advice from a legal advisor.

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

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

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

21 Or would the military become  
22 unique again? I'm just asking for comparison

1 purposes. I'm not saying it's wrong. I'm  
2 just trying to learn more about the -- what's  
3 proposed.

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

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

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

15 COLONEL COOK: That anyone else is  
16 using.

17 COLONEL HENLEY: No.

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

21 COLONEL COOK: So can an Article  
22 32 the way it is now with somebody other than

1 the judge actually being the one considering  
2 it. Again, I'm just looking at it. That's a  
3 significant change in the way we do business.  
4 And I'm just trying to understand.

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

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

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

22 CHAIR HILLMAN: Judge Jones, the

1 changes haven't been implemented yet.

2 JUDGE JONES: Right.

3 CHAIR HILLMAN: To the Article 32.

4 JUDGE JONES: So we're not sure?  
5 Is that the idea?

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

8 JUDGE JONES: Okay.

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

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

20 The preferable standard is above  
21 that, et cetera. And then all those different  
22 milestones in the process are listed here.

1                   So -- but we are suggesting that  
2                   the judge preside at the Article 32. And  
3                   should the judge find that there's no probable  
4                   cause, that means there's no reasonable belief  
5                   that a crime occurred, and that the accused  
6                   committed that offense.

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

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

19                  MR. STRAND: Judge Jones?

20                  JUDGE JONES: Yes?

21                  MR. STRAND: I think overarching  
22                  goal for this -- for us was, as Colonel Henley

1 mentioned, victim confidence. Because right  
2 now, and we had examples where victims were  
3 going through an Article 32.

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

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

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

22 And then it just pushes down for

1 months until the trial. And then what's  
2 happened to that victim who may drop out  
3 because you know, they were being asked all  
4 kinds of questions, you know, that should have  
5 been protected during that 32 that weren't,  
6 that judicial oversight would definitely help.

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

10 JUDGE JONES: Oh, sorry.

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

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

22 COLONEL COOK: Okay, but that

1 advice is prepared at what point? Isn't that  
2 usually after the Article -- correct me if I'm  
3 mistaken -- after the Article 32.

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

11 Is that what it is at this point?  
12 Sexual assault, if that's the charge, isn't  
13 that one of the changes that was made?  
14 There's your rape cases, it's got to go --

15 JUDGE JONES: Um-hum.

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

22 The Article 32 will go to the

1 judge. Pretrial advice is supposed to be to  
2 help the convening authority to decide whether  
3 to send something to court-martial based on  
4 the information that's coming out of the  
5 Article 32.

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

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

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

22 Of if that's a particular issue to

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

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

14 Unless I'm misunderstanding  
15 something.

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

22 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 But it seemed to us that if the  
5 government can't establish probable cause in  
6 front of a learned judge, then the case should  
7 be over. And there shouldn't be a case.

8 It raises questions about the  
9 credibility of the system if a judge says no  
10 probable cause and a commander then says uh,  
11 I disagree. I'm going to go forward. It  
12 raises questions whether the commander is  
13 being influenced by other factors, or just not  
14 well informed about the law, or whatever.

15 So that's where we came out.

16 CHAIR HILLMAN: Judge Jones -- or  
17 sorry Admiral.

18 VICE ADMIRAL HOUCK: Just to be  
19 sure that I'm not missing something. This  
20 would be -- this would be a historic change  
21 that you're recommending.

22 And for the first time, there

1 would be a lawyer that's inserted into the  
2 decision making process in a potentially  
3 outcome determinative way. And who preempts  
4 a commander from making a decision on a  
5 military justice case.

6 It just true --

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

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

20 This is a recommendation that the  
21 Army came forward with. You're hindered by  
22 not having the full discussion of our report.

1                   In 2004, this is -- it's not a --  
2                   it's a -- it's not an insignificant change.  
3                   But it's not a radical alteration of the  
4                   process that's out there right now in my own  
5                   estimation.

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

10                  CHAIR HILLMAN: Yes Your Honor.

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

13                  CHAIR HILLMAN: Yes Your Honor.

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

19                  MR. STRAND: It's also without the  
20                  prejudice. So we envision that if you don't  
21                  have a strong case, or the judge thinks it  
22                  could be -- or there's not enough probable

1 cause, I think it's a good red flag for the  
2 prosecutor and the command and the  
3 investigators to say okay, what do we got  
4 here? And maybe go back after looking at it  
5 and say well, but did you consider this? Or  
6 maybe we missed -- you know we didn't  
7 introduce this.

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

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

19 There's enough if one person, the  
20 victim usually, or an agent gets up and says  
21 this is what I saw, this is what I found. So  
22 I think we're all -- you know, when you think

1 about what the old Article 32 was, there's  
2 sort of more to be concerned about.

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

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

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

19 JUDGE JONES: It wouldn't happen.

20 CHAIR HILLMAN: Right, it wouldn't  
21 be -- it would be in illegitimate act.  
22 Unethical. So that's -- to take that away

1 from the convening authority seems a minor  
2 imposition on the convening authority's  
3 discretion.

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

9 Probable cause determination.  
10 Jurisdiction determination. The form of the  
11 charges being considered. And then  
12 recommending disposition. And the change, the  
13 reason depositions came up, is because the  
14 victim may not be compelled to testify.

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

20 JUDGE JONES: So recommended  
21 disposition would be either dismiss or else  
22 probable cause -- I found probable cause for

1 this offense, this offense, this offense.

2 Okay.

3 CHAIR HILLMAN: Yes ma'am.

4 JUDGE JONES: Thanks. So I guess  
5 I'm down to depositions. There are not --  
6 there really aren't pretrial depositions.

7 CHAIR HILLMAN: Judge Jones we  
8 heard from different civilians on this. In  
9 Philadelphia they told us that victims have to  
10 -- must testify at preliminary hearings with  
11 some exceptions.

12 In Washington State -- this is in  
13 finding 45 A if you want to look at it.  
14 Either party can request interview material  
15 witnesses. So civilian practices vary on  
16 this.

17 JUDGE JONES: Okay.

18 CHAIR HILLMAN: That was our  
19 assessment of the comparative piece.

20 JUDGE JONES: And you're only  
21 asking the judicial proceedings take a look at  
22 it?

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

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

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

19                   Also elevating review to the level  
20 of the Service Secretaries, puts them in the  
21 position, and of course they can get the  
22 advice that they need, but they're exercising

1 prosecutorial discretion in a way that they've  
2 not been trained or prepared to do more than  
3 those that who currently have that authority  
4 in the military.

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

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

15           We looked at civilian offices and  
16 the ways in which those declinations are  
17 structured. They do not require an analogous  
18 lengthy justification. And it's important  
19 here that we preserve the possibility that  
20 charges could be brought again if the  
21 prosecution is declined, if the case is not  
22 referred.

1                   So we recommend that there be a  
2                   standard format for that declination process  
3                   so that it's a -- so that it preserves the  
4                   capacity of the system going forward. Doesn't  
5                   prejudice a later events.

6                   Are there any questions on those?

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

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

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

22                  The next one is a not yet

1 recommendation regarding plea bargaining.

2 This is still under discussion. But we will  
3 at least flag this issue as worthy of further  
4 study. And perhaps of a recommended change.

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

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

19 We see this as not good for the  
20 confidence of victims in the system. But we  
21 haven't recommended a change on this. And  
22 this is still under study.

1                   So we'll -- the subcommittee will  
2                   say something about this in the next final  
3                   report. This is our interim report. But  
4                   we're not saying anything even interim on this  
5                   just yet.

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

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

18                  We recommend too related to that  
19                  that military judges do what they do now.  
20                  Which is to continue to control voir dire in  
21                  a way that insures that the right panel, fair  
22                  and impartial panel can be seated.

1                   Okay, we're in the -- I'm happy to  
2                   take questions on these as we go. I'm going  
3                   to move through these until we get to the  
4                   sentencing piece and then we'll pause then.  
5                   But if you have questions on these as we walk  
6                   through them, please go ahead and raise them.

7                   Ms. Fernandez do you have a  
8                   question?

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

11                  CHAIR HILLMAN: That's possible.

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

16                  I mean the way I'm looking at it  
17                  is as much as a judge during pretrial hearing  
18                  could find insufficient evidence to go  
19                  forward, it would probably in most cases find  
20                  sufficient evidence to go forward. Therefore  
21                  a commander would be in a very tough position  
22                  to contradict what the judge said.

1                   CHAIR HILLMAN:  Agreed.  If  
2                   there's no probable cause and a convening  
3                   authority decides to go forward, I agree, that  
4                   would be --

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

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

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

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

22                  MS. FERNANDEZ:  Absolutely, but

1 it's a big part of it.

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

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

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

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

22 So a commander could obviously

1 take a look at a whole bunch of facts and  
2 decide I'm not taking this to trial. Or I  
3 don't think it should go to general court-  
4 martial.

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

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

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

22 So, in this -- but we do think we

1 need the right decision makers and at that  
2 early point in the life of the case, the  
3 military judge in our estimation was in the  
4 best position to decide there.

5 JUDGE JONES: Jim?

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

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

21 I also think though that there's  
22 another dynamic that enters into it. That

1 puts a different sort of pressure. You're all  
2 making correct statements.

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

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

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

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

22 CHAIR HILLMAN: Understood. Now

1 that we've finished that for the second time.  
2 Are there any other comments on the judge  
3 role?

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

10 So I did voir dire, which was a --  
11 I think I did that one, and now we're on to  
12 the good soldier defense.

13 The Victim Protection Act, Section  
14 3(g) limits some evidence. Attempts to limit  
15 some evidence of good military character. And  
16 the goal of that is to increase victim  
17 confidence.

18 The existence of something called  
19 the good soldier defense, we think does  
20 undermine victim confidence. We did want to  
21 point out though, that character evidence will  
22 still be admitted when it's relevant. And if

1 foundations are -- if the proper foundation is  
2 established.

3 So the military rules generally  
4 parallel the civilian rules. We don't  
5 recommend any further changes regarding  
6 character evidence. And that's our statement  
7 on this particular part of the Victim  
8 Protection Act, 3(g).

9 Okay. All right so, let's see  
10 where I am here. This is the prosecution and  
11 conviction rate issue. This runs to  
12 standardization, so, and collection data.

13 We recommend the Secretary  
14 implement a standard method for calculating  
15 prosecution and conviction rates. This runs  
16 to some of what we said related to survey data  
17 and to different definitions in the process.

18 We think that once it's  
19 standardized, there should be an independent  
20 expert who studies prosecutorial decision  
21 making in the military. The services  
22 currently use different definitions and

1 different methods, which as we pointed out  
2 earlier, makes meaningful comparison  
3 impossible.

4 This is what, if you can see this,  
5 is our recommended methodology. And I'll just  
6 walk through this.

7 So it's likely that for each type  
8 of Article 120 offense, we would like this  
9 sort of data to be kept. So that we actually  
10 have under the current Article, the spectrum  
11 of prosecution outcomes or investigation  
12 outcomes that run through the process, not all  
13 compressed together, but actually separated  
14 out based on the severity of the offense.

15 So at first would be the top,  
16 unrestricted reports. And it says underneath  
17 there in parens, by offense type. So there  
18 would be a chart like this for each offense  
19 type.

20 In some cases command action would  
21 be precluded. In others there would be  
22 military jurisdiction. Now all of this comes

1 under only those cases where there is military  
2 jurisdiction.

3           There is not always jurisdiction  
4 as you saw if you were here for he SAPRO  
5 slides this morning. Sometimes it's a  
6 civilian, a foreign national. So if there is  
7 military jurisdiction, then these are the  
8 options in terms of what can happen next.

9           It can be unfounded. That is  
10 baseless or false. So the sexual assault  
11 offense may be unfounded. It may be  
12 preferred. And we'll get to the what happens  
13 at that point.

14           There could be an alternative  
15 disposition. And there could be a pending  
16 disposition. So we could be waiting.

17           So we do have to recognize that at  
18 any point in time, all we can get is a  
19 snapshot of the data that's out there right  
20 now. And we're always in a -- we're always  
21 in that point of having it -- a time horizon  
22 that extends over the point at which we're

1 actually looking at the information.

2 Under the preferred, the charges  
3 that are preferred, these are the different  
4 options. There can be no action or no  
5 referral. It could be referred to a court-  
6 martial. There could be a resignation or  
7 discharge in lieu of court-martial. Or it  
8 could be pending.

9 So if we have the services  
10 breakout the disposition of cases in this way,  
11 we'll know what -- where they -- how they  
12 compare.

13 And then if it does go to court-  
14 martial, we can have an acquittal of the  
15 sexual assault offense. A conviction of  
16 sexual assault offense. Or possibly some  
17 other action at that point.

18 That could be -- it could still be  
19 in trial, it could be -- it's possible there  
20 would be a resignation in lieu of court-  
21 martial at that point. But most likely, that  
22 would be a dismissal. That could be a

1       mistrial. That's a sort of catch all  
2       category.

3                       But we would generally find that  
4       we would have acquitted or convicted of the  
5       sexual assault offense. We also, by  
6       specifying offense category, would enable more  
7       precise tracking of particular sexual offenses  
8       and sexual assault itself.

9                       Because sometimes there are other  
10      offense that are charged along with sexual  
11      assault. And this would track the sexual  
12      assault offense rather than tracking the other  
13      offenses of which a service member might be  
14      convicted at the end of the process of  
15      investigation and prosecution.

16                      COLONEL COOK: Would you want to  
17      capture lesser included offenses? I mean when  
18      you say conviction in a sexual assault  
19      offense, if somebody's acquitted, that's one  
20      thing.

21                      They're not convicted of the  
22      actual sexual assault offense, but they're

1 convicted of some sort of assault offense, but  
2 they take as a lesser included. Would you  
3 want to count -- do you want to put that into  
4 the other?

5 I mean it just seems like that  
6 other category could get very big. Just  
7 something to consider as you're coming up with  
8 the rest of your report.

9 CHAIR HILLMAN: Right, we're  
10 trying to articulate something that would be  
11 a rubric that could be probably applicable.  
12 Your question points out, since I can't answer  
13 it precisely, that -- and perhaps others can.  
14 Does anybody on the subcommittee what to  
15 answer that one?

16 I don't think we concluded on that  
17 firmly. But we'll make a recommendation that  
18 we think encompasses all the options with a  
19 rational outcome.

20 But no matter what we come up  
21 with, there will be judgement calls that get  
22 made in the reporting of these statistics. We

1 cannot eliminate all the discretion here. And  
2 Colonel Cook, your question points that out.

3 So we have to reckon with is what  
4 we want to know whether lesser included  
5 offense, something less than a sexual assault  
6 charge. And you know sexual assault includes  
7 abusive sexual conduct. It's a relatively low  
8 level offense in the scheme of things.

9 So even if we stuck only to the  
10 120 offenses, we still would capture a lot of  
11 that -- a lot of the conviction rate, the  
12 prosecution rate data for that.

13 Okay, here's where we got to  
14 unfounded and unsubstantiated. We're on a  
15 vocabulary lesson.

16 So Congress should amend  
17 legislation that is currently in the NDAAs so  
18 that services provide the unfounded cases,  
19 those that are deemed false or baseless,  
20 rather than unsubstantiated cases.

21 This is an issue of reporting  
22 requirements causing trouble in interpretation

1 and comparison of the data. The fiscal year  
2 11 NDAA set out this un -- this substantiated  
3 cases We think unfounded should mean false or  
4 baseless. And that's what the services should  
5 report on when they're reporting on the cases  
6 that are not -- are not pursued further.

7 Okay, I'm looking at the time here  
8 Judge Jones. I'll do a couple more of these  
9 and then we'll take a break before sentencing,  
10 does that sound okay?

11 JUDGE JONES: Sure.

12 CHAIR HILLMAN: Okay. So  
13 comparing military and --

14 JUDGE JONES: Sounds like we're  
15 going to get to that.

16 CHAIR HILLMAN: I feel sentenced,  
17 so.

18 Okay, comparing what's happening  
19 in terms of prosecution rates. We don't  
20 recommend Congress or the Secretary use only  
21 civilian or military -- and military  
22 prosecution rates to assess success.

1                   Disposition options in civilian  
2                   jurisdictions vary. Non-prosecution is  
3                   certainly a reality in civilian jurisdictions.  
4                   In the military alternative dispositions are  
5                   also available that are not the same as those  
6                   applicable in a civilian jurisdiction.

7                   We recognize too the definitions  
8                   of the conduct that's prosecuted is different  
9                   in the military versus civilian justice  
10                  systems. We do realize that these are dynamic  
11                  environments too, and that last bullet runs to  
12                  the uniform crime reports broadening of the  
13                  definition of sexual assault.

14                  So these are changing data  
15                  collection efforts. But we don't want only  
16                  the prosecution rate to stand as an assessment  
17                  of success. We need to embed that into a more  
18                  nuance understanding of the data.

19                  All right. And let's see. This  
20                  is about data on sentencing. Maybe Judge  
21                  Jones we should just stop there. And we can  
22                  do the sentencing part sort of going forward,

1 so.

2 JUDGE JONES: All right, so we're  
3 taking a ten minute break?

4 CHAIR HILLMAN: Yes Your Honor.

5 (Whereupon, the  
6 foregoing matter went  
7 off the record at 2:14  
8 p.m. and went back on  
9 the record at 2:36 p.m.)

10 JUDGE JONES: All right you may  
11 continue.

12 CHAIR HILLMAN: So we're on the --  
13 we're in the home stretch here for comparative  
14 systems subcommittee. We're turning to  
15 sentencing. You have about a half dozen  
16 recommendations on sentencing and then I'll  
17 wrap up our report.

18 In order to lead us into  
19 sentencing, I'm going to ask one of our  
20 subcommittee members, Brigadier General John  
21 Cooke, who is the Deputy Director of the  
22 Federal Judicial Center, retired after a

1 remarkable career in the Army. He ended as  
2 Chief Judge of the U.S. Army Court of Criminal  
3 Appeals, and Commander of the U.S. Army Legal  
4 Services Agency.

5 General Cooke.

6 BRIGADIER GENERAL COOKE: Thank  
7 you Professor Hillman and Judge Jones and  
8 members of the panel. I want to start by  
9 echoing what several of my colleagues have  
10 said about our staff. Colonel Ham, Colonel  
11 McGovern and everyone we've worked with has  
12 just been fantastic. It's made this work not  
13 work. It's made it fun really.

14 With regard to sentencing. Let me  
15 start by laying out just a few of the major  
16 differences in the military sentencing process  
17 and those in civilian courts generally. Then  
18 I'll talk about some of the challenges that  
19 we've faced.

20 There are three key differences I  
21 think. The first one being who decides the  
22 sentence. In a court-martial, the defendant

1 once convicted, is tried -- or is -- the  
2 sentence is determined by either the judge or  
3 the members basically at the instance of the  
4 defendant.

5           If the defendant pleads not guilty  
6 and elects trial by members, then -- and is  
7 convicted, then the members decide the  
8 sentence. If the defendant pleads not guilty  
9 and elects trial by judge alone, the judge  
10 decides the sentence.

11           If the defendant pleads guilty,  
12 then he or she can elect judge or members.  
13 And of course in most civilian jurisdictions,  
14 regardless of who tries the case on the  
15 merits, the judge is deciding the sentence.

16           The second major difference is in  
17 the nature of the proceedings. In federal  
18 courts for example, once a defendant is found  
19 guilty, either by plea or by a -- in a  
20 contested case, there's typically a delay of  
21 weeks or months while information is gathered  
22 in a pre-sentence report and to be presented

1 to the judge for a sentencing determination.  
2 And in many civilian jurisdictions, there's a  
3 lag as well.

4 In a typical court-martial, once  
5 the defendant either pleads guilty or is found  
6 guilty, there is no delay. Or maybe a delay  
7 of a day or so. The court proceeds directly  
8 into sentencing.

9 And the information that's  
10 presented is largely presented from the  
11 accused's personnel file, what's already  
12 there. Which is not insubstantial. And then  
13 information presented by the trial counsel and  
14 the defense counsel that they believe is  
15 relevant to the sentencing authority making  
16 the decision.

17 As an aside, it's worth nothing  
18 that in a court-martial, it's rare for a  
19 convicted offender to have prior convictions.  
20 That's because of the recruiting standards in  
21 the military and because usually if you've got  
22 one conviction, you're gone before you're

1 going to get a second one. So a criminal  
2 record is relatively rare in a court-martial.

3           The third major difference is in a  
4 court-martial, they use what we'll call a  
5 unitary sentence. In most civilian  
6 jurisdictions, if someone is found guilty of  
7 multiple offenses, he or she is sentenced for  
8 each of those offences. Sentences may run  
9 concurrently, but there is a sentence issued  
10 for each offense of conviction.

11           In a court-martial, there's one  
12 sentence regardless how many offenses the  
13 defendant was convicted of. So if there were  
14 five offenses, the maximum punishment for each  
15 one of those is totaled on top of each other.  
16 And that total becomes the range, anywhere  
17 from no punishment up to that maximum penalty  
18 in a court-martial.

19           Baring the rare case where there's  
20 a mandatory minimum. There aren't very many  
21 of those in courts-martial.

22           And that presents certain problems

1 as we'll discuss later in terms of assessing  
2 how sentencing -- how sentences -- what we  
3 should think of sentences in courts-martial.  
4 Because it's hard to tell in a case of  
5 multiple offenses with sexual assault offenses  
6 being mixed in there, you can't extract out  
7 and say how much of this was for the sexual  
8 assault offense. And how much of it was for  
9 the rest of it.

10 So it either masks or distorts  
11 assessments of sentences that are given in  
12 these cases. And that's one of the challenges  
13 that we faced in trying to draw empirical  
14 conclusions about sentencing.

15 In addition to that, beyond the  
16 basic question of -- and now I'll get into how  
17 we tried to assess sentencing. It's hard to  
18 say how well or not well the military system  
19 is working. At least if you're judging by the  
20 quality of sentences.

21 To begin with, few of us would  
22 agree what the right sentence in a particular

1 case is to begin with. There's a lot of  
2 different factors that go into it.

3 But beyond that, the data make it  
4 hard to analyze. It's partly because of this  
5 unitary sentencing quality that I mentioned,  
6 that you can't really compare because the  
7 cases are different. And partly because the  
8 record that comes out of a court-martial, the  
9 record of a sentence, the part that can be  
10 easily extracted is what offense was the  
11 defendant convicted of, and what sentence did  
12 he or she receive.

13 But there are no other underlying  
14 circumstances that are easily drawn out to try  
15 to make a better qualitative decision about  
16 why did this sentence result in this  
17 particular case. Unlike a pre-sentence report  
18 in the federal system where there's a fair  
19 amount of information in a fairly concise  
20 document that tells you a lot about the  
21 defendant and his or her offense. Here all  
22 you've got is the offenses of conviction and

1 a sentence without knowing much contents.

2 And so as we were looking at the  
3 various issues we were asked to look at, we  
4 had to wrestle with the fact that there's not  
5 a lot of -- it's not easy to extract empirical  
6 information on which to judge how sentences  
7 are occurring in the military.

8 That didn't stop us though from  
9 making a few recommendations. And we'll go  
10 through several of these. I should say that  
11 when -- as the issues we were asked to look at  
12 like member sentencing versus judge alone  
13 sentencing. Use of sentencing guidelines and  
14 so forth, we I think decided pretty early on  
15 that we couldn't look at those in the narrow  
16 context of sexual assault offenses only.

17 It would be very difficult to  
18 change the sentencing procedures in courts-  
19 martial just for that single category of  
20 cases. And if you're going to make changes to  
21 who sentences, or to have guidelines or  
22 whatever, those need to be done across the

1 board.

2 And that -- that further inhibited  
3 us if you will, from making some  
4 recommendations in several areas. Let me just  
5 speak to the one area where we are  
6 recommending a significant change. And not an  
7 uncontroversial one. And that's who should be  
8 the sentencing authority.

9 And the majority of the committee,  
10 not unanimous, but the majority concluded that  
11 we should recommend that all sentencing in  
12 courts-martial, laying aside capital cases,  
13 completely different animal, should be done by  
14 the military judge.

15 It's not an easy question. There  
16 are good reason for going either way. Members  
17 bring a sense of community and a sense of --  
18 a knowledge of the context of particular  
19 offenses in particular cases to the table.

20 Taking them out of the process  
21 risks lessening the amount of investment that  
22 people in the line feel in the court-martial

1 process. And risks diminishing even further  
2 their experience levels with courts-martial.  
3 Something that's valuable as people move into  
4 positions to become convening authorities for  
5 example someday.

6 On the other hand, sentencing by  
7 members has long been criticized as more of a  
8 lottery if you will in terms of what kind of  
9 a sentence might come out. There's a lot more  
10 unpredictability with members.

11 Major General Ken Hodson, who's  
12 one of the giants in the military justice  
13 business. He was essentially the architect of  
14 the Military Justice Act of 1968, subsequently  
15 called sentencing by members a lottery.

16 And in our various meetings with  
17 trial counsel and defense counsel and others,  
18 one of the things that was cited on both side  
19 of the fence was the unpredictability of  
20 sentencing by members. There's just more  
21 uncertainty as to what they're going to do.

22 And it stands to reason that

1 that's the case. The members are entrusted  
2 with a very important decision in determining  
3 guilt or innocence. But that's a very  
4 structured decision.

5 It's basically a yes, no answer  
6 with a given standard of proof. And very  
7 explicit elements that have to be established  
8 in order for the members to reach that  
9 conclusion that a defendant is guilty or not  
10 guilty of an offense.

11 Judging a sentence is a much more  
12 open ended determination. There are a variety  
13 of factors, rehabilitation, deterrents,  
14 punishment and so forth. But there's no real  
15 formula to how those should be applied.

16 And in fact the instruction tells  
17 members to use all those in their discretion.  
18 Well for people who do this once or twice in  
19 their careers, that's a very difficult thing  
20 to do.

21 Most judges that I work with, and  
22 when I was in the military, when I was a

1 military judge myself, will say that  
2 sentencing is the most difficult thing they do  
3 on a regular basis. And these are people who  
4 have tremendous experience with this. The  
5 members do not.

6 So as I say, a majority, a strong  
7 majority of our subcommittee concluded that in  
8 order to reduce the potential disparities in  
9 sentences, and in order to enhance frankly the  
10 credibility of the system in terms of people  
11 looking at it from the outside, we would  
12 recommend sentencing by judge alone.

13 So with that, let me turn it back  
14 to our esteemed leader and she can walk us  
15 through all of our recommendations.

16 CHAIR HILLMAN: Thank you, General  
17 Cooke. So Judge Jones and panel members.  
18 What I'll do is walk through the  
19 recommendations and then I want you to hear  
20 another -- an alternative vision as I put it  
21 on what might be the right way to go with  
22 judge alone sentencing from Colonel Morris

1 after I walk through this. Then we'll take  
2 questions on all of the issues related to  
3 sentencing.

4 So the first one is recommendation 54. This  
5 is that the Secretary direct the services to  
6 provide data on sentencing for all rape and  
7 sexual assault offenses. And for that matter,  
8 all offenses in a searchable DoD database.

9 We found in our efforts to  
10 understand sentencing practices, that that  
11 data was not easily accessible, although it is  
12 maintained by the services. That we suggest  
13 the service programs be modified to include  
14 sentencing information.

15 We could not even get this  
16 information with the request for information,  
17 the RFI's that we sent on this. So this isn't  
18 being maintained in a way that makes it  
19 possible for us to make a thorough going  
20 assessment. And we think that should change.

21 This is related. We think to  
22 improve transparency, the services should

1 release sentencing outcomes. The Navy is  
2 already doing this. Releasing monthly the  
3 outcomes of courts-martial. And this would  
4 increase transparency and public confidence.

5           Next we recommend the stuff that  
6 General Cooke spoke about. That Congress  
7 amend the UCMJ and the president, the manual  
8 for courts-martial, to make military judges  
9 the sole authority in sentencing. To improve  
10 reliability and proportionality in the absence  
11 of sentencing guidelines.

12           And that we set out here that in  
13 the federal and state systems, most state  
14 systems, judges impose sentences in all non-  
15 capital cases. We also recognized that judge  
16 alone sentencing is already available. And  
17 that the additional cost of this would be  
18 nominal, if any.

19           Sentencing guidelines. We do not  
20 recommend adopting sentencing guidelines. We  
21 do recommend further study of sentencing based  
22 on the data that we could not get. And also

1 an assessment of the impact of the enhanced  
2 role of the military judge.

3 We put out some information from  
4 the slide from our study from comparative --  
5 our attempt to compare the civilian systems.  
6 Sentencing guidelines are in place in the  
7 federal system and the District of Columbia,  
8 and in 20 states. They're also some 24  
9 sentencing commissions.

10 Guidelines can be complex and can  
11 require a substantial support structure. They  
12 need not do that. But for now there's not  
13 sufficient evidence of disparity in part  
14 because we don't have that data for us to  
15 assess the current patterns of sentencing and  
16 decide on guidelines that ought to be  
17 implemented.

18 Likewise, we recommend not  
19 adopting at this point mandatory minimums. We  
20 do recommend sending this to the judicial  
21 proceedings panel, our follow on panel to  
22 review further.

1                   Mandatory minimums are something  
2 we heard very different perspectives on. One  
3 is that they increase victim confidence and  
4 that victim's actually want harsher and more  
5 onerous mandatory minimums. On the other hand  
6 that they decrease the likelihood of reporting  
7 because of the sense that the offenders who  
8 are often community members of the victims who  
9 would report, would be punished so harshly  
10 that it would deter that sense.

11                   So here there are very few  
12 mandatory minimums as General Cooke said in  
13 the military justice system. Now we do  
14 recognize the defense legal policy panel  
15 suggested that there should perhaps be further  
16 review of one of the few mandatory minimums  
17 out there, the mandatory life sentence for  
18 premeditated murder.

19                   So it's not clear that the trend  
20 is really towards -- is rolling towards more  
21 mandatory minimums at all. So we recommend  
22 further study there.

1                   Next this one's not specifically  
2                   to sentencing, but to clemency. We recommend  
3                   allowing convening authorities to grant  
4                   clemency specifically for forfeiture  
5                   protections for the dependents of convicted  
6                   service members.

7                   So clemency has been changed by  
8                   the -- by Congress' changes to Article 60  
9                   which limit clemency and clemency on sexual  
10                  assault charges. These changes may limit  
11                  appellate review in some instances, we're  
12                  concerned about that.

13                  We also think that the civilian  
14                  clemency rules that run through executive  
15                  powers are somewhat of a parallel to some of  
16                  the military clemency powers. But the  
17                  convening authority has a unique role.

18                  We recommend that convening  
19                  authorities retain that clemency power  
20                  especially in this instance of forfeiture for  
21                  dependents. A case in which a convicted  
22                  service members' family, could continue to

1 receive income for some period of time, a  
2 delay of the imposition of a sentence that  
3 would involve total or partial forfeitures.

4 And then this is our last --

5 JUDGE JONES: Liz would you mind  
6 one question right now?

7 CHAIR HILLMAN: No ma'am.

8 MS. HOLTZMAN: Are your  
9 recommendations only for sexual assault  
10 crimes, or are they across the board?

11 CHAIR HILLMAN: Representative  
12 Holtzman, they're across the board. So they  
13 would effect everything.

14 And then the -- this relates to  
15 that actually question. Their last  
16 recommendation on ending the process of  
17 unitary sentencing at courts-martial.

18 Right now, sentences is  
19 adjudicated for the entire spectrum of  
20 offenses that are charged for which a service  
21 member is convicted at a court-martial. We  
22 recommend that there be specified punishments

1 attached to particular counts. Rather than  
2 that unitary sentencing.

3 This would be akin to civilian  
4 sentencing practices. We'd also want the  
5 court to specify whether the sentences run  
6 concurrently or consecutively.

7 We don't see a reason to have the  
8 military sentencing run in this aggregate  
9 fashion when there are specified counts for  
10 which a service member is convicted. And that  
11 they should result in predictable,  
12 proportional punishments that we could  
13 certainly breakout in the sentencing process.

14 And we recommend that change. So  
15 I think that's the last one. Yes. So that's  
16 the last of our sentencing recommendations.

17 I'm going to turn now to Colonel  
18 Morris who wanted to speak about the proposal  
19 that we set forth, about having judges be the  
20 sole sentencing authority in non-capital  
21 cases.

22 COLONEL MORRIS: Thanks Dean. I

1 recognize as one against nine that there must  
2 be something to the wisdom of my colleagues.  
3 And I really do understand the sentiment  
4 behind it.

5           And anybody who's worked closely  
6 in the system, is vexed at times by sentences  
7 that are not obvious in the reason -- not  
8 obvious to figure out what the rationale is  
9 behind sentence. Still I would suggest we  
10 pause before making a change of this gravity,  
11 for three main reasons.

12           I'm not sure that we can identify  
13 exactly what the problem is. Is it a problem  
14 based on data? In other words objectively bad  
15 sentences? Or is it an inherent inability of  
16 lay leaders to get sentences.

17           Secondly whether this fix solves  
18 the problem, or there may be some less drastic  
19 remedies short of going to judge alone  
20 sentencing. And then have we thought through  
21 all of the collateral costs or impacts of  
22 this, including potentially a different flavor

1 of unlawful command influence.

2 Reduction of confidence by the  
3 rank and file in the system. And maybe  
4 further erosion of lay and command and leader  
5 perspective and input into our system of  
6 justice.

7 So on the first one, on the  
8 problem itself, are we -- have we careful  
9 looked at a set of data that shows that X  
10 amount of sentences by lay panels just can't  
11 be correlated to anything sensible. And  
12 therefore we need to dispose of that.

13 And if so would it be worth seeing  
14 or seeking that information before making this  
15 change. My sense is the argument is that  
16 judges are inherently better and uniquely  
17 suited, not just better at it, but uniquely  
18 suited to sentence people.

19 And the question there is then  
20 what is it about lay jurors, particularly  
21 military lay jurors that makes them  
22 incompetent to do this. And that makes us

1 remove this, you know among the protections  
2 that have persisted for a long time, is one of  
3 the balances against command influence.

4 And all of the implicit indirect  
5 ways that command can take charge of the  
6 process. That would make you take that away.

7 Even using the term outlier. What  
8 makes a sentence an outlier? To those people  
9 following a judge's instructions, who we trust  
10 to make all the really complicated decisions  
11 on the merits.

12 Is it an outlier or is it a  
13 reflection of the richness of this system?  
14 This system that remains free of sentencing  
15 guidelines and that sort of thing.

16 That is the community, on this  
17 occasion, on great particularity, judging this  
18 offense. And remember among other things that  
19 we're not just look at time in jail.

20 That we have a range of sentencing  
21 options that includes the not trivial matters  
22 of losing rank in two or three different kinds

1 of discharges from the military that also  
2 factors into jury's decisions.

3 You look at what we do ask and  
4 trust panels to do on the merits. Only  
5 jurisdiction in America that still says a  
6 panel of five people, by a two-thirds vote can  
7 turn you into a felon.

8 And that we trust them to make  
9 those decisions. We look at un -- figuring  
10 out complicated version of facts. Technical  
11 evidence on your know THC in your bloodstream.  
12 Or DNA on a vaginal swab. Striations from a  
13 bullet, all of those things.

14 Then you have issues of  
15 conspiracy, mental responsibility, where  
16 somebody is a principal. The judge can have  
17 a bench book as thick as we do have. And it's  
18 still him imparting that to these lay people  
19 who make those decisions. And we rightly  
20 trust them to make those decisions.

21 On the command influence  
22 possibility, are we -- is our reason for

1 moving this way because we believe that right  
2 now, the sentences are potentially effected by  
3 command influence. And if that is the case,  
4 are they too high or too low?

5 I mean you could make a case for  
6 either. That the command is still wafting  
7 into the jury deliberation room and  
8 essentially saying -- using all the briefings,  
9 you've been in this military. You've had this  
10 push, so jack up that sentence a little bit.

11 Or is it the opposite and our  
12 belief is that we have almost a counter  
13 cultural resistance to, or reinforcement of  
14 the worst of our culture. And that this lay  
15 jury then isn't getting it the way we need  
16 them to get it as reflected by sentences that  
17 we consider to be whatever we're calling  
18 considering to be, outliers.

19 One of the justifications is that  
20 44 -- I think 44 jurisdictions, have judge  
21 alone sentencing. So obviously there's  
22 something to that sentiment there. But do we

1 even know of those six states that don't, have  
2 they had an experience that also says to us,  
3 that they have outliers and results that are  
4 contrary to justice?

5 This isn't a defense or a  
6 prosecution perspective. But that our sense  
7 that justice is less defensible. The result  
8 is less right to put in front of the public  
9 and in front of society.

10 On the other hand look at then,  
11 what we do in growing our judges. I mean our  
12 typical military judge comes into our system  
13 at plus or minus the 15 year point more or  
14 less. And it's just as common that they've  
15 had -- that some might have had a lot of  
16 military justice. Some have had a tour or  
17 two.

18 And some have not had recent or  
19 intensive military justice experience because  
20 they've done' all the other stuff we ask them  
21 to do. So they may have done recently or  
22 primarily administrative law claims,

1 operational stuff, wills, taxes.

2 But we entrust the judging  
3 function to them because we look at a range of  
4 characteristics. Say age, education,  
5 training, length of service, maybe judicial  
6 temperament that we think plus 100 hour judge  
7 course and the sort of tenure that says we  
8 can't really normally take you out of a job  
9 for a couple of years, that makes them  
10 sufficiently suited to manage a courtroom, but  
11 uniquely suited, uniquely and solely suited to  
12 pass sentences.

13 On the other hand, members of the  
14 rank and file, you know if the fifth amendment  
15 applied to military trials we would call them  
16 peers. But bring as Judge -- General Cooke  
17 explained so well. You know bring that  
18 perspective of the community.

19 And before we ditch it, we should  
20 just be really, really sure that that  
21 perspective is irrelevant, or just as  
22 distorting. Because otherwise it's something

1 that has been in our system for a long time.

2 And the fact that it's been there  
3 for a long time isn't a reason to keep it a  
4 day longer if it contributes to injustice.  
5 But it's worth looking at what the basis for  
6 it is before we throw it out as well.

7 And could it not on the other hand  
8 be a corrective against command influence.  
9 You consider what command influence is now.  
10 We're not seeing the command influence problem  
11 that we saw 20 and 30 years ago. But it's  
12 probably fair to say that we have mutations of  
13 it that are more subtle but no less invidious.

14 And also call for systemic  
15 corrections. Call for vehicles that are there  
16 and able to correct against it. So that we  
17 have just results and we have soldiers who  
18 trust it.

19 You know a lot of people, much  
20 more eloquent than me talk so much about your  
21 system can look, you know, can brief write and  
22 be structurally okay. But if it doesn't have

1 the confidence of the rank and file, then it's  
2 not so effective.

3 And we do have one. You know you  
4 can any, but the closer you are to somebody,  
5 the more you'll have some particular view of  
6 a trial. But you have most people who will  
7 say, well they get it about right. And when  
8 they see justice dispensed, most will say  
9 they've got it about right.

10 And the question is, as you start  
11 pulling command and pulling leadership from  
12 the system, you've removed it from Article 32.  
13 Which means that's not a strictly a judicial  
14 aspect. So you've lost the lay perspective  
15 that's there.

16 You've lost the opportunity to  
17 grow a commander and a leader in the  
18 understanding of the system. And if you pluck  
19 it out at this stage as well, it should be  
20 with the understanding that we're redressing  
21 something that as the system is working this  
22 afternoon, is giving out inappropriate

1 sentences anytime that the lay jury is  
2 involved there.

3 So my only thought is to consider  
4 all of those factors before making a change  
5 that is of this significance. No doubt you  
6 gain the predictability. No doubt some  
7 computer model will show that the band of  
8 discretion, which is what counsel consider so  
9 much when they're giving advice to their  
10 clients if they do plead guilty and are likely  
11 to go judge alone. One of the rightful things  
12 that they can consider, the outlier sentences  
13 to be much less like there.

14 But consider overall the reasons  
15 that those factors are there. Why we do  
16 trust, why our juries have different criteria  
17 for selection to begin with. How we populate  
18 those juries. And whether there is a  
19 substantial articulated basis for removing  
20 them from the process.

21 Thanks.

22 CHAIR HILLMAN: Thank you Colonel

1 Morris. Judge Jones?

2 JUDGE JONES: Jim?

3 VICE ADMIRAL HOUCK: Do you have  
4 any data to support the outlier, the lottery  
5 theory?

6 BRIGADIER GENERAL COOKE: No.  
7 Well if you're looking at hard data, no. We  
8 certainly have a lot of testimony that you  
9 know, people say there are greater  
10 unpredictability with members. The sentences  
11 can be high or low.

12 So but in terms of sentencing data  
13 for the reason I mentioned before, no.

14 VICE ADMIRAL HOUCK: Do commanders  
15 venture an opinion on this? That you spoke  
16 with?

17 BRIGADIER GENERAL COOKE: Not that  
18 I know of

19 CHAIR HILLMAN: Admiral Houck,  
20 this is another one where we -- this is part  
21 -- this came out of our deliberations  
22 reckoning with what we brought back from the

1 site visits. We didn't query commanders about  
2 the sentencing process.

3 VICE ADMIRAL HOUCK: Thank you.

4 COLONEL COOK: On that same vain  
5 do we even know what percentage of the case --  
6 I mean it's the accused's determination of  
7 whether or not the case is going to be decided  
8 by the judge alone, or by the members.

9 Do we know what percentage of  
10 cases an accused actually elects to be tried  
11 by the members and then sentenced by those  
12 members?

13 BRIGADIER GENERAL COOKE: We do  
14 have in our data, we have statistics on the  
15 numbers of members cases versus the numbers of  
16 non-members cases. Those are not broken out  
17 though by guilty, not-guilty pleas.

18 So there's a number of those cases  
19 where the defendant asked for members on the  
20 merits. We don't know what the defendant  
21 would have asked for had they had the  
22 opportunity to be sentenced by one or the

1 other.

2 So even there, it's a little  
3 difficult to determine how defendants would  
4 elect if were just looking at sentencing.

5 COLONEL COOK: And that would be  
6 my next point too, with the defendants  
7 electing that. I guess there's a part of me,  
8 as talented and as well trained as our  
9 military judges are, again it's the lawyers  
10 helping to make legal decisions in that  
11 process where with the military unique  
12 structure that's there, it's the -- to the  
13 extent somebody elects to have members  
14 sentence them, or to even determine their  
15 guilt or innocence.

16 They've been in the units. They  
17 followed the orders -- I'm not saying judges  
18 haven't been, they have, to different extents.  
19 Whether it's been the deployments. Whether's  
20 it's been serving out there in the -- living  
21 in a barracks or understanding the conditions  
22 under which an incident might occur. And why

1 something might have happened.

2 Again, not to excuse or anything  
3 like that, but to help decide it. And then to  
4 decide what's the appropriate sentence based  
5 on the number of deployments. The number of  
6 hazardous conditions.

7 The number of the egregiousness of  
8 that crime. And to take it all into account.  
9 I guess I would caution -- I would be  
10 concerned about us changing something. But  
11 for right now I'm not sure until I look at  
12 your data.

13 CHAIR HILLMAN: It's about --  
14 sorry Colonel Cook, it's about 15 percent.  
15 But it's different across the services.  
16 That's about 15 percent of are member  
17 sentencing, as compared to judge sentencing,  
18 so.

19 JUDGE JONES: 15?

20 CHAIR HILLMAN: 15, yes ma'am. So  
21 it's a small percentage even now.

22 MS. HOLTZMAN: Can I just make

1       sure that I understand the rationale for this.  
2       That first that there's an appearance of  
3       improper command influence. When the  
4       commanding officer -- the convening authority  
5       has picked quote, unquote the panel.

6                So that's one issue that you think  
7       that this addresses. And the other is quote,  
8       unquote, outlier sentences. Do you have --  
9       just because it said -- I mean here's a point  
10      that concerns me.

11               Just because a sentence is not the  
12      -- you know, is not in lockstep with every  
13      other sentence for the crime, it doesn't mean  
14      it's unjust. I mean not every defendant is  
15      the same as every other defendant.

16               Not every -- the circumstances of  
17      every crime are not the same. So disparity in  
18      sentences is not for me, enough to be a  
19      trigger to say there's injustice.

20               I mean I think we need to have  
21      something more than that.

22               COLONEL COOK: I wanted to clarify

1 the point of the convening authority picks the  
2 panel. The convening authority identified --

3 MS. HOLTZMAN: Picks the pool.

4 COLONEL COOK: Right, picks the  
5 pool. Identifies a group of officers and  
6 enlisted service members who would otherwise  
7 be available. And you can correct me if I've  
8 got this process wrong, be available to serve  
9 as a pool.

10 And they'll put them on certain  
11 panels. That panel will then go to the court.  
12 And during the court, the judge controls that  
13 process. But the prosecution and the defense  
14 counsel get to ask questions and do the same  
15 voir dire that you do in a civilian court.

16 And ultimately the panel is  
17 decided based on who's got what strikes or  
18 not. But it's the convening authority  
19 identifies the initial pool of officers who  
20 may otherwise be qualified to sit in there  
21 based on Article -- is it 69? What is it  
22 Beth?

1 BRIGADIER GENERAL COOKE: 25.

2 COLONEL COOK: 25. Thank you.

3 The Article 25 criteria of the judicial  
4 temperament, experience, education. All those  
5 things that are well laid out.

6 They'll just say these are people  
7 who I'm putting on my panel for this next year  
8 or whatever. And then from that the judge and  
9 the prosecutor and defense pick the pool from  
10 there each individual case.

11 BRIGADIER GENERAL COOKE: Let me  
12 just -- I would say command influence, or the  
13 potential for command influence plays a  
14 minimal role in our -- in the majority's  
15 recommendation for judge alone sentencing.

16 There's a probably a slightly  
17 greater chance for unlawful command influence  
18 if you have members then there is with a  
19 judge. But that's really not much of a  
20 factor.

21 The bigger -- and outliers is kind  
22 of a hot button term. I think we feel that

1 there will be greater consistency in  
2 sentencing with military judges. For the  
3 reasons that I mentioned. Members do this  
4 maybe once or twice in their careers.

5           So there's no -- there's no real  
6 good frame of reference when you get in and  
7 you're told you can do anything from no  
8 punishment to 40 years confinement and a  
9 discharge and some other stuff. They just --  
10 and they're told you can think about  
11 rehabilitation. You can think about  
12 deterrents. But you've got to come up with a  
13 number some way.

14           A judge who hears these cases on a  
15 regular basis has a better frame of reference  
16 as to how this case fits with other cases that  
17 he or she has seen. And so there's likely to  
18 be less of that great unpredictability that  
19 you -- that I think all of us would say, even  
20 Colonel Morris will say, we've seen in courts-  
21 martial.

22           It's one reason why defendants may

1 roll the dice sometimes when they've got a  
2 very good pretrial agreement. And say well  
3 I'll go with the members. Because I already  
4 know I can't -- the convening authority's not  
5 going to let me have more than this.

6 On the other hand, sometimes it  
7 dissuade a defendant who's really afraid that  
8 they're just going to get the book thrown at  
9 them if they get convicted. And they may even  
10 elect trial on the merits by the judge.  
11 Because they're afraid of what's going to  
12 happen on sentencing if the members -- if  
13 they're sentenced by members.

14 BRIGADIER GENERAL McGUIRE: Judge  
15 Jones.

16 JUDGE JONES: Harv.

17 MR. BRYANT: Yeah, if I could add  
18 too. I think one of the things that we  
19 considered along with everything that General  
20 Cooke has said, is that -- and I don't know  
21 the answer for the six states who allow for  
22 jury sentencing.

1                   But whether or not -- I don't know  
2 whether or not they require unanimity.  
3 Because all states don't require unanimity in  
4 jury trials. Some do in felonies, but not  
5 misdemeanors.

6                   But at any rate. We know in  
7 courts-martial, it's not -- it can be three  
8 out of five. And so part of what we heard,  
9 and what we also thought on our own and  
10 discussed was you may have two members on the  
11 panel who didn't even think the person was  
12 guilty. Yet now they're involved in the  
13 sentencing.

14                   I think the thing that really  
15 highlighted it for us in one of our site  
16 visits to a major installation, which probably  
17 -- I don't know if it's the busiest, but one  
18 of the busiest within that service.

19                   In terms of courts-martial, we  
20 heard not on a single outlier basis but on a  
21 continuing basis, this is a quote, wild  
22 disparity in panel sentencing.

1                   BRIGADIER GENERAL McGUIRE:   Just  
2                   an observation, Judge.

3                   JUDGE JONES:    Sure.

4                   BRIGADIER GENERAL McGUIRE:   And  
5                   that it's interesting that if -- if only 15  
6                   percent of the defendants prefer to have  
7                   members adjudicate -- or their sentence,  
8                   determine their sentence.  That indicates to  
9                   me that they're fearful of a more harsh  
10                  sentence.  And that's why they go with the  
11                  judge.

12                  JUDGE JONES:    Russ.

13                  MR. STRAND:   Well, I think the  
14                  notion that -- and I think most service  
15                  members know that they're not going to be  
16                  tried by their peers.  Because they usually  
17                  have to be above rank.  So they know they're  
18                  going before the leadership.

19                  And so I think that's part of a  
20                  chilling effect as well.  Because I'm going to  
21                  be adjudged by the sergeant majors that I  
22                  don't even know, but I know sergeant majors.

1 And I know commanders. And you know, so I  
2 think that's part of it.

3 The other part of it was for me  
4 was what I got as far as some of our  
5 information is that when the judges go to  
6 school, to the judge course, and it's a joint  
7 course. They actually get several files. And  
8 they get trained on how to adjudge sentences.

9 And they practice that. And I  
10 think it's a really good best practice to be  
11 able to -- if you're going to have somebody do  
12 something so complicated as General Cooke has  
13 said, and I agree.

14 You know, why not train somebody  
15 to do it, you know to where you can look at a  
16 certain degree of fact patterns here and a  
17 certain degree of fact patterns here and  
18 actually practice it before you do it. As  
19 opposed to the first time I've ever done this  
20 very complicated thing, it's going to  
21 significantly impact this person's life.

22 That's what kind of sold me on

1 this. Plus some antidotal stuff I've seen  
2 along the way.

3 Not only in our visits, but also  
4 in my own experience, I've seen juries,  
5 military panels you know, basically --  
6 technically yes, this person was guilty of  
7 sexual assault. But we really think the  
8 victim was at blame as well, because the  
9 victim did this, this and this.

10 So they've given a lighter  
11 sentence because they didn't' really want to  
12 you know, throw the book at him for whatever  
13 reason. And I think those kinds of decisions  
14 don't belong in this system as well.

15 So there's just a couple of  
16 thoughts that I have.

17 BRIGADIER GENERAL COOKE: If I  
18 could just say one more thing in response to  
19 Colonel Morris' very eloquent defense of the  
20 current system. And I learned a long time  
21 ago, you don't want to be on the other side of  
22 a case from Larry Morris.

1                   But as many of the issues that you  
2                   are having to deal with in this whole process,  
3                   this is a 60/40 question with a yes, no  
4                   answer. There are -- there are good reasons  
5                   to keep the current system. There are good  
6                   reasons to move from the current system.

7                   And I think we've laid those out  
8                   for you. It comes down to a judgement call if  
9                   you will as to what is best going forward.

10                  JUDGE JONES: And maybe if it's  
11                  only 15 percent, the system is speaking for  
12                  itself.

13                  BRIGADIER GENERAL COOKE: To a  
14                  large degree it is.

15                  JUDGE JONES: So you have choice.  
16                  Liz?

17                  MS. HOLTZMAN: Just one other  
18                  question. I guess another alternative here,  
19                  is having a pre-sentencing report and a  
20                  different system for sentencing.

21                  So it's not immediate, you get an  
22                  experienced agency that's involved in this

1 process. And it makes a recommendation.  
2 Could be to the panel. Could be to the judge.

3 Did you consider that? And why's  
4 that not a better option?

5 BRIGADIER GENERAL COOKE: Yes.  
6 We'll get to -- we looked at sentencing  
7 guidelines. And there's a whole -- other  
8 whole set of issues there. And we ultimately  
9 didn't make a recommendation on them.

10 My personal view, I don't think we  
11 discussed this, but if we were to move to a  
12 guideline system, that would argue more for  
13 judge alone sentencing than what we have now.

14 Because if the guidelines are  
15 anything like the federal guidelines, their  
16 complexity is such that it would take a long  
17 time to instruct the members in a given case  
18 how to apply these guidelines.

19 MR. BRYANT: If I can just add to  
20 that. We heard from the experts against  
21 guideline sentencing who came to us. That  
22 none of the 20 states that have sentencing

1 guidelines -- in those states the jury's not  
2 even informed what the guidelines are. They  
3 have to -- they have to sentence under the  
4 statute.

5 So whether or not the military  
6 would necessarily have to be informing panel  
7 members what the guidelines were, that would  
8 be a difference from everything else that we  
9 were told goes on in the state court system.  
10 And certainly, well federal juries aren't  
11 told, because federal juries don't do  
12 sentencing.

13 JUDGE JONES: Right.

14 COLONEL COOK: One clarifying  
15 question on recommendation 55, which is the  
16 sentencing data availability.

17 The recommendation says to release  
18 the sentencing outcome. I know the Navy is  
19 publishing theirs. But you're not advocating  
20 actually --

21 I mean if somebody wants to  
22 publish I guess my concern would be let's not

1       become a system that is so results oriented  
2       that we're not emphasizing everything that's  
3       being done with sexual assault. Everything  
4       from prevention to reporting and all that  
5       stuff.

6                    But if this is just recommending  
7       releasing the information, or making it  
8       available, but not advocating that we have to  
9       publish to each of the services. Is that  
10      right?

11                   It says that the Navy's doing it.  
12      But it's not necessarily dictating that  
13      everybody ought to. Because it's not just the  
14      result that hey we got this many convictions.  
15      Because you can create a perception the  
16      opposite way of it's result.

17                   I mean it's the prevention, it's  
18      the protection of service members. It's the  
19      entire process that we're advocating fixing.  
20      And not just -- I mean one indicator is an  
21      increase in convictions or results or things  
22      like that.

1                   But so is the reporting, which is  
2                   now increased by about 50 percent by the  
3                   report that came out this month. So if you're  
4                   going to advocate one, I'd just not -- I would  
5                   hate to take it out of context and emphasis  
6                   one piece of the improvements over everything  
7                   else.

8                   But releasing it or making it  
9                   available to those that are interested in  
10                  seeing it, I'm not necessarily concerned  
11                  about.

12                  CHAIR HILLMAN: Colonel Cook, the  
13                  Navy releases it for everything. I mean not  
14                  just for sexual assaults.

15                  So the intent would be to increase  
16                  some transparency in the whole system and not  
17                  suggest that the sexual assault cases deserve  
18                  a different degree of scrutiny than everything  
19                  else. Notwithstanding that they have in fact  
20                  been subjected to that additional degree of  
21                  scrutiny in recent months and years.

22                  So and the idea is that as other

1 recommendations say, that certainly this  
2 should not be the only thing considered in the  
3 success of this effort to prevent and to  
4 respond appropriately to sexual assault. It  
5 should be considered alone. Agree.

6 COLONEL SCHOLZ: In response to  
7 Representative Holtzman's question the pre-  
8 sentence reports. I think we did discuss  
9 that. Correct me if my memory's wrong.

10 But I think we looked at that  
11 possibility, but in terms, I think we were  
12 concerned about delay. Because we have this  
13 system that we think is pretty efficient.

14 We go straight from findings into  
15 sentencing. And then it's the prosecutor's  
16 job to already be ready to -- with a kind of  
17 pre-sentencing information, to jump into  
18 sentencing.

19 And we were concerned about  
20 waiting to come up with the pre-sentencing  
21 report. Like you said, we'd have to probably  
22 contract out potentially. And there might be

1 a delay in the system.

2 So I think we did discuss that as  
3 a panel.

4 MR. BRYAN: Judge Jones.

5 JUDGE JONES: Yes Harv?

6 MR. BRYANT: Just to add another  
7 fact to go in our calculations here. When we  
8 talked about the fact that only 15 percent are  
9 by panel now. When we were looking at the  
10 guidelines issues, which is different, but  
11 separate, we heard from the Department of  
12 Justice Office of Policy and Legislation, that  
13 in the pre-guideline days in the federal  
14 system, there was only 15 percent jury trials  
15 in criminal matters in federal court.

16 The corollary to that is once they  
17 impose guidelines, it went down to one to two  
18 percent jury trials in federal criminal cases.  
19 So I'm just showing a comparison that at one  
20 point in the federal system, it was only 15  
21 percent going with a jury trial even though  
22 the federal system has never had jury

1 sentencing.

2 MS. HOLTZMAN: Well I'm not  
3 advocating guidelines.

4 MR. BRYANT: No, and I'm not  
5 either Representative Holtzman. No, our -- as  
6 you heard, our subcommittee is not. I didn't  
7 put that in there with the guidelines piece  
8 I just put it in there that that's how the  
9 statistic of 15 percent jury trials, pre-  
10 guidelines in the federal system came to us.  
11 That dropped down to one to two percent after  
12 guidelines.

13 But no, this subcommittee is not  
14 recommending guidelines.

15 JUDGE JONES: Right. And that  
16 meant that defendants were -- opted for  
17 certainty. Because when they pled they got a  
18 guideline range as opposed to rolling the dice  
19 with a conviction where the judge would not --  
20 you know would have a different -- could do  
21 what he wanted within the guidelines.

22 And that just showed prosecutorial

1 power to give them a better deal than what  
2 they might get post-conviction.

3 MR. BRYANT: We did hear from  
4 trial counsel in our site visits, that were in  
5 favor of sentencing guidelines. Just so you  
6 know, that the panel would know that.

7 JUDGE JONES: Colonel Morris?

8 COLONEL MORRIS: Just only one  
9 point about the pre-sentence report. You know  
10 that would also be a major change in how we  
11 operate. And it would logically follow if you  
12 go -- might logically follow if you go to  
13 judge it on sentencing.

14 But you know our sentencing  
15 process, it's very advocate heavy. And much  
16 dependent on both parties preparation of, and  
17 presentation of evidence. And it's relatively  
18 protective of the accused.

19 I mean there's information that  
20 would go in a pre-sentencing report that would  
21 never be admitted in the sentencing phase of  
22 our trials. And that's been even enriched

1 over the last 20ish years where the manual has  
2 codified some of the court opinions that have  
3 further narrowed the scope of opinion on  
4 whether somebody should stay in the military  
5 and that sort of thing.

6 So to dispense with that, has that  
7 collateral impact as well.

8 CHAIR HILLMAN: Okay. I think  
9 wraps up. I have a sort of summary slide.

10 Our goal, and you get to see if we  
11 met that, was to compare all of the civilian  
12 systems we could fathom with the military  
13 justice system. Which itself is complex.

14 We looked at surveys and started  
15 there. And ran through then the investigation  
16 and prosecution process right through  
17 sentencing, as you just heard. And proposed  
18 legislation.

19 These are some of the results.  
20 Things that I slide for your early at the  
21 beginning of the presentation. We think we  
22 need better crime victimization data.

1 Standard terms and rational reporting  
2 requirements.

3 We think we need to continue to  
4 focus on training and encourage collaboration.  
5 We need to balance resources for defense  
6 counsel. Dropped out of our slide.

7 We also need to balance the needs  
8 of the victim and the process. And make sure  
9 that those are represented throughout as the  
10 models for the multi-disciplinary approach and  
11 the integration of new forces. Victim  
12 advocates, victim witness liaisons and the  
13 special victim's counsel in the process show.

14 And we also recommend granting  
15 military judges more authority to improve  
16 fairness, efficiency and confidence in a  
17 military justice system for the multiple  
18 reasons that we sort of set out throughout.

19 So with that Judge Jones, barring  
20 further questions from the panel. I want to  
21 thank the subcommittee members who came today.  
22 Those who couldn't. And everybody for

1 listening to us all day.

2 JUDGE JONES: Well I can't let you  
3 sit down without complementing you and your  
4 entire subcommittee, and Kelly for an  
5 absolutely amazing job. Absolutely amazing.  
6 That was terrific. Thank you.

7 CHAIR HILLMAN: Thank you.

8 (Round of applause)

9 JUDGE JONES: We're going to  
10 switch now to the second subcommittee report.  
11 Which is the victim services. Ms. Hernandez  
12 is the chair of that subcommittee.

13 The process will be a little  
14 different with this subcommittee. I'm going  
15 to stay at the table and keep talking. But  
16 everybody wants to move and rearrange  
17 themselves, that's great.

18 Because the comparative system  
19 subcommittee had not finalized its report, or  
20 its recommendations and findings, we discussed  
21 it. We did not deliberate and as a panel  
22 reach a consensus on accepting, modifying or

1 rejecting recommendations.

2           The victim services committee's  
3 report, it's interim report is final. Their  
4 findings and recommendations are final from  
5 the subcommittee. And so as we review that  
6 report, there will be discussion and  
7 deliberation. And if we're able to do it  
8 today, the panel will make findings -- our own  
9 findings with respect to whether we accept  
10 them, want them modified or may reject some of  
11 them.

12           So we'll be looking to do that.  
13 Which is going to take us a little bit longer.  
14 Recommendation by recommendation. And I just  
15 wanted everybody to understand the process.

16           Why don't we take a five minute  
17 break.

18           (Whereupon, the foregoing matter  
19 went off the record at 3:25 p.m. and went back  
20 on the record at 3:35 p.m.)

21           JUDGE JONES: ... already mentioned  
22 is the chair of the Victim Services

1 Subcommittee will now begin their report out  
2 to the panel.

3 MS. FERNANDEZ: Good afternoon,  
4 Judge Jones and panel members. Thank you for  
5 giving me the honor to present the Findings  
6 and the Recommendation of the Victim Services  
7 Subcommittee.

8 I would like to start by  
9 introducing the members of the panel who  
10 served with me. I had the great honor to be  
11 able to work with these ladies and gentlemen  
12 who provided great insight into the issues  
13 that were confronting victims in the military.

14 We had very passionate discussions  
15 and I think we came to very reasonable  
16 Findings and Recommendations.

17 So let me start by saying that  
18 Former Representative Liz Holtzman served on  
19 the subcommittee.

20 Brigadier General Colleen McGuire  
21 served on the subcommittee.

22 Dean Michelle Anderson who is

1 Professor and the Dean of CUNY School of Law  
2 served on the subcommittee.

3 Lisa Schenck, who's an Associate  
4 Dean here at GW is on the subcommittee.

5 Barbara Jones served on the  
6 subcommittee.

7 Judge Marquardt, who is on the  
8 Kansas Court of Appeals served on the  
9 subcommittee.

10 Meg Garvin, who is not here today,  
11 is the Executive Director of the National  
12 Crime Victims Law Institute.

13 And Bill Cassara, an attorney at  
14 law and also Retired U.S. Army.

15 As I said, it was a great honor to  
16 serve with these individuals and I think that  
17 we have created a really good report but we  
18 could not have done it without the help of the  
19 staff.

20 So I would like the staff to raise  
21 their hand when I mention their names because  
22 the incredible work and time and time spent

1 until two in the morning in the office doing  
2 this report, we could not have done it without  
3 you.

4 So, Commander King, Julie Carson,  
5 Kristin McGrory, Rachel Landsee and Amy Peele,  
6 thank you all very much for your service.

7 Next, I'd like to go into the  
8 mission of the subcommittee was to assess the  
9 adequacy of military systems and proceedings  
10 for providing support and protection to  
11 victims in the investigation, prosecution and  
12 adjudication of crimes involving adult sexual  
13 assault. The result was 37 Findings and 38  
14 Recommendations.

15 I'd also like to tell you a little  
16 bit about the frame and the lens that we  
17 looked upon this issue with.

18 We realize that military sexual  
19 assault is an enormous crime against an  
20 individual but it's a crime against the whole  
21 military system.

22 Sexual assault means that our

1 troops aren't ready and it can drastically  
2 impair capacity to move on a mission.

3           Therefore, we looked and we said  
4 what are the barriers for victims to come  
5 forward because unless they come forward, we  
6 cannot provide them with services. Once they  
7 do come forward, what are the obstacles for  
8 them to access the services and what are the  
9 quality of those service?

10           What's the knowledge that the  
11 victims have of their rights and how are we  
12 enforcing them on a consistent basis?

13           I'd like to quickly go through the  
14 terms of reference which is on Page 4 of

15           Assess the adequacy of military  
16 systems and proceedings to support and protect  
17 victims in all phases of investigation,  
18 prosecution, adjudication of adult sexual  
19 assault crimes.

20           Assess whether military systems  
21 and proceedings provide victims the right to  
22 a Board afforded by 18 USC and 371 Department

1 of Defense Directive 1030.1 and Department of  
2 Defense Instruction 1030.2.

3 Assess differences between  
4 military and civilian systems and providing  
5 support and protection to victims of sexual  
6 assault, identify best practices for victim  
7 support and protection from civilian  
8 jurisdictions that may be incorporated into  
9 any phase of the military system.

10 Assess the effectiveness of the  
11 proposed legislative initiatives, modifying  
12 military justice process and providing support  
13 and protection to victims in adult sexual  
14 assault crimes.

15 Also we were asked to look through  
16 the NDAA at the expansion of the role of the  
17 Special Victims Counsel and also the expansion  
18 of rights provided in the UCMJ to reflect  
19 better what's being doing in the civilian  
20 system.

21 Our methodology was pretty much  
22 the same as the subcommittee before us.

1 Meetings, we met with victims, with SARCs,  
2 with VAs, with military and civilian  
3 investigators, defense counsel, civilian and  
4 military advocacy groups, law professors and  
5 statisticians.

6 We had military site visits at  
7 Fort Hood, in Lackland, and then we had  
8 multiple requests for information.

9 We had an extensive document  
10 review and report writing where we had many  
11 conversations and formal meetings both in  
12 person and on the phone, all of which were  
13 documented and put on our website.

14 For purposes of time, two of our  
15 subcommittee members that are here today may  
16 not be able to be here tomorrow so I'm asking  
17 actually to go out of sequence in our  
18 recommendations, if that's okay, Judge Jones.

19 JUDGE JONES: Of course.

20 MS. FERNANDEZ: And I'd like to  
21 turn to Recommendation 2 and 2.a first and  
22 then Recommendation 19 after that.

1                   Two and 2.a -- yes, they're in --  
2 we put them in the back thinking that we were  
3 going to save time by having those done in the  
4 back, but we're now putting them in the front  
5 in order to have all the right people present.

6                   Recommendations 2 and 2.a came to  
7 us mostly from the testimony of victims that  
8 said I wanted to go restricted, but somehow  
9 this information got to my commander and we  
10 had to go unrestricted. And so it was the  
11 inadvertent passing on of information that  
12 caused a victim not to be able to control his  
13 or her own case.

14                   So our Recommendation, after a lot  
15 of deliberation, we did get consensus on this  
16 particular Recommendation from the  
17 subcommittee, but it was that a victim can  
18 consult with a special victims counsel prior  
19 to deciding on whether to go restricted,  
20 unrestricted or making no report at all.

21                   And for the military police, and  
22 this is going to sound a lot like what the

1 Comparative Systems Subcommittee recommended,  
2 but the first step of the military police  
3 process be to advise the victim that she has  
4 a right to speak to special victims counsel in  
5 order to determine whether to go restricted or  
6 unrestricted.

7 BG DUNN: So, wait a minute, I'm  
8 sorry, because I'm trying to understand that.

9 So do you all see this  
10 Recommendation as a putting the genie back in  
11 the bottle provision?

12 So I'm sexually assaulted. I come  
13 back to my barracks crying. I tell my three  
14 roommates but I don't want to go anywhere and  
15 the three of them go to the MPs and report  
16 that I've come back, I've said this, I've  
17 given them all this detail, this is all I've  
18 told them and now I will still have the  
19 opportunity to talk to an SVC and put the  
20 whole thing back in the box.

21 MS. FERNANDEZ: That is correct.

22 BG DUNN: Have it be a restricted

1 report?

2 MS. FERNANDEZ: That is correct.

3 BG DUNN: Which is not the way it  
4 works now.

5 MS. FERNANDEZ: No. That was the  
6 problem. The testimony that we heard from  
7 victims themselves, what's exactly your  
8 scenario.

9 They go back to the barracks, they  
10 tell somebody and that information  
11 inadvertently goes to a commander then the  
12 commander is forced to then go forward with  
13 the case when that individual hasn't had the  
14 time -- or maybe already has contemplated or  
15 hasn't even had the time to contemplate  
16 whether they want to go restricted,  
17 unrestricted, or do nothing at all.

18 COL COOK: So taking that one step  
19 further, what doesn't go over to the command  
20 for action, or anything like that -- what, if  
21 anything, does the investigator who's had this  
22 person in front of them, are they supposed to

1 do anything or just sit there and wait to see  
2 if they come back?

3 MS. FERNANDEZ: One more time?

4 COL COOK: You're saying that this  
5 -- okay, the information comes to the military  
6 police of an instance of sexual assault and  
7 they tell them, hey, you can go talk to a  
8 special victim counsel about this and the  
9 person then decides, I want to make a  
10 restricted report.

11 The military police who have some  
12 indication that something had happened, do  
13 they take any action whatsoever? Do they  
14 report the contact that the person even gave  
15 to them and said that they sent them back to  
16 the special victim counsel? Now maybe not  
17 their name, it's kept anonymous if it's a  
18 restricted report.

19 What, if anything, are they  
20 expected to do? Do they capture any  
21 information to indicate that the contact was  
22 made even if a return doesn't come back to

1 show that that process is effective in what  
2 you're trying to help them do or a tool that's  
3 used?

4 MS. FERNANDEZ: Therein lies the  
5 rub with our Recommendation, is that if there  
6 is additional information that an investigator  
7 receives other than, you know, the name of the  
8 victim, what do they do with that information?

9 And I think on some level, the  
10 victim has to retain control over what happens  
11 with their case. If there is other  
12 information, I think to some degree, it's got  
13 to be on a case by case basis of what's done.

14 But what the subcommittee felt was  
15 that there really needed to have an ability  
16 for the victim to control the case.

17 COL COOK: And then I would also  
18 suggest then, if you're using the system tool  
19 to allow that, that maybe you allow that  
20 military police office, at least, even if they  
21 don't take any other information, to note that  
22 the contact was made so that later on, the

1 Services have some indication, is this a  
2 process that victims are using. Is it  
3 effectively addressing what you wanted it to  
4 effect?

5 Because if there's no record and  
6 there's nothing that's done, the person just  
7 sits there, it's also interesting they sit  
8 there and they now know that there's a  
9 potential victim of somebody who is out there,  
10 they are aware of it, but they're doing  
11 nothing. And yet, something happens to  
12 somebody else.

13 I understand the concept of making  
14 sure the victim controls the case. It's just  
15 a different Catch-22 for the investigators who  
16 have usually had a different process at that  
17 point.

18 MS. FERNANDEZ: General Dunn?

19 BG DUNN: This actually might tie  
20 in with the Recommendation that the CSS just  
21 made that there be a process for a victim to  
22 Actually speak with an investigator and then

1 make the decision that they don't want to go  
2 forward. But allow the investigative system  
3 to have the name of the alleged perpetrator in  
4 case other cases come forward in the future.

5 So maybe this might be something  
6 that would tie in together somehow.

7 MS. FERNANDEZ: Just for  
8 clarification, I don't know if I'm allowed to  
9 do this, but was that not the Recommendation  
10 that came out of Comparative Systems that the  
11 name of the perpetrator go forward? So that  
12 would be the consistent.

13 BG DUNN: Right, but that the  
14 victim be -- if she wanted to, or he wanted  
15 to, have afforded the opportunity to have a  
16 full out conversation with an investigator and  
17 then say, okay, I want to make a restricted  
18 report.

19 MS. FERNANDEZ: But the name of the  
20 perpetrator is

21 BG DUNN: Catalogued, because CSS  
22 was trying to get to the issue of serial

1 perpetrators which would, you know, provide  
2 the opportunity just to go back to the victim  
3 in the future and say two other people have  
4 reported on this same guy, would you like to,  
5 you know, would you like to talk to us now?

6 MS. FERNANDEZ: Liz, did you?

7 MS. HOLTZMAN: Yes, I think the  
8 genesis I think it's very important for  
9 members of the response panel to realize that  
10 the subcommittee was very concerned about not  
11 interfering with the existing system which  
12 requires the commander immediately to report  
13 any information that comes to his or her  
14 attention. So that is not interfered with at  
15 all because we thought that would be a major  
16 change.

17 But I think the real question as  
18 Mai mentioned, is what happens if the victim,  
19 after discussing it with -- under the CSS  
20 report and with the MCIO or the military  
21 police decides that she or he doesn't want to  
22 bring the case, but information about that

1 case comes from other witnesses who were  
2 there, now I don't know for sure what the  
3 military rules are here, whether the military  
4 is bound by the victim's refusal to go forward  
5 or if they have independent evidence not from  
6 the victim, what do they do and how does this  
7 affect that?

8 BG MCGUIRE: Part of the, ma'am, if  
9 I can respond to that?

10 MS. FERNANDEZ: Yes, please.

11 BG MCGUIRE: Because part of the  
12 discussion that we had during our  
13 deliberations and work was that military  
14 police and the commander has a mandate to  
15 ensure the safety and security of that  
16 installation and/or the area that they're  
17 responsible for.

18 And so, in discussing a restricted  
19 case without knowledge of who the individual  
20 is, is one thing. But once there is an  
21 indicator that we know who our potential  
22 offender is, the law enforcement is compelled

1 or mandated to at least initiate an  
2 investigation.

3 But I think what we were talking  
4 about was that that was not known at the  
5 point. So your recommendations that you had,  
6 while similar in giving the victim an  
7 opportunity to discuss whether or not to go  
8 restricted or unrestricted, I don't think we  
9 really fully discussed any discussion about  
10 the name of a potential perpetrator.

11 MS. FERNANDEZ: I think that the  
12 Comparative Systems Panel, thank you, had a  
13 very good suggestion where it allows, as  
14 Colonel Dunn said, to put -- I'm sorry,  
15 General Dunn said to put the genie in the  
16 bottle, but at the same time, the name can go  
17 forward and if this is a serial perpetrator,  
18 we can also track what this individual is  
19 doing and possibly stop somebody else from  
20 getting assaulted.

21 I don't know if this is correct,  
22 if we could amend our own Recommendation at

1 the table or

2 BG MCGUIRE: Sure, we'd like to  
3 hear it, yes.

4 MS. FERNANDEZ: I think our  
5 recommendation would be, first of all, that  
6 the Secretary of Defense implement policy that  
7 a victim will be

8 The first Recommendation 2 stay  
9 the same but the 2.a be amended to state that  
10 the name of the perpetrator should be put on  
11 file or placed into a data system so that his  
12 or her name can be tracked and further sexual  
13 assaults can be prevented.

14 In other words, to basically track  
15 the recommended coming from the Comparative  
16 Systems Panel the 2.a would track that.

17 BG DUNN: A better way to do it  
18 might be just to reference the CSS  
19 Recommendation by its number, perhaps, to just  
20 some how

21 MS. FERNANDEZ: Adopt it.

22 BG DUNN: -- at the end of this,

1       you know

2                       MS. FERNANDEZ: Adopt it.

3                       BG DUNN: Yes, just make some  
4       reference. I'm sure the staff can come up  
5       with better language than we can sitting here  
6       at the table right now, but just come up with  
7       some statement that this does not conflict  
8       with the CSS report 1-23, whatever it is, CSS  
9       Recommendation 1-23 when we get finished with  
10      that. Does that make sense?

11                      MS. FERNANDEZ: I would say let's  
12      go with General Dunn's

13                      JUDGE JONES: I just have one quick  
14      question. If the victim goes ahead and makes  
15      a report to someone which makes it  
16      automatically unrestricted, is this intended  
17      to say that that it's no longer -- it doesn't  
18      become restricted or unrestricted until after  
19      they've been able to consult a special victims  
20      counsel?

21                      MS. FERNANDEZ: Yes.

22                      BG DUNN: That's what it says.

1                   PROF. HILLMAN: Judge Jones, that  
2                   is what we recommended this morning or at some  
3                   point a while ago and that's exactly what our  
4                   Recommendation was, it's 16 on the  
5                   Recommendations that we made.

6                   So and this would likewise track  
7                   that same

8                   JUDGE JONES: I don't know, I think  
9                   my own preference would be to try to educate  
10                  people on who they can report to as opposed to  
11                  stopping everything. But I need to think  
12                  about this some more. It seems a bit  
13                  complicated to me.

14                  And I worry about what everyone's  
15                  doing while we're trying to decide about when  
16                  -- I don't know. Is the special victims  
17                  counsel going to be available quickly enough  
18                  to respond to things?

19                  MS. FERNANDEZ: I think that  
20                  special victims counsel should be available.  
21                  And again, we have a Recommendation on  
22                  resources and it was a question that came out.

1 The more the special victims counsel is  
2 employed in different situations, the more  
3 that resource is going to run thin.

4 MS. HOLTZMAN: Judge Jones?

5 JUDGE JONES: Yes?

6 MS. HOLTZMAN: My question was a  
7 little bit different from what you have all  
8 focused on, so I don't know that we addressed  
9 it and I don't know what the present policy is  
10 with regard to it.

11 But let's say the victim decides  
12 to make a restricted report or after  
13 consulting with special victims counsel  
14 decides to make a restricted report.

15 Subsequent to that, information from totally  
16 independent sources come to the police to the  
17 effect that there has been an alleged sexual  
18 assault. What happens then?

19 This is not a report that's  
20 triggered by the victim, it's a report that's  
21 triggered by independent witnesses. What  
22 happens in that case? Do they go forward? Do

1       they stop?  Do they -- what happens?  Go back  
2       and consult with the victim again?

3                   MS. FERNANDEZ:  I think that was  
4       the unintended -- it was the roommate scenario  
5       where the roommate gets told what's going on,  
6       the victim decides that she or he wants a  
7       restricted report.  That information  
8       inadvertently gets to the commander or that  
9       the first step has to be going back to the  
10      victim and saying, do you want this to remain  
11      restricted or do you want an unrestricted  
12      report?  I think that was our decision.

13                   But then the investigators need to  
14      go and that's their first step to go back to  
15      the victim.

16                   MS. HOLTZMAN:  Right, but maybe I  
17      didn't make myself clear.  In the case you're  
18      positing, the information is coming from the  
19      victim.  So what we're saying, in essence,  
20      what your recommendation is, the victim may  
21      have made an inadvertent mistake or it was a  
22      spontaneous outburst or it was an emotional

1 thing, so she or he should be able to control  
2 that circumstance.

3 I'm talking about a situation  
4 outside of the victim where other people  
5 witnessed the assault and have come forward,  
6 not at the victim's behest, maybe they don't  
7 even know the name of the victim, but they  
8 were witnesses to the event, not the roommate  
9 who's hearing secondhand. I'm talking about  
10 someone who actually witnessed it. What  
11 happens in that case?

12 MS. FERNANDEZ: Representative  
13 Holtzman, I think that that was something that  
14 we did not deliberate upon in the subcommittee  
15 so we could bring it up at the full committee,  
16 but we did not deliberate on that.

17 MS. HOLTZMAN: Well do we know what  
18 the policy would be of the military? Do you  
19 mind if I ask that question, Judge Jones?

20 JUDGE JONES: No, not at all.

21 PROF. HILLMAN: We heard about this  
22 at one of our site visits. We heard about

1 this where at, you know, a third-party reports  
2 an assault. I think it's a routine  
3 circumstance, in fact, that it happens and the  
4 investigation ensues and the victim doesn't  
5 have veto right over what happens but the  
6 victim is consulted. That's my understanding.

7 General Dunn, do you remember?

8 BG DUNN: That was my understanding  
9 as well is that the commanders and the MCIOs  
10 must report and open an investigation if they  
11 get the information even if the victim has  
12 already made a restricted report if they get  
13 separate information because they don't know  
14 about it. I mean they don't know about the  
15 restricted report. They don't know about the  
16 facts and circumstances, so they would open an  
17 investigation.

18 Ultimately, it would come together  
19 and the victim would -- she would have to  
20 decide whether to make -- he or she would have  
21 to decide whether to make a statement to have  
22 presumably

1                   JUDGE JONES: Whether or not to  
2 cooperate with the investigation.

3                   BG DUNN: Right, right. But the  
4 investigation ensues.

5                   COL COOK: As a point of  
6 clarification for both reports, then, the  
7 conversation with the special victims counsel  
8 would clearly be confidential. If the person  
9 goes to a military investigator, it consults  
10 with them as you both envision and then makes  
11 a decision to make it restricted, then we're  
12 not going to pursue the case on behalf of that  
13 victim quite to the same degree.

14                   But if they decide later on to  
15 make it unrestricted, is the original  
16 conversation with the military or the  
17 consultation with the investigators, is that  
18 considered confidential as well? Because I  
19 don't know what state of mind the victims  
20 might be in when they have that initial  
21 conversation, you know.

22                   If you're saying they should be

1 available earlier to the special victims  
2 counsel and they go to the investigators,  
3 those investigators are involved early on and  
4 the information that's provided may not be --  
5 once they decide to make an unrestricted  
6 report, it may not be completely the same as  
7 the

8 I mean is the initial conversation  
9 considered confidential as well? Or if they  
10 come back later, they make their report, there  
11 are changes in the report that's there based  
12 on maybe a period of time, I don't know. What  
13 kind of information is the investigator  
14 supposed to capture at that point?

15 MS. FERNANDEZ: I think at this  
16 point, is that there would probably be  
17 processes, if in fact this recommendation is  
18 accepted, there would have to be some  
19 processes that we'd have to put in place that  
20 would probably have to go back and revisit  
21 that conversation to see if she wants to still  
22 adhere to what she had said previously or not.

1                   You know, so I think they'd have  
2                   to address it in some manner so they could at  
3                   least say that, you know, they can go forward  
4                   from there. But I mean, at this point, we're  
5                   talking about, you know, a process to whatever  
6                   -- if we go forward with this Recommendation.

7                   JUDGE JONES: So you're not talking  
8                   just about an inadvertent -- well there's  
9                   inadvertent in two different ways, an  
10                  inadvertent disclosure through the girlfriends  
11                  is, I think, the example you gave.

12                  But when the victim herself goes  
13                  to the military police or maybe to a  
14                  commander, that's -- she may not know that  
15                  that's going to cause her to have, you know,  
16                  an unrestricted report. Are you considering  
17                  that as well? That's covered as well? I just  
18                  want to clarify it.

19                  MS. FERNANDEZ: I think what we  
20                  envisioned here was that the victim would get  
21                  a hold of an SVC right away and with that  
22                  consultation, he or she could better determine

1 whether they want to go restricted and  
2 unrestricted.

3 But that means that a third-party  
4 isn't going to go to a commander. So that's  
5 what was the second part of the recommendation  
6 that said, if I told my girlfriend or somebody  
7 else that I had been assaulted and I went  
8 restricted, that person going to the commander  
9 or an investigation couldn't trigger an  
10 unrestricted report.

11 Now the scenario that  
12 Representative Holtzman is positing, we did  
13 not contemplate which is the third-party  
14 scenario. We were all at the same bar  
15 together, we saw the assault take place. It  
16 was completely an independent observation from  
17 a third-party. We did not contemplate that  
18 situation so we didn't have deliberations over  
19 it.

20 But we did want to know that if,  
21 at some point, somebody, like you said, was  
22 going to make an excited utterance, that that

1 wouldn't be used against them in their  
2 decision making power.

3 MS. HOLTZMAN: And to just to  
4 clarify, Judge Jones, if I may, just to  
5 clarify, at least under the Recommendation  
6 that the subcommittee made, the police agency,  
7 if you go, if the victim goes to the police  
8 agency immediately, they are required to tell  
9 the victim that you need to discuss this first  
10 with your special victims counsel.

11 So that would be a way of ensuring  
12 that the victim, at least, knew that there  
13 were -- that she or he was entitled to talk to  
14 special victims counsel and we're going to  
15 assume that the special victims counsel knows  
16 something about restricted and unrestricted  
17 reports.

18 JUDGE JONES: Okay, any other  
19 questions?

20 MS. FERNANDEZ: If we could move to  
21 Recommendation Number 18?

22 JUDGE JONES: Well, I'd like to

1 just get a sense of how the panel -- whether  
2 the panel wishes to adopt these two  
3 recommendations 2 and 2.a.

4 MS. FERNANDEZ: With the cross-  
5 reference to the

6 JUDGE JONES: Yes, with the cross-  
7 reference to

8 MS. FERNANDEZ: -- Recommendation  
9 16 in Comparative Systems.

10 JUDGE JONES: In comparative  
11 Systems.

12 Could we just -- how many are  
13 prepared to adopt it as it is with the cross-  
14 reference? All right. Other -- okay.

15 Any concerns?

16 COL COOK: On 2.a, the only thing  
17 I'd want to know, that concept of the  
18 discussion with the investigators, if they're  
19 going to investigators to consult with them  
20 and just discuss the process, you see a  
21 special victim counsel, I think it's  
22 confidential.

1                   If you go to the investigator and  
2                   say okay, how would this work? What would  
3                   happen and they discuss process, then I'm not  
4                   as interested in that confidentiality.

5                   But I am concerned if they start  
6                   talking about what happened during that  
7                   offense and the merits of it and there's not  
8                   parameters established up front before saying  
9                   they can consult fully with an investigator  
10                  before deciding restricted or unrestricted,  
11                  then I think we either have to say it is  
12                  confidential or it's not confidential.

13                  If you say it is confidential, I'm not  
14                  sure what kind of -- it'll raise other issues  
15                  from a defense perspective that I think need  
16                  to be addressed before I say that I would  
17                  agree to the 2.a language.

18                  Two, I'm fine with. Allowing them  
19                  to have access to the special victim counsel  
20                  up front, I agree with. It's just some  
21                  guidelines of, if they go to an investigator,  
22                  they talk about process, I have no objection.

1 If they talk about merits, then I have some  
2 concerns that I would like to see addressed  
3 before I agree blindly with a cross-reference.

4 JUDGE JONES: All right. Well  
5 then, I think the consensus is to adopt 2 and  
6 I have concerns about 2.a as well, so perhaps  
7 we could come up with a slight modification.  
8 But if that's not accepted, there is a  
9 consensus to accept 2.a as well by the panel.

10 So, Colonel Cook, it's up to you  
11 and me to propose some modification.

12 COL COOK: Okay.

13 JUDGE JONES: All right. I'm  
14 sorry, did you say 18 next?

15 MS. FERNANDEZ: Yes, 18. We're  
16 getting the two hardest out of the way in the  
17 hopes of what you think.

18 So there is no big surprise here,  
19 one of our biggest issues was collateral  
20 misconduct.

21 We all realized it was one of the  
22 biggest barriers for victims to report. But

1 many of us felt that we still hadn't heard  
2 enough evidence about what it would mean if we  
3 removed from the ability to prosecute on some  
4 low-level crimes.

5           Therefore, the majority of the  
6 subcommittee decided that we should study the  
7 issue. So our Recommendation here is, the  
8 Secretary of Defense direct a study of what  
9 constitutes low-level collateral misconduct in  
10 sexual assault cases and assess whether to  
11 implement a policy in which commanders will  
12 not prosecute low-level collateral misconduct.

13           Dean Anderson had had her own  
14 statement and it was Meg Garvin and Judge  
15 Marquardt that also went along with her  
16 dissent.

17           MS. ANDERSON: So, thank you very  
18 much, Mai.

19           I want to thank the staff, as a  
20 civilian, the opportunity to work with  
21 military staff is an extraordinary opportunity  
22 because of the commitment to duty.

1                   The mistakes that I made were  
2                   corrected at the midnight hour and I really  
3                   think that their work on this project has been  
4                   exemplary and I appreciate the work of the  
5                   staff tremendously.

6                   This separate statement is joined  
7                   by Retired Judge Christel Marquardt, who's on  
8                   my left from the Kansas Court of Appeals and  
9                   also Meg Garvin who works at Lewis & Clark Law  
10                  School as a Clinical Professor there and is  
11                  also Executive Director of the National Crime  
12                  Victim Law Institute. So it's an unusual  
13                  statement in that sense that it's got a couple  
14                  of members who are also joining.

15                  The statement is only about three  
16                  pages long. I would be your indulgence  
17                  without the footnotes, its' only about three  
18                  pages long, so I would beg your indulgence.  
19                  This is an important issue and it sounds like  
20                  Judge Jones is moving forward on these  
21                  difficult issues fairly rapidly. So I'd like  
22                  to be able to read the statement into the

1 record.

2 We write separately from our  
3 colleagues on the Victims Services  
4 Subcommittee to recommend stronger measures on  
5 the issue of collateral misconduct and our  
6 measures are consistent with the comparative  
7 systems subcommittee reports and  
8 recommendations from earlier this morning.

9 The threat that Service Members  
10 who've been sexually assaulted will be  
11 punished up to and including prosecution for  
12 conduct they had engaged in before or during  
13 a sexual assault keeps many victims silent.  
14 And the ability to punish victims of sexual  
15 assault for this conduct creates a major  
16 barrier to reporting and prosecuting of sexual  
17 assault.

18 In practice, Actually, victims are  
19 rarely prosecuted for such conduct. Yet the  
20 threat of prosecution looms large, providing  
21 perpetrators with cover and intimidating  
22 victims.

1                   Eliminating the criminal  
2                   prosecution of Service Members who report  
3                   having been sexually assaulted would remove  
4                   the leverage that perpetrators continue to  
5                   have and encourage victims to step forward.

6                   The military, as you all know,  
7                   criminalizes a range of behaviors that are not  
8                   criminal in the civilian world such as alcohol  
9                   offenses, fraternization and adultery.

10                  When Service Members are  
11                  assaulted, whether by another Service Member  
12                  or by a civilian, the victim may have engaged  
13                  in one or more of these activities around the  
14                  time of the assault. If victims then elect to  
15                  report having been sexually assaulted, a  
16                  convening authority may prosecute them for  
17                  these behaviors or other crimes collectively  
18                  referred to, as you know, as collateral  
19                  misconduct.

20                  The civilian world and, Russell  
21                  Strand mentioned this this morning, has  
22                  largely abandoned charges of collateral

1 misconduct against a person who comes forward  
2 to report having been sexually assaulted.

3           Even when victim's misconduct  
4 involves offenses such as drug possession or  
5 prostitution, civilian prosecutors rarely  
6 charge the victim with criminal behavior.  
7 They choose instead to focus on the offense of  
8 highest import and consequence, the sexual  
9 assault.

10           Civilian prosecutors realize that  
11 a policy of charging the victims with  
12 collateral offenses would deter them from  
13 coming forward to report sexual assault. So  
14 from a public safety perspective, therefore,  
15 it is better to refuse to prosecute minor  
16 offenses in order to encourage and prosecute  
17 sexual assault. This practice works then to  
18 ensure that sexual abusers are brought to  
19 justice.

20           The military's policy allowing  
21 commanders the discretion to prosecute sexual  
22 assault victims for collateral misconduct

1 creates a substantial structural impediment to  
2 victims reporting sexual offenses.

3 The 2002 Department of Defense  
4 Workplace and Gender Relations Survey of  
5 Active Duty Members indicates that over 20  
6 percent of male and female victims who choose  
7 not to report having been sexually assaulted  
8 feared that they or others would be punished  
9 for infractions or violations such as under-  
10 aged drinking, if they reported the crimes  
11 they suffered.

12 These data collected in 2012 are  
13 not news to the military. As far back as  
14 2004, the Undersecretary of Defense wrote in  
15 a memo to the Secretaries of the military  
16 departments, one of the most significant  
17 barriers to the reporting of sexual assault is  
18 the victim's fear of punishment for some of  
19 the victim's own actions leading up to and  
20 associated with the sexual assault incident.

21 Many reported sexual assaults  
22 involved circumstances in which the victim may

1 have engaged in some form of misconduct.

2 And in 2013, the Department of  
3 Defense included an instruction that had the  
4 same language.

5 The Victim Services Subcommittee  
6 report finds that the threat of prosecution  
7 for collateral misconduct is indeed a  
8 structural impediment to the reporting of  
9 sexual assault. If the subcommittee only  
10 recommends that the Department of Defense  
11 study the problem and makes no Recommendation  
12 about the wisdom of continuing to vest  
13 commanders with the authority to prosecute  
14 sexual assault victims themselves, even when  
15 the threat of prosecution deters victims from  
16 reporting.

17 Some subcommittee members  
18 expressed concern that the RSP did not receive  
19 evidence on the consequences of the military  
20 policy to discourage or disallow prosecutions  
21 of sexual assault victims for collateral  
22 misconduct. Since such a policy does not

1 exist in the military, any testimony about it  
2 would have to be speculative.

3 The evidence that we do have on  
4 the record suggests that the Services  
5 themselves do not believe that the power to  
6 prosecute victims of sexual assault for  
7 collateral misconduct is critical.

8 According to the information  
9 Services provided in response to the RSPs  
10 request, the Air Force, Navy, Army and Marine  
11 Corps have not tracked the prosecutions of  
12 sexual assault for collateral misconduct.  
13 When they have tracked it, prosecutions appear  
14 to be few and of minor import.

15 The Coast Guard, for instance,  
16 submitted information from fiscal years 2007  
17 to 13 showing that it pursued very few  
18 prosecutions of collateral misconduct.

19 The Army submitted data for fiscal  
20 year 2013 showing that adverse actions against  
21 sexual assault victims for collateral  
22 misconduct occurred in less than five percent

1 of cases and adverse actions, where they did  
2 occur, were mild.

3 For example, adverse actions for  
4 collateral misconduct included counseling  
5 statements for under-aged drinking and  
6 nonjudicial punishments for fraternization.

7 In one jurisdiction for three  
8 sexual assault cases, commanders considered  
9 punishing the under-aged drinking and  
10 fraternization engaged in by victims but in  
11 all three cases, the commanders did not even  
12 administer nonjudicial punishment.

13 Given these data, one cannot  
14 seriously argue that commanders must retain  
15 the discretion to prosecute sexual assault  
16 victims for collateral misconduct because  
17 military good order and discipline are at  
18 stake.

19 Despite the fact that commanders  
20 rarely impose punishment upon victims for  
21 collateral misconduct, many victims are so  
22 fearful that they will be punished for this

1 behavior that they never report to command  
2 having been sexually assaulted.

3 Sexual predators can exploit this  
4 fear and use the potential criminal liability  
5 of victims to persuade them to remain silent,  
6 hence, many assaults go undetected and  
7 unpunished, leaving the perpetrators free to  
8 offend again.

9 Deterring reports of sexual  
10 assault through the prosecution of victims,  
11 collateral misconduct causes a serious  
12 diminution in military good order and  
13 discipline and we believe it's worthy of  
14 reconsideration.

15 We recommend that the Department  
16 of Defense develop and implement a policy that  
17 commanders will not prosecute instances of  
18 lower-level collateral misconduct against  
19 those reporting credible allegations of sexual  
20 assault.

21 Lower-level collateral misconduct  
22 would include under-aged drinking or related

1 alcohol offenses, adultery and fraternization.  
2 However, the Department of Defense may go  
3 further and define lower-level collateral  
4 misconduct as any offense that is less serious  
5 than sexual assault itself given that  
6 commanders should be willing to forego the  
7 pursuit of these lesser charges, these lesser  
8 offenses when faced with a very serious crime  
9 that too often has gone unreported and  
10 unpunished.

11 Thanks.

12 JUDGE JONES: Mr. Bryant?

13 MR. BRYANT: Yes, Judge Jones, as I  
14 advised you and Ms. Fernandez and Dean Hillman  
15 and now you, Dean Anderson, I am leaving but  
16 I assure you it has nothing whatsoever to do  
17 with anything we've heard or not heard this  
18 afternoon.

19 Thank you very much and I'll be  
20 back tomorrow.

21 JUDGE JONES: Thank you, Mr.  
22 Bryant.

1 All right. Obviously, we have a  
2 Comparative Systems Subcommittee set of  
3 Recommendations. It's 13.a, b and c that also  
4 discuss collateral misconduct.

5 I certainly don't have a problem  
6 with your Recommendation 18 that has come out  
7 of the Victim Services Committee to have a  
8 study of what constitutes low-level collateral  
9 misconduct in sexual assault cases and assess  
10 whether to implement a policy in which  
11 commanders will not prosecute which does not  
12 go as far as certainly your statement, Dean  
13 Anderson and nor as far as, I believe, the  
14 Comparative Services statements.

15 So, I don't know whether we want  
16 to -- why don't we just discuss 18 since we're  
17 only deliberating.

18 MS. HOLTZMAN: I thought that  
19 Recommendation 13.c, Professor Hillman,  
20 correct me please if I'm wrong which I could  
21 certainly be the case, also calls for a study  
22 in essence. It does not prescriptive. It

1 just calls for a study of this issue. Am I  
2 wrong?

3 PROF. HILLMAN: No, that's correct.  
4 Thirteen c calls for a study to examine  
5 amending Article 31 and then of a procedure  
6 and other legislation and policy. But it's  
7 additive to 13.b which is really the one  
8 that's at issue here which says

9 MS. HOLTZMAN: Oh, I see, okay.

10 PROF. HILLMAN: -- a procedure  
11 that grants immunity from prosecution for  
12 minor collateral misconduct leading up to or  
13 associated with the sexual assault incident  
14 and promulgated list of qualifying offenses.

15 MS. HOLTZMAN: Thank you.

16 VADM HOUCK: So there being a  
17 difference between 13.b which would recommend  
18 now the establishment of a procedure versus  
19 the study, the verb being to examine in 13.c.

20 PROF. HILLMAN: That's correct,  
21 sir.

22 JUDGE JONES: Well, I don't have a

1 problem in accepting 13.c as from your  
2 committee as we go -- it's broader. I don't  
3 know

4 PROF. HILLMAN: Judge Jones, I  
5 guess we should look, since the Comparative  
6 System Subcommittee recommendations aren't  
7 quite final, so I guess we're not really  
8 talking about those

9 JUDGE JONES: All right, well, okay

10

11 PROF. HILLMAN: -- yes, although  
12 I'm happy to, but you

13 JUDGE JONES: I'm happy you're  
14 happy I'm moving there.

15 PROF. HILLMAN: Eighteen recommends  
16 study, so the question is do we support 18  
17 sort of as drafted from the Victims Services

18

19 JUDGE JONES: I find it pretty easy  
20 to support. Is there any discussion about  
21 that? Beth?

22 PROF. HILLMAN: Thank you, Your

1 Honor.

2 I don't know what we'll find out  
3 by a study because we know what constitutes  
4 low-level collateral misconduct. Right? I  
5 mean it's the list of things. So I guess if  
6 we need to know and this was Admiral Houck's  
7 concern earlier, what impact this might have  
8 on commanders, I guess perhaps that's what the  
9 study would entail, but I'm not sure the study  
10 gets us too far in this.

11 It is a policy issue to decide not  
12 to prosecute those relatively minor issues  
13 compared to the gravity of the sexual assault.  
14 But I'd go further than recommending the  
15 study.

16 VADM HOUCK: Well, and then the  
17 question is, I mean there seem to be options  
18 about going further that might get considered  
19 later.

20 JUDGE JONES: Right, I mean I don't  
21 -- this is a study which may be the minimum  
22 threshold for you, your committee and we're

1 going to go back and look at 13.

2 PROF. HILLMAN: So we should just  
3 take 18 on its face?

4 BG DUNN: Can I just make one  
5 comment here?

6 JUDGE JONES: General Dunn?

7 BG DUNN: I kind of object to not  
8 the concept but the use of policy, policy,  
9 policy. I mean what this really is is going  
10 to be the Secretary of Defense asserting his  
11 authority under the Uniform Code of Military  
12 Justice to grant immunity for certain  
13 specified offenses or to issue some policy  
14 statement that commanders should consider  
15 granting immunity.

16 But whatever it is, it's going to  
17 be a granting of immunity for those offenses  
18 unless you just decriminalize them all  
19 together which they're not going to do, so  
20 unless you change the law, right, right.

21 So what I'm saying is I think that  
22 the CSS Recommendation in 13.c is more

1 specific and more couched in criminal law  
2 terms and I prefer that to be.

3 MS. FERNANDEZ: Judge Jones?

4 JUDGE JONES: Yes?

5 MS. FERNANDEZ: Is there any way we  
6 can consider 18 and 13 together when we  
7 finalize your report? I mean is that

8 JUDGE JONES: That's fine because  
9 we're going to actually have to have final  
10 deliberations on 13 anyway. So let's do that  
11 and we can decide.

12 It's obviously going to be one  
13 Recommendation considering 13.a through c and  
14 18 and we don't know what's going to be in or  
15 out.

16 MS. FERNANDEZ: My only issue is if  
17 Dean Anderson's recommendation goes further  
18 than either 18 or 13, what additional things  
19 we need to consider.

20 MS. ANDERSON: Oh, I'm perfectly  
21 fine with waiting for the resolution between  
22 these two. I was surprised, I think, we on

1 the Victims Services Subcommittee were all  
2 interested in where the Comparative System  
3 Subcommittee went with its own recommendations  
4 dealing with similar issues but in a slightly  
5 different route. And it seems to make sense,  
6 your recommendation, Mai, to consider then  
7 together. So I don't have any problem with  
8 that.

9 JUDGE JONES: All right. And  
10 we'll, of course, consider your statement as  
11 well which does go further. Okay.

12 MS. HOLTZMAN: Judge Jones?

13 JUDGE JONES: Yes?

14 MS. HOLTZMAN: It seems to me then  
15 when we look at the issue of the study, one of  
16 the points that Professor Hillman raised was,  
17 well, what are we going to look at? I mean I  
18 think one of the questions is, what kind of  
19 immunity should be granted assuming immunity  
20 is granted? So that's an issue, you know,  
21 transactional or use immunity or whether it  
22 should be immunity at all as opposed to some

1 kind of directive to military commanders.

2 So I think there's some issues  
3 that need to be examined and I would hope that  
4 in the formulation of this Recommendation that  
5 its' clear, you know, as it's only a study  
6 that we agreed to that that's included.

7 MS. FERNANDEZ: The issue is  
8 comprised in there?

9 MS. HOLTZMAN: Yes.

10 MS. FERNANDEZ: I think that's  
11 fair.

12 JUDGE JONES: All right. Then

13 MS. HOLTZMAN: Judge Marquardt  
14 wants to say something.

15 JUDGE JONES: Oh, Judge?

16 JUDGE MARQUARDT: Yes, I'm a little  
17 concerned about the direction of a study. So  
18 I think I would like for you to consider  
19 exactly what it is you're going to study as  
20 Dean Hillman said that, you know, we know this  
21 is a problem and you can't get people to come  
22 and tell you about it because they're afraid

1 to talk. So, what you're going to study is  
2 perhaps how the military can deal with this  
3 rather than just to study if there's a  
4 problem.

5 VADM HOUCK: I think there are a  
6 host of issues that could be addressed in the  
7 study and I don't think a study is kicking the  
8 can down the road or just punting on the  
9 problem.

10 I think that, and not to belabor  
11 it here, but I think a study could be very  
12 rich and could examine a lot of really, I  
13 think pretty complicated issues that underlie  
14 the interaction between first of all, some of  
15 the problems that we're talking about, drug  
16 use and under-aged drinking and how they  
17 relate to sexual assault, as well as the  
18 impact per se of things like drug use.

19 I mean, I was in the service long  
20 enough to remember a time when drug use was  
21 the issue du jour and we were worried about  
22 airplanes crashing and nuclear reactors being

1       improperly operated because of drug use.

2                   And so I think that we really need  
3       to seriously explore the relationships between  
4       some of these things which are completely  
5       different in the military context than they  
6       are in civilian context.

7                   And I think a study that those are  
8       some of the issues that I would want to see  
9       addressed in a study, which isn't to diminish  
10      the hideous violation of the sexual assault is  
11      at all, but to try to understand the  
12      relationship of these things.

13                   JUDGE MARQUARDT: But prevention  
14      also plays a big part of it and how we're  
15      going to take care of that particular issue as  
16      it relates to this.

17                   JUDGE JONES: All right. I think  
18      when we deliberate 13, we'll have 18 in mind  
19      and all the comments that have been made are  
20      helpful. I mean 13 does go farther actually  
21      calling for the establishment of a procedure  
22      for immunity and so there are obvious things

1 to discuss.

2 I think there's some sense that  
3 there ought to be an examination or a study of  
4 this issue. We may go much farther than that  
5 but I think we need the opportunity when we  
6 finally deliberate on 13 and maybe in the  
7 interim, Mia, you and Professor Hillman can  
8 propose something that combines them.

9 MS. FERNANDEZ: Does FACA allow us  
10 to talk to each other?

11 JUDGE JONES: Oh, I forgot. Well,  
12 I'll tell you, you propose it in an email.

13 MS. FERNANDEZ: I was supposed to  
14 do an email and I sent it to the staff and the  
15 staff can send it around. Okay.

16 JUDGE JONES: We'll do it however  
17 we have to under the law. Okay.

18 PROFESSOR HILLMAN: We'll advise  
19 each other of our rights in that process.

20 MS. FERNANDEZ: We'd better consult  
21 counsel.

22 Okay, if we could turn to

1 Recommendation Number 1. Some of these should  
2 be somewhat easier and because we had total  
3 consensus on the subcommittee.

4 We had 150 people testify in front  
5 of us and we heard about a lot, a lot of  
6 programs that are taking place which is  
7 fabulous. But a lot of those programs haven't  
8 been fully implemented yet. They haven't had  
9 the time to be fully implemented before  
10 another one starts up.

11 So Recommendation Number 1 is to  
12 fully implement the programs that have already  
13 been started. And then once they've been  
14 fully implemented, to evaluate them to see if  
15 they're any good. Pretty straightforward  
16 recommendations.

17 JUDGE JONES: I just have one  
18 question. Doesn't the law already direct the  
19 Secretary of Defense to implement these? Are  
20 we telling him to do what they're already  
21 directed to do? I don't know.

22 MS. FERNANDEZ: I think that they

1 JUDGE JONES: Yes, go ahead, sorry.

2 MS. FERNANDEZ: I think that we've  
3 got to fully implement them in what we're  
4 saying, to capture enough data so that we can  
5 evaluate them.

6 I think that they may be started  
7 and put forward but they're not -- we don't  
8 have enough information coming up.

9 I'll use the Special Victims  
10 Counsel. In the Air Force, it got started  
11 over a year and a half ago and in rest of the  
12 services, it's been implemented since January  
13 1.

14 We still don't have enough data  
15 and information in order to be able to  
16 evaluate that program. We need sufficient  
17 amount -- before we start putting out more  
18 programs, to see if the ones that we've  
19 already done work. So we need sufficient data  
20 to be able to look at it to assess it, to be  
21 able to say we've come up with some  
22 interesting ideas but are these the best to

1 meet the needs of victims?

2 JUDGE JONES: Isn't 1.a that  
3 Recommendation?

4 MS. FERNANDEZ: Yes.

5 JUDGE JONES: I just wonder whether  
6 we need to tell the Secretary of Defense what  
7 he's already been mandated to do by law. I  
8 think 1.a is fine. Any other comment?

9 Okay. Then we accept 1.a and  
10 Recommendation 1 is not accepted. Okay.

11 MS. FERNANDEZ: Recommendation 3  
12 mostly came from testimony that we heard from  
13 victims that at least the behavior, if not the  
14 assault, happened before as they were entering  
15 one of the military services.

16 The military is obligated to  
17 provide information on sexual assault 14 days  
18 in but what we found out through our testimony  
19 was that it was beginning earlier than that,  
20 that the bad behavior and the assaults  
21 themselves happened before that.

22 So our Recommendation is that the

1 Secretaries of the military department direct  
2 commanders in the military entrance processing  
3 stations, MEPS, to provide sexual assault  
4 prevention information to new recruits that  
5 include the definition of sexual assault,  
6 possible consequences of a conviction for  
7 sexual offenses in the military and  
8 information about the DoD self-help line and  
9 other avenues of assistance.

10 JUDGE JONES: I don't know enough  
11 about military entrance processing stations.  
12 How long are people there?

13 MS. FERNANDEZ: What we heard was  
14 as soon as you came in the door, the behavior  
15 started. You have a two week area where you  
16 could be assaulted and you had absolutely no  
17 information that this was a crime in the  
18 military or that you could get assistance or  
19 that you had access to services.

20 So what this does is it pushes the  
21 availability of information and services to  
22 day one when you enter.

1 JUDGE JONES: Any questions or  
2 objections?

3 PROF. HILLMAN: Just a  
4 clarification. It doesn't say day one, is  
5 that what you want to say, so because right  
6 now it's 14 days, right, so do you

7 I'm not sure that as written it  
8 actually tells them to do anything that's not  
9 already happening because they do provide that  
10 information but there's no sort of time line  
11 on this. Right?

12 JUDGE JONES: Is the issue that  
13 they're not there in the military entrance  
14 processing station for 14 days? I don't know.

15 BG DUNN: Not everyone goes through  
16 it.

17 JUDGE JONES: I see.

18 BG DUNN: People get assessed  
19 different ways. But generally, if you enlist,  
20 you go through MEPS generally. And so I think  
21 much of the problem is in that age group and  
22 category.

1 MS. FERNANDEZ: My reading on this  
2 was it has to come within -- you have to  
3 receive the information within 14 days of  
4 entering is what it should read.

5 Thank you, Dean Hillman, for  
6 correcting me.

7 BG DUNN: So you want to really  
8 reduce that to 48 hours or

9 MS. FERNANDEZ: No, no. It  
10 happened during what

11 The testimony we heard was it  
12 happened when they were in training, when the  
13 recruits were in training and that they didn't  
14 get the information early enough but that the  
15 criminal acts happened while they were in  
16 training.

17 And so what we're saying is,  
18 you've got to receive this information within  
19 14 days of getting into training.

20 PROF. HILLMAN: Isn't that true  
21 now?

22 BG DUNN: Yes, I thought that

1 General Snow said the first 14 days of -- he  
2 talked about that specifically.

3 PROF. HILLMAN: So the Finding  
4 here, I think, is that DoD requires that it  
5 happen with 14 days, Finding 3 there.

6 BG MCGUIRE: I think that what  
7 we're trying to explain is that we found that  
8 even on day one as the recruits were coming  
9 into their training station, whether it's a  
10 MEPS or their first basic training, they could  
11 still be in their civilian clothes, there's  
12 grooming going on on day one as soon as they  
13 are coming off the buses, there's sexual  
14 assault grooming.

15 And so if these recruits, either  
16 at the recruiting station or even as they go  
17 through the MEPS or of day one, that they get  
18 some education, boom, this is what sexual  
19 assault is. This is, you know, if you believe  
20 that there's this type of behavior, call this  
21 number almost day one.

22 And the concern was is that what

1 we witnessed was that there appeared to be  
2 grooming-type behaviors going on within the 14  
3 days so trying to find that sweet spot will be  
4 difficult and I think that's why we want to  
5 give the commander the leeway to use the 14  
6 days in order to work it within their training  
7 schedule.

8 But some sort of immediate  
9 education that this is what constitutes sexual  
10 assault and this is the recourse and  
11 information you have available to you to  
12 address it, day one.

13 JUDGE MARQUARDT: Could you do that  
14 at the recruiting station?

15 MS. FERNANDEZ: Well, I think that  
16 was the idea that you would receive  
17 information at the recruiting station that  
18 went beyond a poster on a wall, that you  
19 actually got information in your hand about  
20 services, about the hotline, about what's a  
21 crime, what's an assault, all that information  
22 when you walked in the door.

1                   JUDGE JONES: I just wonder what  
2                   are the sexual assault prevention and  
3                   awareness campaign materials that we talk  
4                   about at the end?

5                   In other words, there's already a  
6                   Recommendation from the Defense Taskforce on  
7                   sexual assault to make available and visibly  
8                   post sexual assault prevention and awareness  
9                   campaign materials.

10                  So that would be make available  
11                  information and visibly post things. So are  
12                  we saying we want that at recruiting stations  
13                  and if MEPS are different, we want them there  
14                  as well? And then if it's there, timing  
15                  doesn't matter, it's there. It's visibly  
16                  posted and the information is available.

17                  MS. FERNANDEZ: But I think this  
18                  goes beyond having posters on the wall. This  
19                  is Actually receiving information in your  
20                  hands.

21                  COL COOK: There's a lot going on  
22                  to prevent sexual assault. I guess as a part

1 of day one, I'm coming in, here are your  
2 papers, sign away. Oh, by the way, here's all  
3 the rules on sexual assault.

4           Instead, is it better than to hand  
5 out the standards? Here are the standards we  
6 expect of all military personnel who, you  
7 know, active duty, reserve, Guard, whatever it  
8 is. Here are the standards we expect our  
9 Service Members to comport to. If you find  
10 that this isn't what's happening, here's where  
11 you can call for some questions and not single  
12 out sexual assault. Because there's a lot of  
13 things that aren't acceptable within the  
14 military that they may come from backgrounds  
15 that it is acceptable.

16           And I know we're trying to get  
17 around sexual assault, but if you at least get  
18 the standards up front at a recruiting station  
19 for everybody and then when they get to their  
20 MEPS station or wherever it is that they're  
21 going to be accessed from, let the commander  
22 at that point own that training schedule to

1 teach them the full scope of what they have to  
2 train them on.

3 But I'm just concerned about day  
4 one, just saying, okay and here, we're  
5 expecting you to be assaulted.

6 MS. FERNANDEZ: I hear what you're  
7 saying. I think it's what General McGuire was  
8 talking about, is we've received testimony  
9 that as soon as somebody came into the  
10 military, they started getting groomed and  
11 whether that was an assault that actually  
12 happened within those 14 days or it was just  
13 the kinds of things that happened before  
14 somebody's going to assault you.

15 And so how do you tell a victim,  
16 this is inappropriate behavior? And how do  
17 you tell somebody who may be a perpetrator  
18 themselves entering the military, this is not  
19 allowable behavior and telling them up front  
20 so that they know right away in a way that has  
21 the most impact, probably a poster on the wall  
22 isn't going to do that.

1                   So that was the issue that we were  
2 getting to. We heard from victims that they  
3 had been assaulted during that time period.  
4 So and they just didn't know that this was --  
5 that they had any kind of recourse.

6                   BG MCGUIRE: And, you know, we're  
7 talking about young recruits who are coming  
8 straight from their neighborhoods and high  
9 school where there may have been this type of  
10 behaviors that was condoned.

11                   Or they come into a new  
12 environment, it's totally strange and you've  
13 got a person of authority that's providing  
14 them some extra attention and guidance that  
15 could be something other than that.

16                   And That's what they're -- they  
17 don't perceive it as sexual assault, perhaps,  
18 or the grooming to that end. But they don't  
19 realize it until unfortunately, it's too late.

20                   MS. HOLTZMAN: I think that moving  
21 the date, I support this proposal. I thinking  
22 moving it to day one is a good idea. I think

1 letting the military decide what are the best  
2 materials to use, I have no problem with doing  
3 that. If they're not good materials, you  
4 know, someone's going to speak out about that.  
5 So I would basically support this  
6 Recommendation.

7 COL COOK: And that's exactly what  
8 I was writing on mine. The only thing,  
9 exactly what Representative Holtzman was  
10 saying is if you went to the third line of  
11 this, it says the Secretaries of the military  
12 departments direct commanders at military  
13 entrance processing stations, MEPS, to provide  
14 -- instead of saying to provide sexual assault  
15 prevention information, it says to determine  
16 how best to.

17 Because it's going to be different  
18 at the different locations where they arrive.  
19 I agree with the need to put it up earlier,  
20 but allow the people that know what that  
21 environment is there to determine how do you  
22 best get it up front into their hands early

1 packaged the right way?

2 JUDGE JONES: So are we saying to  
3 determine how best to -- I still want the  
4 temporal thing here, immediately provide? Is  
5 that what we're saying?

6 COL COOK: Yes. How best to be  
7 right.

8 JUDGE JONES: Okay. And we get  
9 everything in.

10 MS. FERNANDEZ: Thank you.

11 JUDGE JONES: All right, with that  
12 modification, then I think there's consensus  
13 on Recommendation 3.

14 MS. FERNANDEZ: Moving on to  
15 Recommendation Number 4. FY 14 NDAA requires  
16 that a commander file a report eight days  
17 after a Service Member files an unrestricted  
18 sexual assault report.

19 The statute does not require the  
20 tracking of or the reporting on Services to  
21 victims who make restricted reports.

22 The statutory requirement enhances

1 DoD's requirement for SARCs to inform  
2 commanders within 24-hours of both  
3 unrestricted and restricted sexual assault  
4 reports set forth in current policy.

5 What we wanted to do here was, in  
6 fact, have a way of tracking victim care here.  
7 Unrestricted and that report is filed, your  
8 victim care, what services you're getting can  
9 actually be tracked.

10 As a restricted reporter, you're  
11 still entitled to the services but those  
12 services aren't tracked.

13 So that's the essence of what we  
14 were trying to get to in Recommendation 4 is  
15 that there be a mechanism to track victim care  
16 on a restricted report. But also to be able  
17 to maintain the confidentiality of the victim  
18 even though that report is being filed.

19 JUDGE JONES: I think that's -- I  
20 mean it's a good idea in terms of all of the  
21 kinds of data and information that we want  
22 about how things are working.

1 I guess my only question is who  
2 would be filling these out? The commander?

3 MS. FERNANDEZ: It would be a SARC  
4 that would be filling these out because if the  
5 name came to the commander, then they would  
6 have to go unrestricted.

7 COL COOK: Did you get the chance  
8 to ask SARCs whether they think this is  
9 feasible doing it within -- it's great to  
10 collect the information, but the feasibility  
11 of doing it within eight days based -- I don't  
12 know what their other workload is in different  
13 areas, and you had input from them. Do you  
14 know if

15 MS. FERNANDEZ: This is the  
16 Recommendation that we came up with after  
17 deliberations so we didn't have a chance to  
18 ask the SARCs.

19 PROF. HILLMAN: The -- sorry,  
20 Judge.

21 JUDGE JONES: No, no, please.

22 PROF. HILLMAN: Finding 4.1 says

1 already the NDAA says it needs to happen  
2 within eight days of an unrestricted report.  
3 So eight days seems fine for the restricted  
4 report to actually have less to say in the  
5 restricted report presumably. So they ought  
6 to be able to manage this one.

7 MS. FERNANDEZ: Thanks.

8 BG DUNN: But I don't understand,  
9 the Secretary of Defense direct the Services  
10 -- so right now, there's no time limit.  
11 There's no eight day time limit, too.

12 PROF. HILLMAN: There is for  
13 unrestricted.

14 BG DUNN: For unrestricted.

15 PROF. HILLMAN: For unrestricted  
16 but not for restricted.

17 BG DUNN: So where is this applying  
18 the same standard to restricted reports with?

19 MS. FERNANDEZ: Right. So  
20 unrestricted, you're care is tracked.

21 BG DUNN: Okay.

22 MS. FERNANDEZ: Restricted, it is

1 not.

2 COL COOK: Is the SAPRO that does  
3 the report within eight days for the  
4 unrestricted report as well? A commander does  
5 it for her? Okay.

6 The difference we're putting it  
7 with a commander at that point, an  
8 unrestricted report, once the commander knows  
9 that they've got the eighth day, they know the  
10 information, the commander may not always have  
11 that information. The unrestricted report,  
12 you're going to put it on whomever receives  
13 the restricted report.

14 MS. FERNANDEZ: The restricted  
15 report.

16 COL COOK: Right. And if it came  
17 in from someplace other than the SAPRO, it's  
18 still going to end up in their hands, though,  
19 so eight days from the time that they get it.

20 MS. FERNANDEZ: Eight days

21 COL COOK: Yes, right, okay.

22 MS. FERNANDEZ: -- from the time

1 that the

2 COL COOK: From the SAPRO learns  
3 it?

4 MS. FERNANDEZ: Yes.

5 COL COOK: In case it was the  
6 restricted report was made through somebody  
7 else. They might not have it if you want it  
8 to be the SAPRO that actually files that  
9 report.

10 MS. FERNANDEZ: One more time?

11 BG MCGUIRE: Well, there's concern  
12 about who's Actually going to be tracking this  
13 report because there's different means to  
14 report a restricted report.

15 MS. FERNANDEZ: So yes, it's eight  
16 days from the time that the SARC receives the  
17 report. That is a good clarification.

18 BG DUNN: And you all envision the  
19 SARC making that report and doing the updates  
20 on the care.

21 MS. FERNANDEZ: Yes.

22 BG DUNN: So it would never go into

1 command channels.

2 MS. FERNANDEZ: It would not go  
3 into command because as soon as it went to the  
4 command, it would make it an unrestricted  
5 report.

6 BG DUNN: Right, even anonymously,  
7 it would be easy to figure out probably. So,  
8 okay, so that's -- so really, now you're going  
9 to have unrestricted reports reported and  
10 monitored in command channels and you're going  
11 to have the SARCs following restricted  
12 reports.

13 MS. FERNANDEZ: Correct.

14 BG DUNN: But who's going to  
15 oversee that since commanders make things  
16 happen in the military and are responsible for  
17 the means of the discipline to think about.

18 I mean I don't object to that  
19 about, you know, trying to track their care to  
20 make sure that it's ongoing, but SARCs are not  
21 responsible for that from a command  
22 perspective.

1                   BG MCGUIRE: I think at this point,  
2                   the garrison commander would be interested,  
3                   particularly in trying to determine resources  
4                   required in order to provide those services to  
5                   victims on that particular installation.

6                   So, if you've got, you know, ten  
7                   restricted reports, I think as a garrison  
8                   commander it would be, you know, helpful to  
9                   know what kind of services my staff is  
10                  providing and do I have enough staff in order  
11                  to provide the kind of services our victims  
12                  need.

13                  JUDGE JONES: I'm all for figuring  
14                  out a way to gather that data.

15                  I think the written incident  
16                  reports need -- the original intention, I  
17                  would have assumed was for the very top of the  
18                  chain of command to be able to monitor ongoing  
19                  investigations of unrestricted reports and  
20                  it's more investigative than care oriented.  
21                  So I'm wondering if there isn't just an easier  
22                  way.

1                   Because this isn't -- I'm assuming  
2                   that for every

3                   MS. FERNANDEZ: You did your  
4                   testimony that it was care-related also.

5                   JUDGE JONES: Pardon me?

6                   MS. FERNANDEZ: That is was care-  
7                   related also, that the report triggered a  
8                   tracking and the tracking you could figure out  
9                   if somebody was receiving all the services  
10                  that they should be getting.     So it was both.

11                  JUDGE JONES: I see. Well, I think  
12                  we certainly have to make it clear who's  
13                  responsible for

14                  MS. FERNANDEZ: We looked at it as  
15                  if you went unrestricted, you got a set of  
16                  benefits of somebody able to actually track  
17                  what's going on with you and what your needs  
18                  are rather when you went restricted, you  
19                  didn't have that level of somebody really  
20                  guiding you through the system. So it was an  
21                  additional way to track and to provide  
22                  services.

1 COL COOK: I think your  
2 Recommendation 4.a is right on point because  
3 it does tell SAPRO, hey guys, you've got to  
4 figure out a way. We want to make sure that  
5 getting the services, we want to make sure  
6 that they're available and if they're not  
7 getting it, we want a method of knowing that,  
8 too, so that we can correct the situation and  
9 that's what I think 4.a goes directly to.

10 JUDGE JONES: And it sort of  
11 basically it doesn't encourage and it says  
12 they should ensure measures to track the  
13 victim's care so they might be able to work  
14 this out together where they're dealing with  
15 the restricted reports.

16 I would certainly go with 4.a and  
17 I'm just a little hesitant but I may be the  
18 only one to require written incident reports  
19 on an eight day term.

20 MS. FERNANDEZ: All it does is it  
21 parallels what the unrestricted does. So

22 BG DUNN: Okay, right, for the

1       unrestricted.

2                   MS. FERNANDEZ: Correct.

3                   JUDGE JONES: All right. So we  
4 just have to say that, it's SAPRO, right?

5                   MS. FERNANDEZ: That's correct.

6                   JUDGE JONES: That's doing this?

7                   MS. FERNANDEZ: Correct.

8                   JUDGE JONES: All right then anyone  
9 else have any

10                   COL COOK: Or SAPRO's channels  
11 because SAPRO's not going to be at the  
12 installation level.

13                   MS. FERNANDEZ: It'll be the SARC.

14                   COL COOK: It'll be the SARC or  
15 whoever or their personnel. It's going to be  
16 through SAPRO channels.

17                   JUDGE JONES: All right.

18                   Beth?

19                   PROF. HILLMAN: Judge Jones, 4.a  
20 seems great. I struggle with what's going to  
21 be in that written incident report that's  
22 restricted that would be protecting the

1 identity is in 4.a but it's not so much in 4.  
2 I'm just not sure how much you can detail the  
3 services provided to victims for the  
4 restricted report.

5 I mean their anonymity needs to be  
6 protected and while the command knows there's  
7 been a restricted report, they don't know more  
8 about that.

9 I don't know, I worry about  
10 connecting the dots on that and the allocation  
11 of responsibility.

12 But if you feel confident that  
13 this could happen, the SARC could protect the  
14 identity of the initiator of a restricted  
15 report with an incident report that details  
16 exactly the treatment that they were provided,  
17 then I'd defer to the subcommittee's  
18 recommendation on it. I just worry about  
19 that.

20 COL COOK: Is it possible to say  
21 4.a becomes the primary Recommendation and  
22 tell SAPRO that in terms of deciding what the

1 process should be they consider how to capture  
2 everything you have in 4? You know, put it  
3 back to them for their channels to determine  
4 what should be in the report, how best to  
5 process it and who's responsible for it and do  
6 it within the same eight day period that's  
7 afforded to unrestricted reports that go  
8 through command channels, but just let SAPRO  
9 as the people that own that in the field be  
10 the one to determine how best to do it from a  
11 leadership component.

12 MS. FERNANDEZ: Implement it.

13 JUDGE JONES: All right, I think we  
14 can use that for 4.a. We would add while  
15 providing a report as details services, etc.  
16 and sufficient to track the victim's care and  
17 we'll add the eight day period.

18 MS. FERNANDEZ: Yes.

19 JUDGE JONES: Okay. So for 4.a  
20 with those modifications is accepted. And it  
21 will subsume 4. Okay.

22 MS. FERNANDEZ: Our next

1 Recommendation went to expedited transfers.

2 We heard quite a bit of testimony  
3 of the perpetrators living next door to you  
4 but you filed a restricted report. You'd like  
5 to be transferred but in order to get  
6 transferred, you'd have to become  
7 unrestricted. So what could be done in those  
8 circumstances?

9 And the testimony we heard and  
10 what we talked about in our deliberations is  
11 that we'd like to involve, you know, medical  
12 personnel in these decisions. And commanders  
13 can make an expedited transfer decision based  
14 on medical recommendations without having to  
15 really look at the underlying facts of there  
16 was a sexual assault involved here.

17 So it allows an individual to  
18 still get an expedited transfer without going  
19 unrestricted.

20 Five a was training for medical  
21 personnel, SARCs and VAs should include the  
22 options that a commander has available to make

1 or effect transfers based on recommendations  
2 from medical personnel.

3 So basically, the training that  
4 SARCs should be able to go to a commander and  
5 say, look, I've talked to the doctor and the  
6 doctor feels that this person should be  
7 transferred and the commander can say, yes, I  
8 will transfer this person and it avoids the  
9 victim living next door to their perpetrator  
10 but it also avoids the need to go  
11 unrestricted.

12 JUDGE JONES: It's not clear to me  
13 exactly how much information the commander  
14 gets in this circumstance.

15 MS. FERNANDEZ: Under this  
16 circumstance?

17 JUDGE JONES: Yes, where you have a  
18 restricted report.

19 MS. FERNANDEZ: Well, what you try  
20 to do is enlist the help of a doctor and the  
21 doctor can give you the reasoning to provide  
22 for the expedited transfer without having

1 because the reasoning is usually she is a  
2 victim of a sexual assault or he's the victim  
3 of a sexual assault, so we want an expedited  
4 transfer, but that's in an unrestricted  
5 situations.

6 So you have a restricted  
7 situation, so you want to involve medical  
8 personnel that can say for medical reasons, A,  
9 B, and C, we think that this person needs to  
10 be transferred and that provides the commander  
11 with the wherewithal to make the transfer. It  
12 doesn't automatically make it, but it provides  
13 them with the wherewithal.

14 BG MCGUIRE: I'll just, ma'am, I'll  
15 share a little bit about our discussion that  
16 we had. While the recommendation, the  
17 commanders already have a tool available to  
18 them for rehabilitative transfers.

19 And so if it was the opinion of a  
20 reputable medical opinion that this individual  
21 needed to be transferred as rehabilitative or  
22 call it whatever we call it because we use

1 rehabilitative for, you know, other reasons as  
2 well.

3           While it might be understood there  
4 would probably be, you know, you could  
5 probably guess what the issue was, you would  
6 not come out forth and say and this is as a  
7 result of a restricted report. I mean, that  
8 we have reason to believe for her medical or  
9 his medical well-being that this individual  
10 would be best served for rehabilitative  
11 transfer as an option. That was the  
12 discussion.

13           JUDGE JONES: Admiral?

14           VADM HOUCK: So I'm unclear about  
15 whether or not the commander gets to know  
16 whether or not -- I understand the objective  
17 of protecting privacy but I'm trying to  
18 balance the commander's prerogative and  
19 authority to know why he or she is  
20 transferring a person to another unit.

21           And what I'm understanding is they  
22 won't know. A doctor will come to them and

1 say, you know what, we think that Seaman Smith  
2 ought to be transferred and therefore, you  
3 need to do it. I mean is that?

4 MS. FERNANDEZ: Well, you don't  
5 need to do it, the commander can always say  
6 no.

7 VADM HOUCK: But how can I say no?  
8 I don't

9 MS. FERNANDEZ: Well, and I think  
10 it wouldn't be like Seaman Smith needs to get  
11 transferred. I think you'd have to -- the  
12 medical professional would work with the  
13 commander and say, we've diagnosed him with A,  
14 B, and C which could all be things that you  
15 get diagnosed when you've been sexually  
16 assaulted.

17 Seaman Smith has depression.  
18 Seaman Smith has post-traumatic stress  
19 disorder.

20 So you would get a list of --  
21 we'll you'd get a rationale. It wouldn't be  
22 like a wink and a nod from a doctor, you'd get

1 an actual rationale but that would provide  
2 enough reasoning to transfer that individual.

3 VADM HOUCK: Do we have precedent  
4 for doing medical transfer? I just don't know  
5 enough about it. Do we have precedent for  
6 transferring people under other circumstances  
7 that don't involve a sexual assault like that?

8 BG MCGUIRE: I'm not sure and  
9 because I think there's probably some  
10 discussion about HIPAA concerns, but I know  
11 that it was of some discussion during the  
12 course of some of the concerns over suicide  
13 and other mental and behavioral health issues  
14 that there was some discussion about that  
15 that, you know, there's a fine line between  
16 defining what's wrong with the individual,  
17 HIPAA concern, but also that the environment  
18 was not conducive for the person's well-being.

19 VADM HOUCK: I wouldn't want a  
20 person to not get a transfer, you know, be  
21 forced to make an unrestricted report as the  
22 only way to get a transfer. This is one of

1 those -- it seems like it's one of those devil  
2 in the details things that.

3 JUDGE JONES: And maybe if you have  
4 a medical professional who's going to say that  
5 let's take the worst case scenario, you're  
6 suicidal, but I think commanders need to know  
7 the context. Maybe we just say that's a  
8 circumstance where you still maintain your  
9 restricted report.

10 I'm just a little worried about  
11 commanders not knowing what's going on here.  
12 And also, the next commander not knowing.

13 BG DUNN: I was actually thinking  
14 along the lines of what you just said, Judge  
15 Jones, that we've opened the door here in a  
16 couple of places though we haven't approved  
17 those Recommendations to allow the victims to  
18 make certain disclosures and maintain the  
19 restricted nature of the report, certain  
20 disclosure that involve commanders and perhaps  
21 MCIOs or maybe.

22 I don't know if we want to look at

1 some holistic recommendation that revolves  
2 around the victim's ability to control what is  
3 happening with the investigation, you know,  
4 the incident that pertains to him or her with,  
5 you know, the transfer with the, you know, the  
6 discussion with the investigation, the  
7 investigative agency, with, you know, being  
8 able to put it back in the box if a third-  
9 party discloses it before, you know, I mean.

10 But that seems to be an issue that  
11 we're trying to deal with in many aspects.

12 MS. FERNANDEZ: Well, yes. And I  
13 think -- I'm sorry, go ahead.

14 MS. HOLTZMAN: No, I was just going  
15 to say that if it's not the policy now, we can  
16 recommend that it be the policy. And that, I  
17 guess the real question here is, if the  
18 commander is able to deduce from the  
19 information that's given by the doctor what's  
20 happened, well, you know, we could say also  
21 that if the report has been a restricted  
22 report that's the basis of the medical

1 opinion, that if for any reason the commander  
2 finds out about that as a result of the  
3 disclosure by the medical officer then it  
4 remains restricted.

5 JUDGE JONES: I would go further  
6 and say that the medical officer should be  
7 able to give the entire context and the report  
8 still remains restricted.

9 The commander is going to know  
10 under any circumstance that he's being asked  
11 to move somebody.

12 MS. FERNANDEZ: I mean that goes a  
13 step further than our Recommendation. I don't  
14 think the subcommittee would have a problem  
15 with that.

16 BG DUNN: I mean, I don't know why  
17 we have to have all the folder along with the  
18 medical officer. If you file an unrestricted  
19 report, you can ask your commander to transfer  
20 you, so why can't you ask your commander to  
21 transfer you and keep your report restricted?

22 MS. HOLTZMAN: Well, because you

1 have -- Judge Jones

2 BG DUNN: Well, yes, I mean

3 MS. HOLTZMAN: We have a policy now  
4 which is based on a long time where commanders  
5 push stuff under the rug and the minute you're  
6 going to make an exception for that, you  
7 create the possibility that we're going  
8 backwards in time which is why I think that  
9 the medical officer creates some protection  
10 for the situation in which a commander might  
11 just want to push something under the rug.  
12 That's all.

13 So if the person goes to the  
14 medical officer, I mean or the SARC had  
15 suggested going to the medical office. The  
16 medical office says this is a serious problem,  
17 maybe they disclose to the commander. The  
18 commander has to give an expedited transfer  
19 and it's not disclosed. But we're not  
20 disrupting

21 What I'm concerned about is giving  
22 commanders the license to go back to, you

1 know, status quo ante ten years ago, 15 years  
2 ago, five years ago.

3 BG DUNN: So what you're saying is  
4 you think it's not just between the victim and  
5 the commander. You need a third-party in  
6 there, I'm just not sure it's a medical,  
7 that's all I'm saying. I'm just not sure it's  
8 a medical. I have no objection to it being  
9 somebody else but

10 PROF. HILLMAN: General Dunn, what  
11 about the special victims counsel?

12 BG DUNN: I think that the issue is  
13 that the commander would know that the report  
14 would remain restricted.

15 PROF. HILLMAN: Would that satisfy  
16 the concern about having the commander be the  
17 solo sort of the apply for expedited transfer  
18 from a commander and not having that? If we  
19 have that structure for special victims  
20 counsel, if we put that here, it seems

21 JUDGE JONES: Well, I think your  
22 problem, Liz, is you don't want the commander

1 to know because if he knows, the old fear or  
2 the current fear is that he'll do something to  
3 retaliate. Right? Isn't that

4 MS. HOLTZMAN: Retaliate or --  
5 that's the point of restricted- or do  
6 something, right. We just -- right, we want  
7 to keep -- I want to keep pristine the  
8 obligation under the law right now which is  
9 that if a commander finds out that there's an  
10 allegation of sexual assault, he or she has to  
11 do something pronto about that. That I don't  
12 want to interfere with. That's my concern.

13 JUDGE JONES: Well, okay.

14 MS. HOLTZMAN: And maybe that's NOT  
15 a valid concern.

16 JUDGE JONES: Yes.

17 MS. HOLTZMAN: I mean I'm willing  
18 to acknowledge that. But I think and maybe  
19 special victims counsel is the right solution.

20 I think this is a, you know, it's  
21 an important issue, the expedited transfer,  
22 but how we do it is, you know

1 MS. FERNANDEZ: Only victims of  
2 sexual assault get special victims counsel, so  
3 if you go if the special victim counsel says,  
4 Mai Fernandez needs an expedited transfer,  
5 you're going to know that I was sexually  
6 assaulted. So

7 VADM HOUCK: But that's the case  
8 with a doctor, too, though, right?

9 MS. FERNANDEZ: No, there could be  
10 a million reasons

11 VADM HOUCK: The doctor can go to a  
12 commander now and say, I'm going to tell you  
13 that Seaman Smith needs an expedited transfer  
14 and I'll give you some medical reasons and you  
15 need to do that or I'm recommending that you  
16 do that for other things?

17 BG MCGUIRE: Conceivable. I mean  
18 it could be, you know, the climate is such  
19 that the individual, you know, you know, I  
20 mean it's conceivable.

21 BG DUNN: I think we're making a  
22 great assumption about the ability of the

1 military medical system and the -- well, I  
2 mean really, I mean, we're putting this burden  
3 on these doctors now to, excuse me, to follow  
4 this through the system.

5 I mean I think we all agree  
6 absolutely in principle that we need to sort  
7 this out. We just don't have a good  
8 methodology for doing it.

9 But, I know, I mean, you know,  
10 military doctors are in large hospitals seeing  
11 patients every, you know 15 minutes or 30  
12 minutes and I don't

13 VADM HOUCK: If this is like a  
14 bunch of other situations and doctor goes to  
15 my commander and says Houck needs a transfer  
16 because he's got this medical situation and  
17 this medical situation and this medical  
18 situation, that that happens across the  
19 spectrum of different activities and so all  
20 that we're saying is that we want a restricted  
21 sexual assault report to now be in that basket  
22 of things that can result in an expedited

1 transfer, then maybe it's not a big deal. But  
2 I'm just not

3 BG DUNN: I mean doctors are only  
4 transferring people to get specialized medical  
5 care somewhere else which could work in these  
6 circumstances. But that would sort of limit  
7 the transfers to places where there were major  
8 medical centers as opposed to -- by getting  
9 that close to home where the victim wants to  
10 go or something. I'm just

11 BG MCGUIRE: I think at this point,  
12 we're at a pass where, you know, the only  
13 resources we have is either, if you file a  
14 restricted report, you're in an environment  
15 that's not healthy to you or whatever, or  
16 you're forced to make an unrestricted report  
17 to get out of that environment.

18 And so we're forcing the victim's  
19 hand at this point if we don't offer an option  
20 of some sort of how do we get them out of that  
21 environment if, in fact, that environment is  
22 what caused her to want to do a restricted

1 report.

2 MS. FERNANDEZ: And you want to  
3 maintain what Representative Holtzman said.  
4 You want to keep the commander out of it.

5 BG MCGUIRE: Right.

6 MS. FERNANDEZ: So we were trying  
7 to use the buffer of medical personnel that  
8 they could make the call. I don't know if  
9 there's another individual that would be  
10 better, that we didn't contemplate nor did we  
11 discuss.

12 COL COOK: If the victim is already  
13 going to see the SARC, or whoever, you know,  
14 then ultimately, we're already saying the SARC  
15 would probably be the one that has to look at  
16 the this.

17 I don't know, we've gotten  
18 briefings on the SAPRO channels. The  
19 restricted reports are usually made through  
20 chaplain or a SARC-type channel. We're even  
21 asking the SARCs to be the ones to track what  
22 kind of victim services they get.

1                   Just like what we did with  
2                   Recommendation Number 4, is that we send it  
3                   back to SAPRO from a DoD level to look within  
4                   there because they are sitting there waiting  
5                   to handle these restricted reports and make  
6                   sure there are the services that are provided.

7                   Do we figure out a way to allow  
8                   them a means of asking for that expedited  
9                   transfer from outside the commander channel  
10                  without sharing that information with anybody  
11                  else?

12                  It's still going to have to get  
13                  back to the commander that they're losing a  
14                  troop. How it gets back is going to be, you  
15                  know, does it come back through personnel  
16                  channels? Or does it come back through  
17                  something else?

18                  But it's not going to be that SARC  
19                  that makes the decision, they're going to have  
20                  to coordinate through somebody higher to get  
21                  what needs to be done.

22                  MS. FERNANDEZ: You know, if the

1                   BG DUNN: Well, what if it goes in  
2                   SARC SAPRO channels into the service level  
3                   human resources? So in the Army, it would go  
4                   into Army human resources command in a  
5                   confidential chain and they would just  
6                   reassign the individual. And then it comes  
7                   down as a reassignment and that could happen  
8                   across all Services. The commander's  
9                   completely out of it.

10                   MS. FERNANDEZ: The commander's  
11                   don't have a say in that?

12                   COL COOK: They get the Service  
13                   Members and they don't use them within their  
14                   unit, but they don't assign or reassign them  
15                   out of the individual unit. So if the  
16                   assignment orders come down from higher the  
17                   opposite way, then it could be for any reason.

18                   It's their time to go,  
19                   compassionate reassignment, it can be a lot of  
20                   things that it would be, it's not necessarily  
21                   just -- but you've kept it through the SARC  
22                   channels, again, not letting that person at

1 the administration level do anything about it  
2 except take the request.

3 Say what if I want to be  
4 transferred and having that person come up  
5 with some kind of communication channel and  
6 let them decide how best to get that into  
7 personnel channel if it's appropriate.

8 But if the conscious decision  
9 that's going to have to be made but that would  
10 also keep it out of the command channels.

11 JUDGE JONES: It's all kind of  
12 convoluted to me.

13 If somebody's made a report, even  
14 though it's a restricted report and SARC has  
15 it and they're getting care, then I don't  
16 think we're in a situation where if the  
17 commander finds out that they need, you know,  
18 a transfer that the commander's going to be  
19 able to sweep anything under the rug at that  
20 point Because we already have somebody who's  
21 on record without a name, but getting care and  
22 will be transferred to another SARC presumably

1 and get more care.

2 So I'm just -- I personally think  
3 we should just say that that doesn't change  
4 the nature of the report. It remains  
5 restricted.

6 And the commander has to have a  
7 record unless we really try to go this whole  
8 different method of transferring people and  
9 commanders not knowing why.

10 BG DUNN: Well no, but see, there's  
11 a level. For example, if you are in a  
12 military unit at Camp Swampy and you're  
13 reassigned to another military unit, there is  
14 a whole U.S. Army system up to the top that  
15 cuts the orders and reassigns you. I mean at  
16 a level above whoever your command is.

17 So, I mean if you stay within your  
18 unit, it might be at a lower level, but this  
19 would not be that hard to do through SARC  
20 channels up to a level designated far enough  
21 above the command who owns the soldier that  
22 you don't need to worry and then just have the

1 reassignment come down. Either you're  
2 reassigned across post or you're reassigned,  
3 you know, to Mississippi where your family is.

4 JUDGE JONES: So a commander would  
5 know.

6 BG DUNN: Yes, a commander would  
7 know but it could be at a level

8 JUDGE JONES: The unit commander.

9 BG DUNN: -- far enough above to  
10 avoid any concern.

11 COL COOK: The risk with going up  
12 through SARC channels in the personnel, you  
13 know, going up and coming around is probably  
14 a little bit of a delay.

15 If the commander at the local  
16 level's got some idea, then they could  
17 probably work with, you know, if it's a  
18 company level command, one of the smaller  
19 ones, there's a personnel person at the  
20 battalion or the brigade level, you can have  
21 somebody get moved the next day and at least  
22 temporarily reassigned while a personnel move

1 is done. So you risk delay if you don't get  
2 the commander involved.

3 But if the fear really is any  
4 command involvement, then going up through  
5 SARC channels is an option.

6 BG DUNN: Or go in at a higher  
7 level of command where you can get the same  
8 speed, but

9 COL COOK: But a command would know  
10 still.

11 BG DUNN: Right, but above. I mean  
12 if you're at the company level, you go to the  
13 division level. I mean there's some options  
14 here.

15 MS. HOLTZMAN: I guess I don't  
16 understand the objection to having a medical  
17 officer. It doesn't have to be a doctor, it  
18 could be a psychologist, it could be somebody,  
19 you know, somebody like that who writes a  
20 letter saying this person needs a transfer and  
21 that's what happens.

22 BG DUNN: I just -- based on my

1 experience, that would be a six month process.

2 MS. HOLTZMAN: Oh, that would be?

3 All right.

4 BG DUNN: That that would be  
5 putting that inside the military medical  
6 system, I think would be much more difficult  
7 than figuring out how to get up higher in the  
8 level of command and handling it.

9 MS. HOLTZMAN: Oh, okay.

10 COL COOK: And if the victim  
11 doesn't otherwise elect to go to see a  
12 particular doctor or to get that service, then  
13 you may be requiring them to go discuss an  
14 issue in an outlet where they hadn't planned  
15 on doing it.

16 The SARC might be one place to  
17 report it and they're looking for help but  
18 you're on the outside and they have to go  
19 through a process they didn't contemplate.

20 JUDGE JONES: Last comment?

21 PROF. HILLMAN: May I make a  
22 friendly amendment?

1 JUDGE JONES: Yes.

2 PROF. HILLMAN: I think that the  
3 goal is to include in the range of services  
4 that are available to those who make  
5 restricted rather than unrestricted reports  
6 the option of expedited transfer and that the  
7 issue is the process by which that expedited  
8 transfer might happen and we have concerns  
9 about whether we know enough about the  
10 smoothness and the wisdom of the particular  
11 medical personnel solution that the  
12 Recommendation and the subcommittee report  
13 proposes.

14 So I'd amend that we adjust the  
15 Recommendation to say Service Secretaries  
16 should craft a means by which expedited  
17 transfer is available to a person to make  
18 restricted reports and then leave it up.

19 Actually, I don't think you have  
20 to do the same thing in each of the services  
21 and at each installation. I think there could  
22 be different ways to do this.

1           I also think that the sharp line  
2           between restricted and unrestricted reports is  
3           something that we are reckoning with modifying  
4           somewhat because of our Comparative System  
5           Subcommittee saying we'd like some contact  
6           with law enforcement with the special victims  
7           counsel to still be able to preserve a  
8           restricted rather than an unrestricted report.

9           So it feels to me that if we  
10          simply recommend that the Service Secretaries  
11          craft a means by which individuals who make  
12          restricted reports if they're service members,  
13          not dependents. I don't know what dependents  
14          -- dependents aren't going to be able to  
15          request an expedited transfer so that's  
16          another set of issues.

17          But the active duty Service Member  
18          who would make a restricted report could get  
19          an expedited transfer and then leave it to  
20          others not so late in the day to work out.

21                 MS. HOLTZMAN: Yes, but it should  
22          have a clause saying without undoing the

1 restricted nature of the report.

2 PROF. HILLMAN: Agreed.

3 JUDGE JONES: All right. We're  
4 past our time.

5 Five is in limbo officially at the  
6 moment. With your friendly amendment, we'll  
7 rewrite something and see everybody, I think  
8 it's 8:30 tomorrow.

9 MS. FERNANDEZ: Great.

10 JUDGE JONES: Well thank you.

11 (Whereupon, the foregoing matter  
12 went off the record at 5:13 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

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

Before: US DOD

Date: 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.



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Court Reporter

**NEAL R. GROSS**

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