UNITED STATES DEPARTMENT OF DEFENSE

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

SUBCOMMITTEE REPORT BRIEFINGS AND PANEL DELIBERATIONS

TUESDAY
MAY 6, 2014

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

PRESENT:

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

STAFF:
Maria Fried, Designated Federal Official
Lt. Colonel Kyle Green
Colonel Patricia Ham, Staff Director
Commander Sherry King
Lt. Colonel Kelly McGovern

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Subcommittee Report to Panel .................. 3

Public comments................................. 372
8:53 a.m.

JUDGE JONES: Yes, we are. The meeting's open.

Colonel Ham?

COL HAM: Yes, thank you, ma'am. Judge Jones, I just wanted to make sure that the panel members are aware we received some public comments for this meeting. They're all in your folder.

One is from Ms. Patricia Breen, one is from Sergeant Major Retired Betsy Rodriguez, one is from Ms. Nancy Parish of Protect Our Defenders, one is from Ms. Christina Thundathil and we just received one from Ms. Virginia Lee.

And both Ms. Thundathil and Ms. Lee have requested to present public comment today which is scheduled for 4:30 to 5:00.

Thank you, ma'am.

JUDGE JONES: Thank you.

Before we proceed with our
discussion of the report of the Victim
Services Subcommittee, I just wanted to point
out a couple of things.

During our discussion of these
Recommendations and Findings, at times, we
have suggested modifications. When we suggest
a modification, we're suggesting it as the
panel. Obviously, the committee itself has
made its final report and that's what we're
working from.

And Ms. Fernandez, you have two
hats as did Professor Hillman. So your
comments will, as were Professor Hillman's
help us get through these when we begin
discussions, you'll be speaking as the panel
member.

Great, thank you.

Then I think we should let you go
ahead.

MS. FERNANDEZ: Good morning.

First, I'd just like to announce to those of
you who weren't here yesterday that there is
copies of the Victims Services Subcommittee
report in the back of the auditorium if
anybody would like to pick one up.

I think we left off with
Recommendation Number 6. And this
Recommendation has to do with the DoD Help
Line.

As we know, the Safe Help Line
runs 24/7. The issue that we heard at the
subcommittee level was that often time on
bases, there's a second line, one that's being
created by the individuals working at that
base. Those lines sometimes are not operated
24/7 so there's confusion.

First, there's confusion over the
Help Line and then the separate line that's
created on base.

The base lines sometimes are
operated 24/7, sometimes they are just
periodically manned and, therefore, there's
times where people call and there is actually
nobody on the other end.
The other problem that we heard was when someone called the official DoD line, what they're supposed to do, the DoD line operators, is to then connect them up with someone at the community level, at that base level, that can offer them assistance.

Because those numbers, the local numbers are not frequently updated, what happens is you get an operator at the DoD Help Line but then you get another number to call at the ground level and nobody answers.

So our recommendations are, first of all, that the DoD Help Line be the only line that is called so there's not confusion between the local line and the official DoD line.

Second of all, that they make an easily remembered number so that it's in your head. It's posted all over the place. People can call whenever they want.

And then thirdly, that the local numbers are updated by the DoD Help Line on a
continual basis to make sure what we are calling a warm handoff, so that when you get the number of somebody locally, you're ensured that you get somebody on the phone, that you're not just leaving a message and that the victim is left not knowing if somebody's going to call them back or what kind of services that they're going to be able to get on a local level.

So those are our Recommendations with regards to the Help Line.

JUDGE JONES: Yes, Mr. Bryant?

MR. BRYANT: Yes, thank you.

Ms. Fernandez, when you say at the local level that somebody's not answering the phone, are you talking about an on base local level phone or an off base? Are they referring with the DoD hotline to other community help lines for sexual assault?

MS. FERNANDEZ: These are military lines.

MR. BRYANT: So when your
subcommittee makes this recommendation, will it be like a directive to military personnel that you must use this line, say in lieu of something that maybe available in the community?

MS. FERNANDEZ: What we want is that every installation just have one number so that there is no confusion and we can also ensure that the service continues.

If there is the DoD main line and then there's another line, we don't have any oversight over that second line. We can over the main DoD line.

MR. BRYANT: All right, but I think it's a wonderful idea, I'm not questioning that, I would just want to make sure that military personnel are not going be directed -- there's not going to be a directive that they can't, for instance, call other hotlines or other online chat services for counseling and that sort of thing.

MS. FERNANDEZ: That's not our
intention. Our intention is just for this particular service to be operating as best as it can.

COL COOK: During your investigation, do you know why did the individual local lines come up? Was it because the DoD line wasn't being resourced?

I just want to make sure if you make the one primary, which makes sense and sounds like a best practice, did the others come about because they weren't getting through on the other lines? Or why did they come about to start with?

MS. FERNANDEZ: Confusion. So you would see one poster that had the DoD line and then the local number that was also posted. You'd call the local number and you wouldn't get an operator.

COL COOK: But you don't know why the local commands decided that the needed their own number as opposed to even just using the other number to start with?
MS. FERNANDEZ: No, we didn't have testimony regarding that.

COL COOK: Okay.

MS. FERNANDEZ: But we didn't get testimony that the DoD line was not operating. That was not what we were seeing. It was operating but it was -- the testimony that we got was that there was a confusion between the local lines and the DoD line.

COL COOK: So as far as you know, you understand that the DoD line is resourced to take the 24/7 military wide --

MS. FERNANDEZ: Yes.

COL COOK: Okay.

MS. FERNANDEZ: Yes.

JUDGE JONES: And if there's additional volume, I assume they can handle that or do what they have to do to be able to handle it?

MS. FERNANDEZ: We didn't have testimony that said that they could. My sense is, though, that if we only have one line and
we have deficiencies in that line, it's much
-- there's a quicker fix because you can go
and you can go to the one vendor and say,
which is RAINN and say we're hearing about
deficiencies in wherever, wherever the
deficiency is, you need to pump up your volume
of operators or you need to offer additional
services.

If you have all these individual
local lines, there's no way really to
supervise all those.

JUDGE JONES: One last thing just
to Mr. Bryant's point, I guess the way
Recommendation 6 reads is that it says it's
the single crisis hotline for Military Service
members and I know we're not trying to
preclude them calling a civilian hotline.

MS. FERNANDEZ: So if somebody
feels better going off base for their
services, we are not trying to hinder that
whatsoever. We're just wanting to make sure
that the military has got a consistent service
that its offering.

COL COOK: So then do we want to change that word to be primary instead of single?

JUDGE JONES: Yes, I think what Professor Hillman and I were both thinking was that it should say military sexual assault crisis hotline.

MS. FERNANDEZ: Okay.

JUDGE JONES: So that they are aware that it at least doesn't say it's the only one.

MS. HOLTZMAN: Judge?

JUDGE JONES: Yes?

MS. HOLTZMAN: To me, it's like 9-1-1. You can still call the precinct if you want to, your local precinct, but you have a central number, everybody knows it. It's easily accessible and that number can be as Mai just said, held accountable if it's not responding.

But if you have to call the
precincts, oh well, you know, maybe so Joe Blow was sick this day and someone else was
supposed to answer the phone was sick the next
day or something like that. You can't monitor
it as well. I think it's a very simple and
important suggestion.

JUDGE JONES: Well, do we have any
other comments before I ask for --

MS. FERNANDEZ: I think Dean Schenck has.

MS. SCHENCK: We got testimony
that many of the local numbers were going to
a recording and they would come back to the
office. Nobody wants to leave a message on a
recording when they've been sexually
assaulted. So in order to better treat the
victims, we thought of this.

JUDGE JONES: I think that all
three of the Recommendations in 6, 6.a and 6.b
I would support. I would just add the word
military in Recommendation 6 so there's no
sense that they have to use that or that's the
only one they can use which I think was MR.

Bryant's thought on it.

Is there any other discussion or dissent on this?

All right, then those recommendations are accepted. Thank you.

MS. FERNANDEZ: Our next recommendation goes to the evaluation of the SARC and the Victim Assistance Training.

Mostly what we're trying to get at this is ensuring that there is best practices being used by both the SARCS and the VAs.

In 2012, SAPRO did ask for an assessment of the training; however, the assessment -- there was no uniformity in how the assessment was being done and some of the information was outdated and incorrect.

Then the 2014 NDAA directed the SAPRO training to have some common core elements and to be able to put forward those common core elements and that those elements be produced within 120 days within enactment.
of the Act. Those have not been issued as of the issuing of this report.

So what we're directing is the Secretary of Defense direct that periodic evaluations of training provided for Service SARCs and VAs be conducted and included an assessment as to whether the training and curriculum across the services is uniform, effective and reflects all existing initiatives, programs and policies. What we're really looking for here is consistency in the training.

JUDGE JONES: Any comments?

All right, then Recommendation 7 is accepted.

MS. FERNANDEZ: Recommendation 8 is similar.

First we have the alphabet soup, a SARC, a Sexual Assault Response Coordinator; a VA, Victim Advocate; a VWL, a Victim Witness Liaison; a FAP, a Family Advocate Program; and SAPRO, Sexual Assault Prevention and Response
Office.

What we're looking -- all these different programs were created at different times over the last 20 years. So there's gaps, there's deficiencies, there's overlap and what we need is an assessment that looks at all these different positions and sees where we need to have changes, where maybe there needs to be more distinction between the roles.

So what we've suggested here is the Secretary of Defense directs SAPRO or the DoD IG to assess the roles and responsibilities of SARCS, VAs, VWL and FAP personnel to ensure advocacy personnel are effectively utilized, they are properly delineated, overlap is minimized and to determine whether their roles should be modified.

JUDGE JONES: Any comments?

All right, having heard some of the testimony about these issues and there
being no other comments, I certainly would accept this and it's accepted by the panel.

MS. HOLTZMAN: I would just add, Judge Jones, that after the — on the third line where it says they are properly delineated, shouldn't it be their roles are properly delineated?

JUDGE JONES: Yes, I think that's right. Thank you.

Anything else?

MS. FERNANDEZ: The next Recommendation is about the proper caseload and the proficiency of the Victim Assistance personnel.

This is something that the Comparative Systems also brought up, that because there is a set number of Victim Assistance personnel that are required, that often times, if you're in a location where there's not been sufficient numbers of sexual assaults reported, the Victim Assistance personnel does not get any experience in
working with victims.

So you have individuals who feel incompetent in working with victims because they never have.

So what we're asking is that an assessment be done of the actual caseloads that a Victim Assistance individual should have. In addition, they should get some sort of experiential training. And if you can't get that in a military setting, then you should go outside of the military setting and pair up with a community-based organization that may be able to offer that kind of experience.

JUDGE JONES: Any questions or comments?

All right, that's accepted.

MS. FERNANDEZ: Recommendation Number 10, this has to do with the evaluation of the SARC duties.

The subcommittee spoke to a large number of SARCs, particularly when we went to
Fort Hood and what we realized is that they were tasked with too many duties, managerial, outreach, training, administrative and then victim care. There were so many duties that the SARCs didn't feel like they were able to do their best job in providing services to victims.

So we're asking that the SARCs duties be evaluated by the Secretary of Defense in order to really kind of define the role better and to make sure that there utmost duty is to provide victim care, also to ensure that there's enough -- there are sufficient numbers of SARCs available.

JUDGE JONES: Any questions or comments?

BG MCGUIRE: Judge, I just have a comment.

JUDGE JONES: Oh sure, General McGuire.

BG MCGUIRE: How is that much different from what we're requiring of
Recommendation 8? Could that not also be compiled as part of 8 because we're also assessing the roles and responsibilities there as well and measuring workload case and responsibilities amongst all these programs.

MS. FERNANDEZ: There may be a bit of redundancy there that we could -- I think in one Recommendation, there was confusion amongst all the different roles. And that was the testimony we got there.

And the other one, the testimony was this particular position is overloaded and we need to make sure we have enough of them and that the workload is really focusing on the victims and not on lots of other things.

COL COOK: You know, especially an installation like Fort Hood, I guess the question when you say the position was overloaded. Is it overloaded because of the victim services portion or is it overloaded because some of those Service members are also tasked with supporting the command with
whatever kind of duties are out there, whether it's, you know, military-type duties that are completely unrelated to that that are shared across the installation even within the paralegals, whatever personnel are out there unless they're specifically exempt by policy. Is that what the concern was?

MS. FERNANDEZ: Yes.

COL COOK: It was those additional duties that they were concerned with?

MS. FERNANDEZ: It was the additional duties too.

COL COOK: Then I would concur with what General McGuire had just said in terms of if you put it into Number 8 and you make SAPRO look at what is the scope of those duties. How many people? What is that caseload in that piece of it if they are not able to address some of those other duties and let the command make that decision of saying should they be exempt from some of those additional duties that are at the installation
or unit level?

JUDGE JONES: So is that a friendly amendment from the panel to the Recommendation 8?

COL COOK: Yes.

JUDGE JONES: Why don't we agree that we accept Recommendation 10 but the panel would suggest and we will do it. We'll combine it with 8.

Thank you. Go ahead, Ms. Fernandez.

MS. FERNANDEZ: Recommendation 11 has to do with mental health care treatment.

What we heard from various victims was that it was really difficult to get the mental health appointment and then if you did, it wasn't consistent care. You may be dealing with different professionals every time you walked in. So there was no consistency in the individual that you -- once you got in, you weren't sure you were going to be seeing the same therapist over and over again.
We also heard about mental health being put right into the SARC program as part of the kind of care a victim gets right away so it was integrated right into the care that a victim would get as soon as they reported an assault.

We didn't have enough testimony to evaluate that program, but it is something that we thought should be looked at more thoroughly. It made intuitive sense that part of what a victim would need was mental health care and if they got that from the very beginning, there may be more consistency going through.

So what we're asking for is the Secretaries in the Military Service evaluate the availability of an access to adequate and consistent mental health care for victims of sexual assault to evaluate the option of incorporating counselors into the SAPRO program in the manner similar to the integration to the FAP program.
Additionally, the Secretaries of Military Services establish policies to ensure mental health treatment for sexual assault victims will not have a negative implication on such victims' eligibility for career advancement or promotion.

That was the other thing that we heard was that people are reluctant to go get mental health because they think it's going to damage their careers.

JUDGE JONES: Any questions or comments?

PROF. HILLMAN: Judge Jones, just a comment.

I think you addressed in another recommendation that -- or is this the only place that you addressed advancement and promotion, the impact of --

MS. FERNANDEZ: I think we do later on. We may have done it before. I can't remember where we do it but we do do it in a couple of different places.
PROF. HILLMAN: I just wondered if that's actually two separate pieces in this Recommendation and that we should put all the advancement and promotion recommendations into a single Recommendation in a final panel report?

MS. FERNANDEZ: I think that would be -- it would make it stronger because we did hear that you don't want to go for mental health treatment, you don't want to go for lots of different treatments and seek services because you worry about your career.

JUDGE JONES: All right. I think it's the sense of the panel then that we'll accept Recommendation 11.

However, the second sentence which really talks about possible damage to career advancement or promotion will go in a different section.

PROF. HILLMAN: Thank you.

MS. FERNANDEZ: Recommendation 12, this is also something that Comparative
Systems touched upon. The FAP program, the Family Advocacy Program, and the SAPRO program were created at different times.

Currently, if there's an incident that's reported through the FAP program, it doesn't get integrated into the data of the SAPRO program. So if somebody was sexually assaulted as a part of a domestic violence incident, it won't get reported as a sexual assault because it's looked at as completely different.

So we're asking for integration here. The Secretary of Defense directs that adult unwanted sexual contact reports handled by FAP and recorded in a database be included in the annual SAPRO report of adult unwanted sexual contact cases.

BG DUNN: What happens with those cases with respect to restricted and unrestricted reporting and prosecution, etc?

MS. SCHENCK: We heard testimony from the Family Advocacy Program and they
still get the same restricted, unrestricted
treatment, but they're not counted. They're
not within the purview of military sexual
assault and they involve intimate partner
relationships in addition to spousal assaults.

B G D U N N:  Right.

M S. S C H E N C K:  And so if you have
two intimate partners in the unit, two active
duty members and there's an incident of sexual
assault, that would go into the Family
Advocacy Program. It would not be covered
under the SAPRO program.

And so it's just, I believe the
victims still get the same treatment as far as
restricted and unrestricted, it's just that
there's no accountability for them.

M a ' a m , you remember the Family
Advocacy Program is an older program and it's
come a long way to be established because the
issue of many years ago was spousal abuse and
so that program, I believe, the Department of
Defense wanted to keep that program intact.
At least from my perspective, when we heard this testimony, it seemed to me that many of those issues involving intimate partners, and we heard testimony from victims that those cases were treated completely different and so they weren't actually getting the attention we believed they should be getting.

BG DUNN: And was there any --

MS. SCHENCK: This is a really important Recommendation and it's really important for the panel to really think this one out, flesh it out because I think it's going to be one of the ones that the Department of Defense is going to have to grapple with. I just think it's really huge.

BG DUNN: Was there any concern expressed in the fact hierarchy when they -- did you speak to the -- Family Advocacy Program --

MS. SCHENCK: No.

BG DUNN: -- managers?
MS. FERNANDEZ: We did.

MS. SCHENCK: We did.

MS. FERNANDEZ: Yes.

BG DUNN: And did they have any concern about it impacting the -- I mean I kind of, I'm reaching here maybe a little bit, but I sort of see the responsibility of the Family Advocacy Program to, you know, kind of assist families in staying together. Do they have any concerns that moving this will work against that --

MS. SCHENCK: Yes, the Family Advocacy --

BG DUNN: -- goal of theirs? And what do they think about it?

MS. SCHENCK: Their testimony was that they wanted to keep their program separate. They were happy the way it was running. But then we heard compelling testimony from victims.

At least one victim who was involved in a sexual assault, it was a sexual
assault between intimate partners. So, but the FAP program managers were adamant about keeping it in their lane to keep the family together.

But also, we didn't actually grill them about the intimate partner.

MS. FERNANDEZ: General Dunn, we didn't hear any testimony that by sharing this data it was going to weaken the FAP program on any level. It was strictly that there were two silos that were created and because they were created at different times, they weren't sharing their data.

And so anybody who's sexually abused in a family setting just isn't -- those numbers are just not being recorded by SAPRO and this would allow for that.

MS. SCHENCK: Right, this isn't going to take their program away, it's just allowing for accountability within SAPRO. So when they actually provide numbers of unwanted sexual contact, those include the entire
military community.

BG DUNN: But did you envision

that if the FAP numbers are reported that

that then goes in the command channel and

you're tracking them, mental health care and

all of that that's provided to those victims

or does it stay within -- I mean --

MS. FERNANDEZ: I don't think --

BG DUNN: -- yes, I'm just trying
to sort this through.

MS. FERNANDEZ: I think we were

just trying to capture the numbers.

MS. SCHENCK: We just wanted the

numbers. We just wanted the numbers.

And I think if I were in DoD SAPRO

office, I would work with the FAP office to

get the data and then, you know, when he does

the waterfall chart, I would take that number

out and separate it out. But you still would

have to have accountability regarding the

method and disposition for those sexual

assaults.
Family Advocacy Program likes to
keep everything in the Family Advocacy Program
and keep the family together. But if you have
an offender who is a spousal offender, he may
also be an offender within the unit. There's
no accountability for that. There's no way to
figure out the accused also was abusing
subordinates, is also abusing -- sexually
abusing the spouse in a family setting.

BG DUNN: Okay. The bigger vision
for this is that rather than imposing the
SAPRO requirements all the way down to the
unit level on those in the FAP program, it
would be the FAP program providing those
numbers up to SAPRO so SAPRO --

MS. FERNANDEZ: We didn't hear any
testimony -- we heard the testimony that the
FAP program was -- we didn't hear any
testimony either way that the FAP program was
not working and that our intent was not to try
to fix it any way, it was just to record those
numbers.
BG DUNN: Just to record the numbers, okay, so just that administrative task, so to speak, of making sure that those numbers are included and then as you said, on the waterfall chart moved back out as these are FAP.

MS. SCHENCK: And I think the programs will work closer together if you do that. You're --

JUDGE JONES: I'm sorry, I can't hear you.

MS. SCHENCK: I believe the programs will work closer together as opposed to being completely siloed, they'll work closer together if you require the data to be tracked.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: Ms. Fernandez, I assume that the Family Advocacy Program has the same restricted, unrestricted parameters that reporting sexual assault does.

And so then my next question is,
did you get any sense of what the numbers might be? Those that have go to Family Advocacy that have associated sexual assault issues? No? Okay.

MS. FERNANDEZ: No. We didn't get any hard numbers like that from the FAP program. I mean one could speculate where there's domestic violence, there's usually sexual abuse also. But that is strictly speculation and we didn't get any testimony as regards to how many sexual assaults occur within the FAP program.

MR. BRYANT: Is that going to include sexual assault of children in the household? Can they -- no.

MS. FERNANDEZ: No.

MR. BRYANT: They don't go to Family Advocacy?

MS. FERNANDEZ: It's strictly adult.

MR. BRYANT: Okay. All right.

MS. FERNANDEZ: Well, all the
numbers that we're asking them to share with SAPRO are the adult.

JUDGE JONES: Professor Hillman?

Oh, I'm sorry. Professor Hillman?

PROF. HILLMAN: Just a question, Ms. Fernandez.

You just said you heard no testimony that the services were a problem through the Family Advocacy Program. So, there's really -- there seems to me there's really two issues, the Recommendation runs only to reporting and to numbers and that's fine. I mean I entirely support that creates a more accurate of what the extent of sexual assault is and that makes sense.

But the services, you're not recommending a change in the provision of services but you are suggesting there should be closer coordination between the services provided by the FAP program and for sexual assault prevention and response?

MS. FERNANDEZ: Well I think that
not in this Recommendation but in the other Recommendations where we said here are all the people that are working with sexual assault. We have need to assess their roles and make sure that there is no overlap whether it's gaps and we need to fill them in.

So what our hope is, is that we've had all these siloed programs developed over the years. All of them offer some good services, maybe some outdated services, let's assess that holistically and see where the strengths are and where the gaps are and then let's really create a unified program that can help any individual in any situation.

PROF. HILLMAN: Thank you.

COL COOK: One clarification on that, though. The Family Advocacy Program, that's more of a stovepipe organization that works separate from the command. Whereas, the SARC program works within the command. So you're pulling the command then into some of the family issues as well would be a concern.
So the services piece, you know, to the extent this is capturing the reports, I agree, the numbers should be reflected. I would just hope that to the extent that his possibility that even within SARC program that you might have had somebody who is part of a family and their case is within the Family Advocacy Program, but they're also a military member and they're part of a unit that their case could also be within the SARC program, that there's no double counting.

So whatever steps have to made to make sure you're only counting one incident as one assault even if they are covered by both programs and I would just caution, you know, as far as the services, I'm not sure including that into this Recommendation because I do think pulling a family issue into the command channels when it, for years, it's been kept away from the command channels in order to help mend that family, if that's what the family wants to do might be better.
But the services themselves, the people who are the providers, having more coordination between the providers and not the program advocates, that would be fine because the skill set is the same and it might would maximize the available resources at a local level.

JUDGE JONES: I'm just confused.

So FAP keeps its own database of adult unwanted sexual contact reports?

MS. FERNANDEZ: Correct.

JUDGE JONES: And if they never go beyond a report to FAP, what about the ones that may result in reports that are then investigated and then go through the normal process? Because there, I would be worried about double counting as well.

MS. SCHENCK: Okay, so the Family Advocacy Program has a way to treat family issues and if sexual assaults is one of those, they do court-martial individuals for those cases. There are adverse implications but
they're worked through the Family Advocacy Program initially.

So if there's an escalated abuse, where do the parties want to go initially? Because military life is very stressful and we don't want to, you know, break the families off immediately.

And so they pull in the Judge Advocates into that process and they have Family Advocacy team meetings and the JAG is in there talking about the possibilities for disposition. The MPs, the military police, are in there. And so at that point, the trial counsel can voice concerns, this case should be a court-martial. We can give an Article 15 for this type of abuse, even though the wife doesn't want to go forward.

So those cases are tracked very closely and at some point, I think the sexual assault's going to be where FAP is now. But those cases are not pushed under the rug by any stretch of the imagination.
JUDGE JONES: No, no, but so, if there was a decision, all right, we're going to do an Article 15 or a decision there's going to be a courts-martial. You're saying that those statistics are not captured because it's an FAP?

MS. SCHENCK: Oh, they are eventually captured though the Judge Advocate report. The JAGs do a specific report about numbers of courts-martials. Those are captured --

JUDGE HONES: And they're in the SAPRO numbers, aren't they?

MS. SCHENCK: -- but they're not specifically -- right, they're not specifically captured --

JUDGE JONES: Oh, they are not?

Okay, well that's my question.

MS. SCHENCK: They're not captured under --

JUDGE JONES: So even though there's a courts-martial, it's not in the
SAPRO numbers?

MS. FERNANDEZ: Correct.

MS. SCHENCK: Right, that's correct.

JUDGE JONES: Got it.

Any other comments or?

COL COOK: The narrow wording of what's in here to capture the reports and the numbers. As long as it has the protection to prevent against double counting, with that, I've got no comment.

JUDGE JONES: All right, then I think we have agreement.

Thank you.

MS. FERNANDEZ: Okay.

Recommendation 13, this is also a topic that we touched on yesterday, revictimization services and prevention.

Many people walk into the military having been sexually abused outside of the military. It's also one of the key indicators for being abused inside of the military. So
we were all concerned if there was anything
that we could do with that knowledge that
could help, that if we treated that knowledge
early on, it could help prevent a
revictimization inside of the military.

So our Recommendation is the
Secretary of Defense directs SAPRO to work
with the Center of Disease Control and other
appropriate agencies to develop services for
military members who have previously
experienced sexual abuse and to develop
strategies to encourage utilization of these
services in order to prevent revictimization
and develop or maintain skills necessary to
fully engage in military activities and
requirements.

BG DUNN: How do you envision
handling the very, very sensitive issue of
identifying those individuals? I mean it's
just making the information available and they
self-identify and they understand the services
available and they can avail themselves?
MS. FERNANDEZ: We struggled with this issue. I mean that's --

BG DUNN: Yes, that's a tough --

MS. FERNANDEZ: It is a very sensitive issue.

On the one hand, we didn't want to force people to self identify if they didn't want to be. At the other time, we couldn't turn away and say this is a key factor in revictimization and if we can somehow help this person early on, it really should be our duty to do so.

So what we're hoping is, is that by working with the CDC, we can come up with some really good protocols. We don't have the answers for you right now. We identified that there was a problem. There is a possible solution and we'd like to look into it and create something that we can use.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: My question, was going to be very similar to General Dunn's,
and that is are we going to do this upon entry
or at some point? How do we identify them?
And you've answered that, so thank you.

MS. SCHENCK: I think they're
already identifying themselves because I think
when SAPRO testified, they identified about
500 cases where those unwanted sexual contacts
occurred prior to service. So those
individuals must have gone and reported those
prior service assaults.

MR. BRYANT: But that was not
because someone asked the broad question if
you've ever been sexually assaulted before you
came into the military, please raise your
hand? And I know I'm being facetious, but so
that they could identify or here's if you
have, here's a number. But no efforts like
that are currently being done, are there?

MS. SCHENCK: We did not hear any
testimony to that.

The SAPRO office numbers do not --
the numbers that the General was testifying to
do not come from any kind of survey. The numbers, when he was testifying, he was talking about reports and those reports were either to MCIO, the military investigating organizations or to commanders or to the SARC but they weren't raised hands. They were actual reports.

However, the Workplace Gender Survey, the survey where you get the extrapolated 26,000 victims, I'm not sure they don't ask. I am not sure if they ask that in the survey. They don't identify -- those are anonymous survey respondents anyway.

But those numbers, as I said the 500 mentioned that I mentioned, 492, something like that, those were actual reports because he was testifying where those numbers were going in the waterfall.

MR. BRYANT: Should we assume or not assume that those 500 were the result of reporting a sexual assault while within the military?
MS. SCHENCK: Yes, those would be reports. For example, if I enlist --

MR. BRYANT: Yes, which? I'm sorry, that was a double-edged question, I should have known better than to ask it.

Are we assuming that those came in connection with?

MS. SCHENCK: No, I think SAPRO could answer that but when he testified --

MS. HOLTZMAN: Excuse me, I the answer to that is no, that these are just cases that had nothing to do with sexual assault in the military. These are cases, these are reports of sexual assault that took place prior.

MR. BRYANT: So they're coming into the military and then reporting at some point, I was sexually assaulted while a civilian?

MS. HOLTZMAN: And I need help.

MS. FERNANDEZ: I don't want to speak for SAPRO but I do believe that that's
one of the reasons they're saying things are getting better, because people who were assaulted prior to the military are coming forward while they're in the military because they know they can get services. That's my interpretation of what --

MR. BRYANT: But we do also know from -- I'm sorry, Judge Jones.

We do also know there is some statistical evidence on the reporting of sexual assault that a lot of the sexual assault victims in the military also report having been previously assaulted in civilian life.

BG DUNN: Which is what this about.

MS. FERNANDEZ: That's what this is about.

MR. BRYANT: But that's not the 500 that she's talking about. That was my question.

MS. FERNANDEZ: No, it isn't them.
BG DUNN: The 500 just are those who understand that you can get services if you report that you've been sexually abused --

MR. BRYANT: All right.

BG DUNN: -- even prior to accessing the military.

I think the whole object of this recommendation is to increase that 500 to --

MR. BRYANT: Whatever the universe of it is.

BG DUNN: -- 10,000 if that's how many there so that women understand, and men understand that when they enter the military, if they need services because they were previously sexually assaulted, they can get them and it's to everybody's benefit to do it as soon as possible so that to assist in avoiding revictimization because there is apparently that connection.

MS. SCHENCK: Well I have one caveat. First of all, there is quite a bit of revictimization. The 2,000 cases that I
reviewed on the appellate bench involved many cases of revictimization and I can't speak to SAPRO's report in that when it said 492 or Whatever unwanted sexual contact incidents occurred prior to service. I can't speak to whether that report included -- I was sexually assaults before I came in and I'm now also reporting this sexual assault. You see what I mean? Which would be, you know, up to SAPRO to report.

COL COOK: Mine's just a clarification.

When somebody joins the military, and this -- I don't know the answer to this -- when somebody joins the military and they report that they had been sexually assaulted before they came in, the fact that they are now military a member, they are entitled to services that are on an installation. Anything that installation has to offer, that person is eligible for even if it's for an event that happened before they joined the...
Is coordinating with CDC and other agencies, are there some gaps in what they have available on the installation that you're trying to avoid? Or are you just trying to allow them the option of, look, you can go on post to get help, if you're not comfortable because you're trying to get a new start and you want to go outside the system, if it's to identify other avenues? Or why the CDC and other agencies when they are already eligible for services?

MS. FERNANDEZ: I don't think the question's eligibility.

COL COOK: Okay.

MS. FERNANDEZ: I mean because there's already people stepping up. It's the numbers. We only have, let's say it's the 500, just statistically, if you look at the general population, there should be many, many, many more people reporting and coming forward and getting services. They're not.
And so you have a very small number of people who have been previously victimized in the civilian world coming forward and saying, I was victimized.

What we want to do is see if we can raise those numbers, get the right services and then hope that they don't get revictimized in the military.

COL COOK: So that they don't have to -- even if they have reported already, they don't have to report, they just to have to know, look, if you need some help, you can go to Whatever agency you arrange to get that help and it's usually this help available at no cost to the victim at that point or is this?

MS. FERNANDEZ: It's usually at no cost. It's really accessing the service.

JUDGE JONES: Representative Holtzman?

MS. HOLTZMAN: I just want to put this into context. The figures we heard, and
that's what made me very concerned about it, is that 45 percent of people who have been previously sexually assaulted are revictimized. Well that's a huge number, a huge percentage and I think this Recommendation has a little humility.

It says we don't know how these people should be identified. Some will self-identify and come forward, but maybe there are ways of encouraging other people to do that so we've asked the Secretary and CDC and other agencies that are knowledgeable about this to do several things.

One is to figure out how to encourage these people to come forward or maybe it would be at some point mandatory, I don't know, we haven't taken any position on that. We just said look at it.

But the second thing is, I'm not sure entirely that people really understand the whole -- this phenomenon scientifically and what the treatments are and so that's also
part of this to encourage the scientific
community, the medical community, as well as
the Secretary to focus on this problem. They
haven't really focused on it. And if you
could deal with the 45 percent who are likely
to be revictimized, you'd be reducing the
incidents in the military in a big way.

That's really, and we just say we
don't know quite enough to make a totally full
recommendation on that point, but that this
problem has to be addressed and pulling in the
CDC, I mean they're the gold standard on
public health issues and to develop an
approach.

COL COOK: Then the only comment
I'd make on the Recommendation is to change
one word, you know, to consult with the CDC
because I see as the expansion trying to
capture more, to work with CDC and other
appropriate agencies to expand services. You
know, this way they've got the option more and
maybe they'll report someplace else.
MS. HOLTZMAN: Yes, well, not only to expand but to develop services too. I mean I would hope that it would be the whole panoply of efforts because this has been ignored and it's just a way of, you know, what are we going to do about this. This isn't an area that if we could reduce this number, it would have a major impact.

JUDGE HONES: Professor Hillman?

PROF. HILLMAN: Just a comment that the education and training that's already happening that's of value to all members of the Service will be of value to the members of the Service who are critical to the units that they are working within regardless of their past history of possible victimization.

So trying to -- I just want to be careful that we don't -- to focus on revictimization to an extent that makes it actually more difficult to, I think the rising tide of education and understanding overall will make a big different here but these
people are us. They are not some separate
group and coming forward to get services may
not entail economic costs, but entails other
costs that those persons have to bear as they
step up and I think it's a mistake to push too
far in the direction towards targeting as this
subgroup as needing something different than
what the rest of the force needs overall.

JUDGE JONES: So are you objecting
to the notion that there might be strategies
developed that would --

PROF. HILLMAN: I have no
objection to the Recommendation.

JUDGE JONES: You don't?

PROF. HILLMAN: No.

JUDGE JONES: Okay, fair enough.

Any other comment? All right

then, 13 is accepted.

MS. FERNANDEZ: The next few
Recommendations go to culture and so I want to
say that you're going to hear to the extent
not already going on in the military. These
are things that we heard in testimony that we
just wanted to highlight in our Findings and
Recommendations that there may be some of this
already going on, but it was important for us
to really bring it up and to highlight it for
purposes of the report.

The first is retaliation and
harassment training. We've heard many times
that harassment by your peers is often why
folks don't come forward and report. So what
we're asking here, to the extent that it is
not already occurring, the Secretary of
Defense develop and implement training for all
members of the military, including new
recruits, that retaliation or harassment by
Service members in response to an allegation
to sexual assault violates good order and
discipline.

JUDGE JONES: No comments?

I guess my only thought here is
that I think it is occurring but maybe we
don't know that for sure so I guess there's no
harm in making the revisions.

    MS. FERNANDEZ: Well, that's what
we thought, too.

    JUDGE JONES: Okay.

    MS. FERNANDEZ: We thought it was
occurring but we just wanted to make sure if
there isn't something, there's got to be
because that was the testimony we heard over
and over again. It was the peers that were
creating the problem for folks not coming
forward.

    JUDGE JONES: Any other comments?
Yes?

    PROF. HILLMAN: Judge Jones, if
the wording of this one and the next one, we
could adopt a convention of the Secretary
continue to develop and implement training
which serves the purpose of the subcommittee's
goal and the same thing for the next one there
rather than the contingent phrase at the front
end.

    JUDGE JONES: I would agree with
that. So it would say, should continue in each of those two.

So we accept Recommendation 14 and it seems everyone's in agreement, it will read, the Secretary of Defense should continue to and now may we hear from you on 15?

MS. FERNANDEZ: Absolutely.

This is similar, again, you're going to have to minus the contingent phrase, but this is, again, making it explicit that superiors cannot sexually harass and obviously, not sexually assault.

Yet, there's still the perception that if it comes -- we heard the testimony from victims that if it's a superior that's harassing them, a lot of times they fear reporting or they don't even know that they should report.

So what we have here, to the extent not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new
recruits, explaining that implicit or explicit
invitations or demand for sex or sexualized
interactions from commanders or superiors are
not lawful orders, should not be obeyed,
violate the Code of Military Conduct and will
be punished.

JUDGE JONES: Any comments? All
right. That's accepted then with the
Secretary of Defense should continue to
develop language.

All right, 16?

MS. FERNANDEZ: The next
Recommendation, again, it's similar and this
goes to reporting is not a bad thing. You are
not a bad person, you are not a snitch if you
report. It is important for unit cohesion.

So this one reads, to the extent
it is not already occurring, the Secretary of
Defense develop and implement training for all
members of the military, including new
recruits, emphasizing that reporting instances
of sexual assault is essential for good for
order and discipline and protects rather than undermines morale.

JUDGE JONES: Any comments?

COL COOK: The only comment that I would offer is that I agree to include that it should be a component of the training and I just want to make sure that as you're, you know, it should be not singled out as the only point.

It should be, you know, you should report it. You should let the process work and trust the justice system. Let it get investigated, let them determine what happened and don't preconceive that the person who is now accused is guilty. There's still a presumption of innocence or the victim, you know, the victim's doing what they need to do.

But let the process work and include it as part of an education of yes, report. It's important to good order and discipline. Let the system work. This is a justice system, we want to make sure that we
have a good climate within the command.

JUDGE JONES: Colonel, are you proposing some additional language? I understand it as a comment that certainly makes sense in this context.

COL COOK: Back to the same language that Professor Hillman had just suggested that the Secretary of Defense continue to develop and implement training for all military members including new recruits, emphasizing that reporting instances of sexual assault is essential for good order and discipline and protects rather than undermines morale.

It is also essential for good order and discipline that we allow the investigative process and the military justice system to work as a follow on.

I want it reported but I don't want it singled out as they should just automatically believe or ostracize a person against whom an allegation's been made.
JUDGE JONES: Any reaction to that? Comments? All right.

Mai, could --

MS. FERNANDEZ: Sure.

Recommendation 17 --

JUDGE JONES: We'll work on that one, then. Thank you, otherwise accepted.

MS. FERNANDEZ: -- goes to the fact that we had testimony regarding male victims that said that often times because the victimization of male takes part as a hazing ritual, the people aren't identifying it as a sexual assault and a true victimization.

That we really felt that there needed to be additional training for me about what it meant to be a victim and to recognize it and then therefore, and then report.

So what we had here, to the extent it is not already occurring, the Secretary of Defense develop and implement training for all members of the military, including new recruits, with examples of male on male sexual
assault, including hazing and sexual abuse by
groups of men.

The training should emphasize the
psychological damage done by sexual assault
against male victims.

JUDGE JONES: Any comments?

All right, 17 is accepted.

MS. FERNANDEZ: Eighteen, we did
yesterday.

I believe that ends or Victims
Services section of our report. Oh, 19,
sorry, did I skip 19?

Oh, this is their career
repercussions, pardon me.

This is our Recommendation dealing
with career repercussions and we may want to
insert the mental health Recommendation in
this one.

So, the Secretary of Defense
implement policies that protects victims of
military sexual assault from suffering damage
to their military careers including, but not
limited to weakening performance evaluations or lost promotions, security clearances or personnel reliability certification based on having been a victim of sexual assault, having reported sexual assault or having sought treatment for sexual assault.

We also then wanted to make sure that victims knew that they could go to their SVCs and the SVCs could also advocate to ensure that their careers weren't damaged.

So we wanted to link in the SVCs as advocates for victims where there could be a problem with their career.

BG DUNN: I have no problem with the Recommendation but I think that last sentence that say the DoD should promulgate a regulation, that tells a lawyer what they should be doing in terms of their counseling and individual client, which I just don't see as necessary or a good idea.

MS. FERNANDEZ: Can we say something more along the lines of SVCs should
advocate on behalf of their clients? Or --

BG DUNN: Maybe that SVCs have the

appropriate training to understand the --

MS. FERNANDEZ: To advocate on

behalf of the clients on these issues.

BG DUNN: -- understanding of --

MS. FERNANDEZ: I think that that

would be fine.

BG DUNN: -- something along

those lines.

MS. FERNANDEZ: I think that would

be fine.

JUDGE MARQUARDT: I think you have

to be careful because many of these people

that have been assaulted are of lower rank and

I think that's one of the reasons we stated it

as we did, that they wouldn't really

understand and that you'd make sure that the

SVC does make them aware.

BG DUNN: I just see the lawyer's

responsibility to be to counsel on all aspects

of this as part of their ethical
responsibility to their client. So I'd be more comfortable with saying --

MS. FERNANDEZ: Well, I think you're right. Maybe somewhere in our Recommendations on the SVCs, we should mention that part is just not the trial advocacy but --

JUDGE JONES: I think that might be a better place for this.

MS. FERNANDEZ: Career and what?

MS SCHENCK: Career implications.

MS. FERNANDEZ: And career implications. I think we could add it on as a Recommendation on our section on SVCs.

MS. SCHENCK: Because we did hear testimony from individuals and they had their SVCs present, I don't know if you remember that, and the SVCs were sitting behind the victims and the victims were talking about career implications but the SVCs were not, you know, up on that. They -- we talked to them on -- I talked to them after on the break.
And so I think, ma'am, you're right. If the SVCs have training regarding career implications or we make that part of their responsibilities in the section about SVCs then that will trigger any training.

JUDGE JONES: So I think we -- I think this sentence should be taken out that the second one and we should see where we can fold it into the SVC section. Is that agreeable to everybody?

MS. HOLTZMAN: But it shouldn't be in terms of advising their clients.

JUDGE JONES: No, it shouldn't.

MS. HOLTZMAN: But they should have the power to assist their clients with regard to --

BG DUNN: And the training to --

MS. HOLTZMAN: -- and the power and the training to assist their clients in regard to --

BG DUNN: Or alternatively, hook them up with legal systems or something but
overall responsibility to manage that process.

MS. HOLTZMAN: Right.

JUDGE JONES: Well, is there any
doubt that a Special Victim Counsel may go the
next step, if you want to call it that, after
the process is done and then continue to
counsel with respect to these various
incidents that might occur?

I'm under the impression they're
permitted to stay with the victim that they've
begun to counsel for quite some time after any
courts-martial or sentence.

MS. FERNANDEZ: Yes and no. I
mean I think right now --

JUDGE JONES: Or do we just not
know yet?

MS. FERNANDEZ: I don't think we
know yet. I also think that's an additional
responsibility that needs to be -- if you
trained for it and you have an expectation
that they will go beyond any kind of trial
work or appeal work, that we need to
explicitly state it in our report because it is going to be a question of, are there sufficient resources for somebody to stay and advocate on those issues past any kind of criminal justice proceeding.

BG DUNN: But it may also be just ensuring that the client is getting the assistance with that particular issue in a legal assistance office. I mean it's cut and dry --

JUDGE JONES: Well there are other lawyers in the military who would --

BG DUNN: Right, there are other lawyers who would see these clients and assist with that process. I mean if it got into a, you know, if a victim had a, you know, some kind of consumer issue or is getting divorced, I mean the SVC is not going to assist them with that, but the legal systems office will and can and has attorneys who do that all the time.

So I mean I agree that that's an
issue that we need to keep under the umbrella of victim assistance.

MS. FERNANDEZ: I think at a minimum we have to highlight that it's something the SVCs have to keep in mind.

BG DUNN: Right.

MS. FERNANDEZ: I think we've talked about this on our subcommittee that people need to know what their rights are and it's not an explicit right but what we're seeing here is, if you're sexually assaulted, you're a victim, that shouldn't have any detrimental effect on your career.

But somebody needs to know, the SVC needs to be able to ask the question, even if it's -- has anybody demoted you? Have you had any problems with your command? Have you had any problems getting the assignments that you want? At least for that type of questioning to be in their mind set when they're talking to victims because it's beyond the treatment and beyond the trial.
This is -- they're in the military. Folks want to stay in and it's also about readiness and about making that individual wanting to stay in the military.

BG DUNN: I mean I absolutely agree we have to highlight that and that the SVC should maybe coordinate it or just, their finger on it, I agree.

MS. FERNANDEZ: Just asking the questions, I think, is important. So I think that does go to training. General, I think you mentioned it, I think it could just be in the form of training for the SVCs.

What could possibly be the career implications here and make sure you ask these questions.

JUDGE JONES: And we should look for a section where that's more appropriately placed. Okay.

MS. FERNANDEZ: The next section is on the Special Victims Counsel and we start with the most obvious, money.
We're heard a lot of really incredible testimony about how the Special Victims Counsel is working and the kind of help that it's providing for victims.

We also know that this is a program that's really just begun. The Air Force has been doing it for a little over a year and the rest of the Services have been doing it since January.

There needs to be more money dedicated to this or consistent funds dedicated to this so that we can really evaluate it and see how well it's working.

So straightforward Recommendation, Congress appropriate sufficient funds annually to DoD to ensure the Services are able to sustain a robust SVC program.

COL COOK: A question I have is the same question I asked yesterday during the other panel of use.

This Recommendation and the one that talked about the investigative training
said we want Congress to do these.

Some of the other ones that have
stressed the importance of training for the
legal community and providers, they all talked
about having the Secretaries do it.

My question would be -- I mean I
agree, all these things that we're looking at
in terms of trying to prevent, reduce better
respond to the sexual assault allegations are
important. But equally important, does the
panel want to single out one or two items and
say, okay, the funding at the Congressional
level for the SVC program, the funding for the
investigative training at the Congressional
level is what we want to do.

Or at the end, do we somehow make
a recommendation that says that the Secretary
of Defense or Congress has got to appropriate
or we recommend the request be for Congress to
appropriate money for a continued resources
for a robust sexual assault program.

And then the Secretary of Defense
has the latitude to determine in any given year where do they need the most help? Maybe we've gotten enough training in terms of we've built enough of a bench for the investigators or the counsel.

We don't need to put the emphasis there but we need to put it into the services and the health care that are actually going to victims. Or maybe it's already a robust bench for the victims and the health care that they're getting and we need to put it someplace else.

Do you want to single out individual items for Congressional level funding and say that's in our recommendation over other things that may be equally important or just as important at the end of the day?

JUDGE JONES: Professor Hillman?

PROF. HILLMAN: These are hard questions but I think that part of our contribution is to focus on the pieces that we
see most at risk and perhaps most consequential in responding and the first responders, the investigators are just so crucial and victims having a positive experience through the process. Likewise, the Special Victims Counsel have such potential for proving the loadstar, you know, the guidance through this difficult process. So I'm comfortable with singling out some aspects of what, you're right, is this set of interconnected training challenges that have to be funded one way or another. I'm comfortable singling out the ones that have been highlighted by the subcommittees for a little more Congressional muscle and the money.

COL COOK: And what about the health care piece? The first person, you know, the person that's actually proving that support to a victim who needs to you know, the process is one thing, but taking care of the individual themselves, we haven't singled that
one out.

I'm just concerned that if we single some out that at the end, we take a look holistically of which ones have singled out? Which ones have we decided aren't what we want to put our first recommendations? So that it becomes a more holistic recommendation on that point of who do we want to give that funding? Is it Congress having the discretion or is the Secretary having the discretion looking around and seeing what's needed on that year.

JUDGE JONES: General?

BG DUNN: Could I add I agree with Colonel Cook on this one because I absolutely agree there should be a designated funding stream for sexual assault and that the Congress has its finger on and can look at.

But within that, and you know, given the way the funding process works in the military and sometimes the fact that Congress may not appropriate things for years, that it
then gives the Secretary of Defense the option
to have that flexibility and a little more
medical here, a little more training for
lawyers there or, you know, six years from now
we have a great, you know, the program is
really established in these areas and somebody
has a great new idea, move a little funding in
that direction.

You know, but money is so fenced
for sexual assault period. And we could even
enumerate within that some specifics if we
wanted to, investigator training, the SVC
funding, the HQEs for prosecution side, you
know, we could roll that in as ideas the cared
for items under it. And I think that's more

--

JUDGE MARQUARDT: Well, it seems
to me that we are dealing with a situation as
it stands now and a lot of these programs are
so very new that we don't really know where
they're going but we do know that the SVCs do
need some help.
BG DUNN: And I agree. I just think this is a different methodology for ensuring that it'll still --

And if we put the language in underneath that Congress, you know, appropriate specifically for sexual assault and then put some example underneath.

JUDGE JONES: Professor Hillman?

PROF. HILLMAN: Just a question on that. We aren't -- right now there's not a Recommendation before us to sort of make an appropriation for support of training funding related to all of these sexual assault pieces which are funded in so many different ways right now.

So I wonder about our capacity to actually recommend an appropriation that would do all that just in terms of how that might work. But that said, I'm open to different solutions on how we might do this and recognize the discretion that you're talking about would be a good thing but the pushing at
the buttons that we can see rather than
creating a new sort of funding stream that
would then be allocated according to
priorities at the time. That also seems a
tough Recommendation to craft.

BG DUNN: I mean the money has got
to be defensive, because change is
institutionalized in the government with
funding strain, you know. Right now,
everybody's focus is on this and we do have to
ensure that the money follows behind it to
ensure that it's sustained somehow, whether
it's enumerating specific programs or
discussing a larger sexual assault
appropriation that has these.

Maybe you can help, Representative
Holtzman.

JUDGE JONES: I was about to call
on her.

MS HOLTZMAN: Well, first of all,
I think that it's important, you know,
Congress sometimes doesn't always have the
longest attention span and I have to give them enormous credit, on the other hand, for their efforts which have made the Secretary of Defense and the Pentagon respond to this issue.

I think the Special Victims Counsel, I completely agree with you that there's a whole panoply of programs here but this is like the baby, it's still in the toddler stage and we need to make sure that it's going to be to be a healthy baby and grow up.

And so that's why I think it's a good idea just to tell Congress that focus on this and just make sure that it's going to be that grown up that'll grow up in strong way.

We can also add to that that of course we're trying to minimize, but I think if you give Congress a whole list of things, they're not always likely to do that.

This one, I mean, I think everyone's taking credit for this and so I
think it's a good idea to say, let's have the money for it and that doesn't mean we can't ask for money for one of the other programs and I'm not sure I would give the Secretary of Defense the discretion because we just want to see this program get to the point where it's flourishing, working really well and so that's my view about it, for what it's worth.

JUDGE HONES: Well, I actually believe it's a good idea to showcase it, if you will, give it the prominence that everyone seems to be giving it and whether it's the right way or the wrong way, to actually ask for the money for it. I think we will have served a good purpose by highlighting.

MS. HOLTZMAN: There's no wrong way to ask for money.

JUDGE JONES: There's no wrong way to ask for money.

BG DUNN: That's one more thing, if we're going to do it for this program, you can't just say money, you have to say and
authorizations which is the body.

JUDGE JONES: So there is a wrong way to ask for money.

MS. HOLTZMAN: Why?

BG DUNN: Oh because, if you just give them the money then they'll start pulling lawyers from other places to fill these instead of and authorizations which means a, you know, increase the number lawyers available across the board.

COL COOK: In the military, the only way to guarantee a follow-on person is assigned to a position is if it's an authorized position which means, you know, it might be that you have one less trigger puller or some other -- there's a cap on the number of military personnel and each of the services goes through authorization.

If you're going to say you need special victim prosecutors, it may be at the expense of another trial counsel or defense counsel, but it might also be at the expense
of another infantry soldier or armor officer,
but the authorizations are allocated then out
to each people, so you need the personnel and
the money.

BG DUNN: I would let Congress
dealt with that.

MS. HOLTZMAN: I would let them
handle how to do it. I don't --

COL COOK: If they mandate the
program --

BG DUNN: Suggest that to them,
the money and authorization.

MS. HOLTZMAN: Well authorization
has a specific meaning and, you know, in
Congressional terms. It means you're
authorizing as well as appropriating, so it's
in two bills which is different from, I guess
what you're saying, which is authorization is
personnel, so we need to be very clear about
we're talking about here because Congress is
not necessarily going to understand that.

MS. FERNANDEZ: Is there any way
of making that -- because it is two different
-- I was thinking about authorization the way
you were taking about it, Representative
Holtzman. Is there a way to say, and dollars
and sufficient personnel?

BG DUNN: Personnel

authorizations.

MS. FERNANDEZ: Oh and sufficient
personnel authorizations.

JUDGE JONES: All right, with

that.

MS. FERNANDEZ: I just, okay not
to --

JUDGE JONES: Sorry.

MS. FERNANDEZ: -- prolong this
one.

The NDAA is an authorization, I
mean it's an appropriation, correct?

COL COOK: No, National Defense

Authorization Act is the authorization act

that has to go to the --

MS. FERNANDEZ: Let's do an
authorization rather than an appropriation.

COL COOK: You have to go to the
other side for the money.

MS. FERNANDEZ: I'm speaking out
of school.

Recommendation 21, now that we
have our baby, we want to make sure it's a
brilliant baby so we want to evaluate it.

So the Secretaries of the military
departments develop a standard of evaluation
mechanisms for appropriate metrics when
appropriate to measure the effectiveness of
the SVC program in each service on an annual
basis.

BG DUNN: So what were you
thinking of along those lines? Because
these are lawyers who work in the office of
the staff of Judge Advocate or a staff Judge
Advocate who evaluates lawyers, yes? No?
Patty, you're shaking your head.

COL HAM: Ma'am, only the Army has
it that way and they'll get to a
Recommendation, I believe. All the other services have a --

MS. FERNANDEZ: Have their own stovepipe as you would call it.

BG DUNN: Oh, they have a separate SVC organization?

MS. FERNANDEZ: Yes, exactly. The Army is different but we're making a Recommendation that, too.

BG DUNN: Okay.

MR. BRYANT: It's just a scribner's recommendation, I guess. Do we need to say, Ms. Fernandez, with appropriate metrics when appropriate, can't we just leave that when appropriate?

MS. FERNANDEZ: I think we can leave out one appropriate.

BG DUNN: But are you talking about just client load and what are you talking about?

MS. FERNANDEZ: Well, I think it's process and impact.
BG DUNN: Right.

MS FERNANDEZ: I think it would be both and we could add those words in there because a process one will only tell you, you know, we served X amount of victims. We --

BG DUNN: Have these surveys, here's the survey.

MS. FERNANDEZ: Right. You know, I think it's got to be impact evaluation also.

COL COOK: And you had said earlier, either yesterday or today, you had also said one of your goals is that the Special Victim Counsel be as responsible as quickly as possible so it might even be how long it took before there was that contact once you knew there was the allocation.

MS. FERNANDEZ: That might be a measure of process, I'm not sure if it's an individual thing to bring up. I just want to make sure is, is this making -- having an impact on how often victim rights are being brought forward. Are they being litigated?
I mean I can't sit here and create the evaluation for your, but I think it's got to be on process and impact.

MS. HOLTZMAN: It says effectiveness, to measure the effectiveness and effectiveness will include, I think, the most important thing, is it encouraging victims to come forward? Are they pleased enough with this program and feel empowered enough by this program so that they're coming forward in larger numbers? That what, you know, counts.

And how are they satisfied with it? I mean that would also be part of it.

MS. SCHENCK: So the Air Force does these surveys with the victims after and the Air Force also tracks the number of reports that went from restricted to unrestricted after visiting SVC. And the put an article together about the success of that program already.

And so I think the other Services
could draw from some of those things. And
they both are process related as well as
effectiveness. So I mean, you're right, it's
client, a client list analysis in addition to,
you know, a lawyer based analysis. Did you
sit there or did you actually go to court?
Did you do motions?

JUDGE JONES: Would we want to
include something like which could or could
include victim's survey? Just to make it more
specific or no? I see you --

MS. HOLTZMAN: I think that's a
fine way.

JUDGE JONES: Effectiveness is
enough? All right. Any other questions or?
Then 21 is accepted.

MS. FERNANDEZ: Recommendation
Number 22, this is a Recommendation that just
formalizes what the Services are currently
doing so that the collaboration and best
practice sharing continues on after the
current leaders have left their positions.
So, our understanding was certain people are leading the SVC programs now but once they leave, we want to make sure that these inter-Service working groups continue in order to be able to share the best practices.

I mean some of the case law is currently being developed so the more that the SVCs can come together and share their best practices, the better.

So the Recommendation is, the Secretary of Defense establish a mandatory inter-Service working group to assess the practices of Military Service SVC program.

The inter-Service working group should discuss, deliberate and decide upon the best practices being used by all Military Services. The working group should then ensure each Military Service implement the best practice of the SVC program and SVC receive adequate training on these practices.

The working group should consist of a minimum, the SVC program heads from each
Military Service.

The first meeting should occur within 12 months from the date of this report. Thereafter, the working group should meet at least annually.

JUDGE JONES: Yes, Professor?

PROF. HILLMAN: This looks totally well founded. I just wonder if we should drop the training part of it there because you have another Recommendation that runs to training and I don't think we want to put training responsibilities and implementation under a joint Service working group, but rather have them focus on best practices.

And while I'm making friendly changes, maybe strike mandatory from that first line because it's not clear for whom it would be mandatory. You want participation in that so if the inter-Service working group is established, it ought to include all the -- opting out shouldn't be a provision.

If you feel there's resistance out
there that you need the word mandatory, then
I defer, but --

MS. FERNANDEZ: No, I don't think
so. I think you're right, Dean Hillman.

JUDGE JONES: I agree.

And we're going to move the
training section. Is that something that
everybody believes will be a good idea?

COL COOK: Yes, it's in the next
Recommendation.

JUDGE JONES: Okay, fine.

MS. FERNANDEZ: Should we go on to
23?

JUDGE JONES: Yes.

MS. FERNANDEZ: This goes to the
sharing of information on a regular basis. As
I said before, case law is currently being
made on this, so there could be information on
motion practices, on case law, on just how to
deal with a sticky issue.

So what we're asking for is
basically, an inter-Service website be
The Secretaries of the military departments establish collaborative methods to disseminate information and training of SVCs between the Services including an inter-
Service website where SVCs can access training materials and resources from each Service.

MS. HOLTZMAN: Just a friendly suggestion about language. When you say disseminate information and training, shouldn't it be information, including information about training or how do we disseminate training? There's something wrong with that.

BG DUNN: Well the websites might have courses on them actually. That's not uncommon with the Service JAG schools, they've got all these training modules on websites.

MS. HOLTZMAN: No, no, I'm just talking about the phrasing of the --

BG MCGUIRE: I have a recommended phrase ma'am.
JUDGE JONES: Sure, General.

BG MCGUIRE: If we could change it to establish and disseminate collaborative methods, information and training. Oh, that doesn't really help there, does it? It just talks more about the methods.

COL COOK: And training materials for --

MS. HOLTZMAN: Right.

COL COOK: Training materials and then I would make it for SVCs between the Services instead of, some training materials for.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: Yes, thank you.

Ms. Fernandez, in this recommendation, are you just formalizing what you're finding on Finding 22.2 was because you found that there are already communicating via email and telephone and they're meeting monthly.

MS. FERNANDEZ: This is more of a
website, more of a clearinghouse.

MR. BRYANT: This just would make it more formal institution of what's already existing other than a website.

MS. FERNANDEZ: Well yes, and it's more between, instead of just an email between you and me, you could have chat rooms, you could have all sorts of technology helping you.

What we see as not a whole lot of people in this whole world know what these lawyers are doing. And so they're going to have to rely enormously on each other to learn about what to do in special circumstances. So we're trying to provide as much infrastructure for them to be able to access information and access each other.

MR. BRYANT: Thank you.

BG DUNN: The Service JAG schools right now have this capability easily to host something like this. This should not be -- I mean my guess would be actually if we called
them, it probably already exists, that they're probably already doing this. But it's certainly easy for them to do. They've got the technology to do it.

MS. SCHENCK: The Finding was related to program managers within the Services so within the Services, the program, the chief of the SVC program was disseminating and getting information but, you know, it's getting the Army to get with the Air Force.

The Army has gotten with the Air Force and they initiated the program, but it's the ongoing litigation that you want them to stay on top of so they're not -- so they can understand those legal issues. There's so many legal issues especially in the courtroom.

MS. FERNANDEZ: Just so that you understand how new this is, there really isn't a place for the SVC to stand in the courtroom. So, you know, there's defense, there's prosecution and the SVC is sort of, I don't know, the ballet dancer in the middle because
there's no place for them to stand.

So it's at that level that we need
to start growing the processes and the case
law so that this really becomes a position
that people understand and can be best
operationalized.

MR. BRYANT: I understand what
you're saying, Ms. Fernandez, because our site
visit to the Norfolk Naval Base revealed that
that was an issue with them.

The SVC that we heard from goes in
and sits in the courtroom but the whole
question of when he or she had a motion, do
they go to counsel table? Do they just stand
up and raise their hand? How does that work?

And he/she was the SVC, I'm sorry,
was very quick to point out she only had been
on the job four months at that particular
thing.

JUDGE MARQUARDT: You know, it
seems to be me that the Comparative Systems
would have looked at this as well because in
the civil side of things, they do have victim advocates that do speak in the courtroom.

MR. BRYANT: They do, but we found, well I don't want to get back into our committee, but we found that there were very few as formalized as the Military Services are doing now in terms of an actual lawyer.

We found many, many jurisdictions almost all had victim advocates who were in the courtroom but they weren't the same thing in most civilian jurisdictions or wasn't an attorney there on behalf of the victim. That was the main difference we saw.

COL COOK: I guess as a policy decision, one of the questions, that's interesting because I hadn't thought about where they're standing but by the same token, there's, pardon me, if it's also determining how far does the Special Victim Counsel go, they are a resource for the victims, but the party to a court-martial or to a trial is still the Government, the accused and the
military Judge, I would think with the Special Victim Counsel there to at least educate a victim throughout the entire portion of the process and to the extent that any of their rights are being discussed, it's a witness but -- and a very important witness --

MS FERNANDEZ: Colonel, we're getting there.

COL COOK: Yes, that's what I was going to say, so where they stand is --

MS. FERNANDEZ: The Victims' Rights section will address all of that.

COL COOK: Okay, that's good.

MS. FERNANDEZ: No, no, no, you're heading in the right direction because as these things evolve, it's when you go, oh.

COL COOK: I would love to hear more. I mean the Air Force program has been going on longer, but even with taking on sidebars with some of the people who came and testified to us, even they weren't quite sure. If you talk to the Defense
community even within the Air Force, it was
different concept. So it's interesting to see
how it will develop and grow up to become from
a baby to something -- a portion of the court
but that's an intended.

MS. FERNANDEZ: Just on an aside,
the Supreme Court just heard its first case
where a Victim's Counsel was present and where
that person would sit was a major issue. So
the Supreme Court is wrestling with these
issues as this body of information grows.

JUDGE JONES: There are nine of
them so they probably had to discuss it. One
Judge could probably could figure it out
pretty fast.

MS. FERNANDEZ: So are we good to
move on to Recommendation 24? Do we need any
further discussion on 23? We're good with
that?

JUDGE JONES: Accepted.

MS. FERNANDEZ: What we were just
talking about, these attorneys are paving new
ground and, therefore, they can't see straight out of law school. They need to have had some courtroom experience and that isn't clear in the job description or responsibilities.

So we're asking that one of the skill sets is that they have courtroom experience.

The Secretary of Defense direct the Military Service to implement additional selection criteria for their individual Special Victim Counsel programs to require that Counsel have appropriate trial experience prior to being selected as Special Victim Counsel.

The criteria should include special emphasis on the unique selection of SVC and require actual courtroom experience rather than simply requiring services in the military justice billet for a certain period of time.

JUDGE JONES: Do we know what the criteria are now?
MS. FERNANDEZ: It is listed. We don't have it in the Recommendation and I don't have that with me. It didn't specify and that was what we were worried about is it didn't specify courtroom experience.

COL COOK: One of the challenges within the military is when you bring, as you're saying somebody right out of law school, we bring officers right out of law school into all of the Military Services.

They go to their basic courses and they have their training and then they go out to some post, camp or station or installation.

I know, having deployed to Baghdad or the combat division, I had people who were six months out of law school sitting in there, some of them doing legal assistance, some of them doing operational law, some of them doing trial counsel. It is hard.

We also have a triangular system. You don't come into a position at different levels. You come in at the bottom level and
you work your way up. So while we had these
new -- and the largest numbers we have are at
the more junior level who are your direct
commissions.

Some of them come in with trial
experience from their civilian jobs, granted.
Some of them don't but they're really, really
smart and really talented and we still have
them making shoot and don't shoot decisions
based on the rule of law in some environments.

We have them serving as trial
counsel. It is rare, it happens. It's not
even an absolute that we don't even have them
to try a defense position up front. It just
depends on the circumstances. But usually,
trial defense services, when you're sitting
next to an accused who's due process rights
are at issue is not the place we do our best
on the job training. We'll do it if we have
to but it's not usually their first
assignment.

It's hard to say that you're going
to say a Special Victim Counsel has to have had an adequate or clearly defined baseline of courtroom experience when we have to fill trial counsel, defense counsel, Special Victim Counsel, operational law, legal assistance, claims -- and there's not many claims, most of those are civilianized -- a lot of the legal assistants in the United States is civilianized.

But in terms of these are military officers and there are only so many criminal positions that are out there. I am not sure that you can say this person has to -- I do say you have to have the right training. You have to be completely understanding of the system that you're working with. You can't have somebody who has is not competent to advise a victim of what's going to happen and then have the mistake of them being wrong.

You have to have to have them supervised by somebody who also can provide them a greater depth of knowledge.
I'm concerned that if you tie the Services' hands, they're not going to be able to resource some of the other things that are just as compelling. And you have to leave them some discretion to put people where they need to be at the time that they get there because of the way people enter the military and the important task they do very, very quickly upon entering their branch.

JUDGE JONES: Yes, I think this has to be more aspirational just because we do have a finite number of lawyers as Colonel Cook has gone through and we don't know how fast additional authorizations are going to get out there to make enough experienced trial lawyers available for this new program.

So maybe just saying, Professor Hillman's suggestion is whenever possible in there and that makes it -- I agree, we cannot tie their hands, not with what I think we all know from the testimony is the current situation in terms of availability of people.
with trial experience.

MS. SCHENCK: Well, I just want to
draw your attention to this wonderful chart in
the back of the back of the report that the
staff has done. Many of these charts are in
the back comparing the services and one, at
Appendix I, is a comparison chart for all the
Services regarding the Special Victim Counsel
includes selection in there. But they did a
tremendous job laying everything out for us.

COL COOK: And Mai, it definitely
is not to say they don't have to have the
required training that's the baseline. That's
got to be there even if it's a checklist in
front of them saying you have to address all
of these things, you have to have graduated
from a particular training program. The
challenge is just --

JUDGE JONES: You have to be
supervised properly.

COL COOK: Right, you have to be
properly supervised and mentored and
evaluated. It's just a question of that training base because you'd be amazed at what some of the Judge Advocates do incredibly well even if they've never done it before.

JUDGE JONES: Well will whenever possible --

COL COOK: Yes.

JUDGE JONES: -- satisfy that? Is that enough?

COL COOK: Yes, and it makes it aspirational and should be a consideration, I agree.

JUDGE JONES: All right, I think that's the sense of the panel. That's accepted.

COL COOK: Yes.

I'm sorry, just to clarify for you and it's adding whenever possible both to that first sentence and to the second sentence that it says you have the additional selection criteria, that they have appropriate trial experience whenever possible prior to being
selected and on the second one --

JUDGE JONES: That's where I put whenever possible.

COL COOK: Okay, the second one says and it requires actual courtroom experience rather than simply -- I think that second sentence goes too far, maybe we can take it out. It should have special emphasis on the unique selection to include special emphasis on the unique selection of SVC period. If you want to do that or take the sentence out, but I don't think the second sentence is needed.

JUDGE JONES: So the second sentence, the criteria should include special emphasis on the unique selection of SVC?

COL COOK: That's fine or delete it. It doesn't add very much with just that.

JUDGE JONES: Right.

COL COOK: It's the second part that I find concerning.

JUDGE JONES: I think I would
favor just ending it with the first sentence
and deleting the second, but let me -- any
disagreement on that?

   All right, then with that
amendment, it remains accepted, but we're
going to delete the second sentence.

   Twenty-five?

MS. FERNANDEZ: Twenty-five deals
with extending the service of the SVC to the
victim.

   Mostly what we're looking at is
extending it through appeal.

   So right now, the relationship
continues until final disposition of the
matter or when the attorneys reassign or leave
active duty.

   We want an SVC to be available to
the victim through appeal. So what we've said
is the Secretary of Defense direct the
Military Services to extend the opportunity
for SVC representations to a victim so long as
a right of the victim exists and is at issue.
This includes any time following final action by the convening authority and during appellate review. While it may not be feasible due to mission requirements for the victim to maintain the same SVC throughout the duration of the process, the policies should permit for the appointment of an alternative SVC to advise the victim and assert any right or interest still at issue following the final action.

COL COOK: I think as a former appellate Judge, what role might -- I mean I understand through the Victim Witness Liaison Program, there is obligations that even after a case is done, there's notification requirements, the progress of the case is still after the case has gone up through the appeal, hey it's coming up on appeal, this is what'll happen. That notification happens. But an appellate Judge, what you're usually deciding an appellate case based on the information presented at trial.
What new information might a victim have to present during the appellate process? Well, what role would you see a special victim Counsel playing during that piece?

MS SCHENCK: I think it's probably going to be a limited role. So for example, the accused on appeal may raise Grostefon matters.

COL COOK: May raise?

MS. SCHENCK: May raise Grostefon matters. That means he writes a statement that indicates something adverse about the victim, so now her 412-type issues are brought into the case and Grostefon matters are unsworn, just written by the accused, but then the appellate counsel can also use those in raising an appellate issue.

If the Court Orders the would order a DuBay and then the victim could be recalled. I mean there could be those type issues raised and I do believe it's a limited, very, very limited amount but the concern was
that they would be out there, these things would occur a DuBay is a post-trial hearing where the appellate bench gets the case and the case doesn't have this issue resolved, the client was sleeping with the Counsel, those type issues that aren't resolved.

The appellate Court has the authority to order a DuBay in that scenario to have the trial court sort it out and take testimony. That would be one scenario that could occur.

BG DUNN: It seems to me that as long as it's not directed how the services do this and as long as we recognize that it's not going to be that same SVC.

MS. SCHENCK: Right. I also want to point out the limiting language it says, assert any right or interest still at issue.

BG DUNN: Right.

MS. SCHENCK: That means if there is one, then there would be an SVC. Do you see what I mean?
BG DUNN: Well, I mean, you know, the case can be sent back for reassessment of the sentence.

MS. SCHENCK: Right.

BG DUNN: It could be -- there's some things that could happen that would be relevant and pertinent to the victim.

So it seems to me as long as we recognize very clearly that it's not going to be the same SVC because SVCs transfer, move to different jobs, I mean the victim may move to Alaska and the SVC may move to, you know, Bosnia.

But there's a somehow a system in place that maintains that contact with the victims and it might really be, you know, at part of the -- at the appellate level somewhere with one person managing them but all for one service, for example.

MS SCHENCK: Right, because what happens is the appellate attorneys will get this issue and they'll call down. I mean
sometimes there's not a sensitivity to the people on the ground. They'll call the former prosecutor a year before and say what happened? Was there collusion? You know, they interview those folks. They are going to do that with the victim as well.

And so that's sometime everybody needs to be sensitive to at the appellate level.

Also, remember, at this point, with the Kastenberg case, there's really only two military rules of evidence that the Special Victim Counsel can voice their opinion, you know, voice their representation on.

But we don't know how that's going to get expanded in the process and those two issues, one is the rape shield, of course and the other one is the confidentiality between the psychotherapist and the victim advocate. Oh the accused wants to get those records. Those two issues can still come up on appeal.
Right?

BG DUNN: Yes, I mean there has to be some system to hand off that victim, much like the accused gets handed off to, you know, in the appellate system. There's got to be a way to hand off the victim somewhere where he or she knows they go, you know, and somewhere that, you know monitors the case and continues --

MS. SCHENCK: Right, there's going to have to be some tracking and --

BG DUNN: Continues that contact.

MS. SCHENCK: And I think That's what the chief of the Special Victim Counsel Office would do if you encourage the appellate counsel to reach out to this Special Victim Counsel Chief and say, you know, we're going to reach out to this victim and so random calls won't occur.

It'll be hopefully, some handoff because you know what'll happen is the records are up there years later and the defense
appellate division's going to look at the record and they're going to say, oh, Lisa Schenck, she was the victim Counsel two years ago. They may call the Special Victim Counsel that it was and the Special Victim Counsel's going to say it's not me anymore, call the chief and hopefully just to avoid any kind of issues.

I think it's -- Mai has a different view on this. I think she believes that this is for the victim so they know this isn't going to just end at the court-martial so they're going to tell the victims.

From the JAG perspective, it's the well, you know, this may never be required because there may not be a right or an interest but if there is, we don't want this.

COL COOK: But that's a good point. I mean did you all talk about the special victim in all your interviews and everything else, you've got a briefing, I'm assuming, on the Victim Witness Liaison
Program because it used to be within that, even after a trial was finished, there was still an obligation on the investigative arm and on the Judge Advocate there to tell the victim, here's what's going to happen in the appellate process.

But there was somebody in that process under those rules that told them if an appeal was coming up to keep them posted as long as the victim maintained that contact and kept us apprised of how do you contact them. They were told what was coming up and the process. So again, when the trial was over, the victim wasn't left hanging under the Victim Witness Program.

All I would say is I have no problems with this in terms of that clarifying language to make sure that the victim is also not -- it's got to be communicated what is that right? It may be a limited right to the extent that an appellant Judge asks for additional information. But the Victim
Witness Program still has a requirement to keep the victim apprised of what's going on. If they want to go to an appellate argument, they're more than welcome to go to that, that doesn't necessarily mean that they have a speaking role within it.

So I don't have a problem with it saying if something comes up later that they get a special victim Counsel. If theirs is available great, if not, somebody else to help them provide in a DuBay hearing or something else. That, no objection.

JUDGE JONES: We do say it all in the first sentence but I know it may not be enough. I mean if they get representation, so long as the right of the victim exists and is at issue that's really what we're talking about but perhaps we don't need --

MS. FERNANDEZ: Anything else?

JUDGE JONES: Anything else on that? And I think we talk about what all the rights are that's coming up.
COL COOK: Judge Jones, I agree with you, I mean that's what we're trying to say. What I do like the one sentence that's in there that says, while it may not be feasible due to mission requirements for the victim to maintain the same SVC, the policy should permit appointment of an alternative SVC, you know, to assert if it's still at issue.

You know what, or you put it in the first sentence. The Secretaries of Defense direct the Military Services to extend the opportunity for SVC representation, although not necessarily the same SVP to a victim as long as the right of the victim exists, you know, although not necessarily the same SVC throughout the appellate process so long as the right of the victim --

JUDGE JONES: I mean the SVC could become unavailable at any stage.

COL COOK: Okay.

JUDGE JONES: There's a motion for
a break. This might be a good time.

MS. FERNANDEZ: I was just about
to make that motion also.

JUDGE JONES: Thank you, General.

(Whereupon, the foregoing matter
went off the record at 10:39 a.m. and resumed
at 11:08 a.m.)

JUDGE JONES: With recommendation
25. And I actually think that just the first
sentence is all that's necessary. It just
says you get representation, and I don't know
that we need to go into you may not have the
same person. I think that will work itself
out.

Any objections to that, or can we
leave it at one sentence?

COL COOK: I'm fine with leaving
it as one sentence, as long as there is some
right that exists. If there is some right
that's been appealed to a trial level about
the denial of a right to a victim and that's
what the Special Victims' Counsel is working
on, if it's a DuBay hearing ordered during an appellate process, that's fine. I just don't want to, I would just be concerned that, once the trial is over and the victim still needs to get Services and advice and all those other things, but as far as the appellate process, it's a legal proceeding that I don't see a very large role --

JUDGE JONES: Right. And so I think by saying as long as a right of the victim exists and is at issue does the trick.

COL COOK: I think so, too.

JUDGE JONES: I agree with you that when I first read during the appellate review I had a vision of having to have a special victims' counsel, you know, add an oral argument with the victim or something, which they may wish to do. But I think if we just talk about an issue, and they certainly can arise during and post-appellate review.

COL COOK: That's exactly -- I was thinking, okay, so there's a government
appellate division for them, there's a defense
appellate division. Is there a victims' 
appellate division? I just don't see it going 
that far. It's a limited expansion. As long 
as something exists and there's something at 
issue, I would limit it to that.

JUDGE JONES: And I think it says 
it perfectly in the first sentence. Any other 
comment? All right. Twenty-five is accepted. 
Twenty-six.

MS. FERNANDEZ: Twenty-six is 
about access to documents. In order for a 
victim to assert his or her rights, he or she 
need access to the appropriate documents. If 
the government doesn't give it to him or her, 
they should have the right to petition the 
court. And if the court decides that they 
don't need the documents, they should have a 
right to an expedited appeal. That's what our 
findings said.

So our recommendation is the 
Secretary of Defense implement policy
clarifying the victim's rights to access records which are relevant to the assertion of the victim's particular right through his or her SVC. The policy should include language establishing that, once the SVC makes a request for information and is subsequently denied by the trial counsel, the SVC may petition the court for access to the relevant information.

Furthermore, it should permit the military judge to then perform an in camera review to determine what documents, if any, are relevant and necessary to assert the right to release the SVC, as well as the appropriate method for disclosing the relevant documents to the victim. If the military judge declines to disclose the records, the reasons should be made on the record in order for the victim to seek further review.

BG DUNN: Is there something specific that you all are trying to address here? I mean, this seems to me to bring
together all of the issues of a third lawyer
in the courtroom and in the, you know,
appellate process, and I was just wondering if
there's an underlying issue that needs to be
--

MS. FERNANDEZ: Let's say there is
an issue about -- and we'll talk about that
later -- about a plea agreement. You need to
be able to see the document in order to assert
that right or at least parts of the documents.
So in order to assert your right, whatever
that victim right may be, you need to have the
appropriate documentation. If you need
documentation to assert that right, then you
need it from the government.

Let's say the government says, no,
this is confidential information, you can't
have it. Then it should be up to the judge to
take it in camera to look at it and say, okay,
you can have this piece of information but not
this piece of information and this is how it
needs to be transferred to the victim. This
is how this information needs to be transferred to the victim.

The judge says, sorry, you can't see any of this information, the victim should have a right to appeal that decision.

COL COOK: And then what happens if the judge has said that they don't get that, is the court-martial stopped while it's going out there?

MS. FERNANDEZ: I think that what we're looking at is interlocutory appeal.

COL COOK: Do we know, I mean, are any of the Services right now -- what you're saying is to mandate it. Are any of the Services, as they're developing the Special Victims' Counsel program, are any of them following this or do we know of any civilian courts, is there --

MS. FERNANDEZ: Meg Garvin was our subcommittee member or is our subcommittee member who's the expert in this, and she was helping craft this because she says it does
come up at trial. You need to be able to have the information to assert your rights.

COL COOK: It comes up in trial, but how is it addressed so far? I mean, has it been addressed by anybody, or is the military the first one to be taking a step on this one?

MS. FERNANDEZ: My sense of it, in civilian courts it comes up, and it proceeds the way I just described. If the government says, no, you can't have the documents, then a victim has the right to go in front of the judge and say I need the documents.

COL COOK: And then how quickly? I mean, even in terms of discovery, the accused is entitled to request documents, trial counsel gives it to them at certain portions of the proceedings, not necessarily at the time in which they want them, based on whatever the rules of evidence and the trial rules are. Are you proposing or do you know if we go with this recommendation of creating
a greater rights to information from victims
than an accused who's got constitutional
rights --

MS. FERNANDEZ: No, I think it's a
very limited right because it's only the
documents that you'll need to assert that
particular right. So if there's, say there's
a whole volume of documents, you're not
entitled by the victim to the whole volume of
documents. You need those pages that will
allow you to assert your right in front of the
court.

So the way that a motion practice
would be is, you know, I'm going to be asking
for documents A, B, and C. And the judge may
come back and say, sorry, you can only have
document A.

BG DUNN: I still am having --
maybe I'm -- I'm having trouble coming up with
a scenario where this is an issue.

JUDGE JONES: Well, I mean, a
victim certainly has the right to weigh in on
a recommendation, or a plea bargain shall we say, and they would have to have the written plea bargain or maybe, at a minimum, they would have to be told, even if not given the document, they'd have to be told the contents.

To the extent that there are rights codified in the next section, if a victim needed information in order to perfect that right, I understand the principle. But I just wonder whether this is the kind of thing that should be worked out through cases and case law, you know, as this program grows.

All of this seems perfectly fine to me, to be perfectly honest. It's exactly what I would do, although I never had a victim before me asking for information. But every judge, I think, would do you need it? I'll look at it in camera, and I'll give you what I think you need. And it's usually in the context of, you know, the defendant may want information or what have you. I just don't know whether this wouldn't be better crafted
by, I don't know, the Judge Advocate Corps
after there's some case law or case law. I
don't know.

JUDGE MARQUARDT: Didn't we hear
evidence, though, that the victims don't have
a right to get any documents at this point?

JUDGE JONES: Well, I don't think
we're giving them the right, are we?

JUDGE MARQUARDT: They can ask for
it now with this proposal.

JUDGE JONES: Well, this says to
clarify it. But I don't know what it is.

MS. FERNANDEZ: The express
finding is a special victims' counsel's right
to access records is no greater than his or
her client's access rights, her client's
access rights. Currently, the government
trial counsel may, but is not expressly
required to, disclose information and records
to the SVC. Further, when disclosing
information, the trial counsel is limited by
the Freedom of Information Act and Privacy
Acts. So I think that . . .

JUDGE JONES: They're very complicated questions, I guess.

MS. SCHENCK: There's also an issue regarding whether or not the Secretary of Defense can promulgate a policy that would bind military judges --

JUDGE JONES: Well, I'm also worried about that, yes.

MS. SCHENCK: Military judges are under the Military Rules of Evidence. I mean, they're subject to the Manual for Courts-Martial, and I think there's another panel that's looking at the judiciary after your panel, as well.

But the bottom line is I don't think that, the first part is about policy. The second part is about military judges, and the military judge would do that anyway. So the second part is something they would do. And right now the only two rights, as I stated earlier, the only two Military Rules of
Evidence, according to the Kastenberg case, that the Special Victims' Counsel has, the interest of the victim where they can represent them in court, would be 412, 513.

So the records I would think that may come into play there would be maybe medical records of the accused because if they're their own records, they would be able to get them. The victim records, the victim would be able to get their own records. But sometimes there may some medical records, you know, evidentiary type things regarding 412 and 513.

But, nevertheless, the latter part of this recommendation I believe military judges can do already. I personally would recommend that the panel maybe refer this to the next, the judiciary panel, which is --

JUDGE JONES: Professor Hillman?

PROF. HILLMAN: But right now this is the recommendation of the subcommittee that's already been finalized that we're
reckoning with right now. So that's a
suggestion for how to adapt this for the
panel.

I think that if we leave -- the
first sentence simply states that we want the
secretary to make sure an existing right is
protected through access to information. For
me, that seems unobjectionable. The question
is what to say about the right to appeal
through a military judge, and I think we need
not direct too narrowly what the military
judge could do but perhaps add a clause that,
so to access records which are relevant to the
assertion of a victim's particular right
through his or her SVC, including access to a
military judge or -- I don't know, Judge
Jones. Just some brief thing that recognizes
that this could end up being decided in the
court if there's some --

MS. FERNANDEZ: By military judge
or --

JUDGE JONES: I'm sorry. I'm not
past the first sentence because I don't know how the Secretary of Defense would clarify victims' rights to access records. I mean, that's a vast and complicated area.

PROF. HILLMAN: Would you object to ensure the victim's right to access records relevant to the assertion of the victim's particular right be protected?

JUDGE JONES: Yes, I would, I would certainly prefer that. It's much narrower. And I think since everybody -- well, there are now victims' rights to access records, so I think we're not creating a right that we may not have thought about or had a chance to think, you know, to let a judge think about. So what's that language, Professor?

PROF. HILLMAN: The Secretary ensure the victim's right to access records which are relevant, that are relevant to the assertion of a victim's particular right through his or her SVC and that if we wish to
have language that makes explicit the access

to a court.

JUDGE JONES: You know, that's the

other thing. Is the Secretary of Defense the

right person to be ensuring this? Isn't that

what happens -- I don't know what that means.

COL COOK: Right now, the victim

counsel programs are a policy program that's

out there by the Secretary. I mean, as a

policy --

MS. FERNANDEZ: Not for the Army,

but that's coming up. They're going to change

that.

COL COOK: Okay. Well, isn't it

in OSD policy, though, that there will be a

special victim program? Exactly how to

implement or execute it is determined by each

Service at that point. Is that -- who says we

have to have a special victim program? Is it

OSD policy at this point? So we have to have

a policy, so that means there's got to be

implementing language from OSD on that, or did
they not do that? We just went to the
Secretaries of the Services concerned; do we
know?

MS. FERNANDEZ: It was just
brought to my attention that one of the
scenarios could be the need for the victim to
access the accused's prior military records.
That could be one of the scenarios.

JUDGE JONES: Well, I guess my
point is there could be a hundred scenarios,
and they're going to be case by case. That's
uniquely suited, it seems to me, for a judge
to hear it and decide it. But that just takes
me back to how the Secretary is possibly going
to be able to clarify those kinds of rights.

And I also don't think that
telling him to ensure the victims' rights to
access -- I mean, once there is a final
victims' rights act -- well, there is one
that's already been passed. Is there a no
right to access of records in that? Are we
adding something to the current Victims'}
MS. FERNANDEZ: My sense is that it's not a right. I mean, it's a way of --
the records themselves aren't the right. But in order to enforce the rights, you need the records. So it's not that we're creating another right. We're creating the vehicle to actually get the right.

COL COOK: But by creating the vehicle to get the right, I guess it becomes this appellate right that could, in a system where the military justice process is expeditionary, you know, to stop a court-martial at that point and have this interlocutory appeal and somehow affect readiness, it's just an interesting -- it becomes too complicated, to some extent.

If the victim has the right to be heard on the plea, the fact that they get informed, look, an accused is offering to plea to this, here are the offenses they're going to plea, here is potentially what the sentence
could be, or whatever it would be, the
information, that doesn't necessarily give the
victim before court access to the actual offer
to plea itself where the accused actually
writes out in the military everything that
they're pleading to. I don't know where that
lines goes to so . . .

JUDGE JONES: Well, let me go back
to having the Secretary of Defense ensure
this. I think that if a judge decides that a
victim is trying to assert a right and that
that victim needs access to records, it's a
judge who would make the decision and would
ensure the right. I just don't think the
Secretary of Defense is the right --

MS. FERNANDEZ: I think you're
right. I was thinking of the judge, also.

JUDGE JONES: Okay.

COL COOK: So are we saying that
the judge should ensure or are we saying --

JUDGE JONES: I don't think we
should -- only because I was a judge, I don't
think we should be telling judges to do their
jobs, which is to ensure people's rights.

MS. FERNANDEZ: We should point it
out to them.

COL COOK: That's what I'm saying.

It's appropriate for them to consider --

MS. FERNANDEZ: Yes, consider it.

Consider it is the word. I think what we are
trying to get to here is, again, you can have
a lot of rights, but if you have no way of
accessing them because you don't have the
materials or the information to do so, then
the rights are worthless. This is a vehicle
to getting your rights.

BG DUNN: But that's what judges
do, though. The judge acknowledges --

MS. FERNANDEZ: Correct.

BG DUNN: -- that the accused has
a right --

MS. FERNANDEZ: Correct.

BG DUNN: -- the victim has a
right, and makes the government comply,
provide the information, you know, and make it better. And there are other statutes implicated here with FOIA and Privacy, etcetera.

MS. FERNANDEZ: And HIPAA.

BG DUNN: HIPAA, exactly. So I do think --

JUDGE JONES: I think this is like a bench book for a judge in an area where they routinely do this. I don't . . .

BG DUNN: Maybe we could make a recommendation that you look at the Military Judges' Benchbook and provide an instruction that would ensure --

PROF. HILLMAN: Your Honor, can I recommend we take this to the judicial policy panel since we're struggling to craft this appropriately. Say the judicial policy panel consider clarifying the victim's right to access records which are relevant. And then maybe put the other suggestions in a finding so that it's not actually in that
recommendation because I don't think we want to restrict the follow-on panel's assessment of the issue. We want a study of it so . . .

JUDGE JONES: So that's the judicial proceedings panel?

PROF. HILLMAN: Whatever the next group --

JUDGE JONES: Right, the follow-on panel.

COL COOK: I guess the concern I have with that is I'd rather see the Joint Services Committee, which considers any changes to the UCMJ from all perspectives, not just from the judiciary's view. I don't want the judiciary creating rights that weren't intended by a new policy or a new program, and the SVC program is still new and developing across the services and it's developing differently --

MS. FERNANDEZ: Yes, I don't think we're creating a new right here. That's the distinction. We have, we've created the
rights. This is, if you need certain
documents in order to assert your right and
you don't have those documents and you can't
access them because the government won't give
it to you, you need a vehicle to be able to do
that. We are not creating a new right because
you could be asserting a panoply of rights,
but you would need those documents in order to
do so. So it's not a right, it's a process to
access it.

MS. SCHENCK: I think trial judges
could entertain motions from the Special
Victims' Counsel regarding discovery of
documents at the trial level. I think that
could occur at any time after the preferral of
charges.

JUDGE JONES: I don't think
anybody disagrees. It can be, and I think, no
surprise, I would like to leave this for the
judicial proceedings panel and let them see
what they want to do with it. Well, I know,
because the next sentence is the policy should
include language, and then it establishes a procedure. I don't know whether the judicial proceedings panel will want to get into suggesting that in the benchbook for judges they are made aware of this SVC issue and that this is a recommended practice.

Frankly, normally, those come after case law and after people have, you know, there have been decisions and gone through appeal. This is not controversial in my view about how to handle this.

MS. FERNANDEZ: I think that what we were hearing testimony is that you couldn't get a hold of certain materials, that the SVCs couldn't get a hold of certain materials and, therefore, their hands were tied in helping assert those rights.

JUDGE JONES: And they didn't feel that they could make a motion to the court?

MS. FERNANDEZ: We probably didn't go that far with the . . .

BG DUNN: But just because you're
an SVC doesn't mean you have all these, outside the normal channels, access to things. You know what I mean? I mean, they're representing their client within the context of that proceeding, and so they should use the tools available to them in that venue, which I think, you know, a number of people would point would be the military judge making a determination about how --

MS. FERNANDEZ: I think that it's probably a good idea to send this one to the next panel.

JUDGE JONES: Any objection to that?

MR. BRYANT: No, but I think the finding is good. The finding has stayed the same, but the recommendation is the next --

MS. FERNANDEZ: We could have a finding without a recommendation.

MR. BRYANT: Yes, yes, and I don't think the judge is suggesting --

JUDGE JONES: Oh, I'm not saying --
MR. BRYANT: -- not have a recommendation, just change the recommendation to recommend review by the follow-on panel.

MS. FERNANDEZ: I think that's a good recommendation.

JUDGE JONES: All right. So we will recommend that this issue be reviewed to the judicial proceedings panel.

MS. HOLTZMAN: Because if you read the finding, it kind of suggests that the right is inadequate and is suggesting the need for an expanded right. It doesn't actually say that, but, when you finish reading it, that's what you're left with. And then the recommendation is not clear about that. But I think it's probably a good thing to ensure this issue.

COL COOK: I'm fine with referring it. For me, I still think the better place to refer it is to the Joint Services Committee because they are ones that are responsible for
overseeing for all Services the creation of
the trial process. I understand the judge
oversees it in the courtroom, but I'll --

MS. FERNANDEZ: Could we do both?

Could we do both?

COL COOK: We could do both and
let them both consider it and they can both
consult because the Joint Services Committee
came and they testified before us and provided
us information. They could start looking at
it right now, and by the time the next panel
sits they might have some information or a
recommendation for them to consider, and we've
got the best of both worlds.

JUDGE JONES: Could I just ask one
other question? In the finding, a Special
Victims' Counsel's right to access records is
no greater than his or her client's access
rights. I don't know what that's trying to
point to or what did you hear that made that
a finding?

MS. FERNANDEZ: I think that just
because you're an attorney in the courtroom doesn't mean that you get to access additional documents. You only get to access what, if your client was standing there by himself or herself, what they could access. So it's not like you get special privileges. I think it's kind of an awkwardly -- but it's just asserting that you're limited to whatever you need to assert your right.

COL COOK: And the proper forum probably. You don't want a special victims' counsel being able to walk into the personnel to the unit or into the medical community and saying, hey, I need access to these rights to help my client in a court-martial. It's not the same. It's through the trial process and the forum stays through there. That's where the right exists.

Let's keep it in the right forum so that people within the rest of the command don't get confused and we don't inadvertently violate somebody else's rights. We wouldn't
want a defense attorney to go and get the victim's records either. You do have HIPAA concerns and the control of what information can be seen by any side, the courtroom is the proper forum for determining that.

JUDGE JONES: I think someone's counsel can always endeavor to help their client get records within legal process, which could happen outside a courtroom. I don't know. I just find the statement a little ambiguous or maybe not necessary. I don't know.

PROF. HILLMAN: Judge Jones?

JUDGE JONES: Yes.

PROF. HILLMAN: Just a procedural question. Are we adopting the findings of all the subcommittees as we walk through the report?

JUDGE JONES: No, we're not, we're not. So perhaps we don't even need to engage in this conversation. My comments are on the record. Okay. We'll send the whole thing to
the judicial proceedings panel. Thanks.

Thank you, Professor.

COL COOK: And to the Joint Services Committee.

JUDGE JONES: And to the Joint Services Committee. Is that agreeable to everyone? Okay.

MS. FERNANDEZ: This is where we're asking for the Army to change itself. Separate and distinct Army SVC division. The term has been used --

JUDGE JONES: We're on recommendation 27, page --

MS. FERNANDEZ: Oh, I'm sorry. I am really sorry. There's a change here. I have a note. The following recommendation 27 is identical to the right to speak with SVC that was deliberated and discussed in the victim service portion as a subcommittee. We're skipping one, and this is -- Commander King, I know that we're skipping --

JUDGE JONES: Well, the substance
of 27 we've already deliberated on, I believe.

CDR KING: Yes, we've discussed this and put it in the PowerPoint here. It's the one that we discussed yesterday in the victim services portion. Number two. So we already discussed it.

MS. FERNANDEZ: So we've already deliberated and we already ruled on it.

COL COOK: Yes. And just for clarification, the fact that they get to consult with the victim counsel as a preliminary matter is fine. It was the question of whether or not they got to go to the investigation military police piece that was more controversial, at least by me. Okay. So are we going to 28?

MS. FERNANDEZ: Twenty-eight.

Currently, the Army's SVC unit goes up to the staff judge advocate. The problem there is we eventually see that there could be a conflict between the staff judge advocate and the SVC.

So in this recommendation, we're
asking that the Army create a special division
for the SVC, as all the rest of the services
have done. The Secretary of the Army create
a separate and distinct Special Victims'
Counsel division with its own chain of command
and support personnel to alleviate any actual
or potential conflict of interest between the
SVC and the local office of the staff judge
advocate and ensure SVC independence.

BG DUNN: But in the legal
assistance office, there are regularly
conflicts between the legal assistance
attorneys and the staff judge advocate. So,
I mean, that is a, you know, an operating
environment that has --

MS. FERNANDEZ: The rest of the
Services created a siloed division, and we
thought that there could be a lot of conflict
between the interest of the government and the
interest of the victim. That's how it's
played out in the civilian world oftentimes.

So our idea was, if the rest of
the Services have created its own division, then maybe the Army should -- it's looking like a best practice and that the Army should follow suit.

BG DUNN: Yes, except if the Army pushes its lawyers, aside from the consolidated installation offices where you do have your legal assistance, etcetera, the Army pushes its lawyers into units in a much different fashion than the other services. And it just, when you stovepipe, then you have levels of supervision that you have got to man and support. It just doesn't, I mean, it's huge resourcing.

COL COOK: What might work, I mean, each of the services do use their forces. They have different numbers in terms of the caseload. They have different numbers in terms of, you know, if you look at, the Air Force has regional trial teams. The Army has trial teams at the installation at the unit level. Right now, it's at the legal
assistance offices. If a legal assistance attorney in an Army office has got a conflict with something that the commander might want -- I know in my own case, when I was a staff judge advocate, combat division deployed and the general wanted access to information that one of my legal assistants -- it was a younger judge advocate. My deputy got recused from anything to do with the command. I advised them, he advised the young captain, and we kept a very hard line between it. But that captain got to do it.

The resourcing and the feasibility and the numbers of what you're proposing -- and the SVC is not the only duty in the Army, and the reason for that is to maximize the visibility of it, I think, at the local level. If you've got a legal assistance attorney who's there, you don't have a sexual assault case on every base at every installation. But you do have a legal assistance attorney there who might be dual-hatted and properly trained
if that's the way the Army is doing it.

If you decide to do the stovepipe,
you're probably creating within the Army the
requirement to regionalize it, which means the
availability and the immediate accessibility
might become more limited. By allowing the
Army -- as you said, it seems like a best
practice. But it's a best practice that's
only been developed, the Army was only
allowed, like the other services, except the
Air Force that started this, to put this into
effect as of about January of this year. It's
probably too soon to say it's not working.

So are you fixing a problem to
match everybody else because it sounds good
but costing them the ability to provide more
responsive services at the installation? The
fact that they're the only ones doing it their
way doesn't mean it's not going to work.

JUDGE JONES: Well, maybe we can
just recommend to the Army the appropriate
person to look at this.
MS. FERNANDEZ: Is there a way, though, an evaluation be done if this is really the best way to do it? I mean, we're right. Intuitively, it sounds like let's create a system that has the least conflicts as possible. But if we're creating is more problems, we obviously don't want that. But I think that we need, I think that we've asked for an evaluation every year. I think that the Army's evaluation of this problem, of this program needs to include a consideration of whether it should be its own division.

COL COOK: And that is something, in one of the previous recommendations, you also said that the SVC heads meet and discuss the best practices and evaluate and assess how they're doing businesses and what challenges are out there. It's something that could be discussed in that forum: Is this stovepipe working well? Is it not? Is the dual-hattedness, the way the Army is currently doing, does that work better? Is it more
responsive, especially when you've got a unit out at an operation post where there's not a lot of support there, but you're going to have somebody who can get to that person, no matter where they're at, really quick if an allegation is made.

MS. FERNANDEZ: Absolutely.

BG DUNN: I think if you, you know, the Air Force and the Navy regionalize a lot of things. And I think if you actually push down into this that there are more, because of the way the Army disperses its counsel, you know, you won't have a situation where you've got the SVCs all sitting at Fort Bragg, North Carolina. And if you're in Savannah, Georgia, if you're in Fort Jackson, South Carolina, or if you're in all these other smaller installations, you get that service from Fort Bragg. The way it's constructed now, those lawyers will be there, whereas, based on some of the other things we heard in CSS, I don't think that's going to be
the case. I mean, the Navy is running all of its court-martial operations for the entire East Coast out of Norfolk, you know. So I think that Holly's point about the access is extremely valid.

COL COOK: As I'm looking at it, too, you may actually be getting more coverage through the Army because if you've got them dual-hatted and more available -- you've got 500,000 people within the Army; 26,000, if we look at last year's numbers, of the allegations of sexual assault throughout. If you've got a person who's both through legal assistance but also specially-trained and able and capable of handling the other, you've probably got more people available because they are able to do different things when it's not a criminal law focus, whereas the other services, if they've got pure SVCs doing only that work, my guess is their numbers are smaller and that they are more, you've got to tape into them.
That would be just a concern, but I don't know if we have enough time behind us to say what's in the Army doesn't work. I'd recommend giving them time. But I agree: continue to evaluate and assess it.

MS. FERNANDEZ: Evaluate and evaluate on this specific issue.

MS. HOLTZMAN: I'm not sure I would let the Army make that decision because there's always a kind of sense, well, this is what we've set up and it's going to work. I mean, this is something for the Secretary of Defense to look at.

JUDGE JONES: Or maybe the Joint Services?

MS. HOLTZMAN: I think they just do, basically just do military justice.

COL COOK: I don't think it's the Joint Services Committee.

JUDGE JONES: Okay.

MS. HOLTZMAN: I would give the Army at least a year to have this --
MS. FERNANDEZ: We're asking for an evaluation every year already, so I think that this would be added to but the decision --

MS. HOLTZMAN: Okay, fine.

MS. FERNANDEZ: I agree with Representative Holtzman. It should be a call that the Army doesn't make but --

BG DUNN: The SECDEF looks at conflicts issues, whether or not conflicts issues are --

MS. HOLTZMAN: This structure is providing the same level of services the other agencies --

MS. FERNANDEZ: And I think it must be the opposite, as well. If the Army, because we are dual-hatting people and making it more available at more installations, that it becomes, the evaluation assessment is both ways.

JUDGE JONES: So does this get tucked into a previous recommendation where we
add it as something to be evaluated?

MS. FERNANDEZ: I think so. I think it probably gets tucked into recommendation on evaluation, which is like, I think, one of the first ones under the SVC. Yes, I think it's recommendation 21. Yes, it could be -- yes, it could be 21 or 22. I think you could probably put them in under both, but one of the -- I don't know. I feel a little that would it be inappropriate to start tasking the inter-Service working group with what it needs to do? It should make its own calls, but the evaluation should definitely consider whether the stovepiping or creating discrete divisions for the SVC is a best practice.

COL COOK: So I just went and looked at number 21, and it was the appropriate metrics. What do we measure? How do we know if this is working? And then the actual evaluation and assessment of what the information that you gathered was what I was
seeing there that we discussed in 22. I'm not sure. You're right. It needs to be in both, or it needs to be questioned in the first for the metrics and then evaluated to determine what is the best practice --

MS. FERNANDEZ: I don't necessarily know if we saw that 22 was the group that would do the evaluation. You can get an outside evaluator to do the evaluation of it. But I think that one of the metrics that we mention is the creation of separate divisions, that that's the best way to -- if you get the best results by creating separate divisions or if each Service needs to create it slightly differently because of its needs.

JUDGE JONES: So do we want to include it in 21 or 22?

MS. FERNANDEZ: I think it's 21.

JUDGE JONES: Okay. So we just want to add some language that would include any issues with respect to conflict of interest?
MS. FERNANDEZ: Conflict of interest and for a specific evaluation to be done with regards to the organizational structure of the SVC, whether it's better to be its own division or to be incorporated under the staff judge advocate. And somebody I'm sure can say that much better than I just did.

JUDGE JONES: We'll try to take from the language in 28 and include it --

MS. FERNANDEZ: Incorporate it into --


MS. FERNANDEZ: Twenty-nine. We basically came out the same way as the Comparative Systems Subcommittee on adopting the VPA, 2014 VPA. We thought that Congress should defer adopting. I think the Comparative Systems said that you shouldn't adopt.
We felt that there just wasn't enough testimony before Congress to adopt this. So our recommendation here is Congress defer adopting 1917 Section 3 of the Victims' Protection Act of 2014 until Congress obtains further evidence and information about the potential impact of such legislation on victims in the military justice system.

JUDGE JONES: Do you have your language, just to remind us?

PROF. HILLMAN: Your Honor, I wonder if we should just defer this until we get the Comparative Systems Subcommittee report language, until we get that final report, so let's just hold -- I think this will be subsumed in that.

JUDGE JONES: Well, that's true. We haven't gotten the final report, so why don't we hold since we have parallel recommendations here, different but parallel? And we can discuss them together, probably on May 16th. Okay, thanks.
MS. FERNANDEZ: Recommendation 30.

This has to do with entry-level personnel. The Navy, Marine Corps, and the Coast Guard implement or amend their individual SVC policies to provide for SVC representation for entry-level personnel who are led to have been involved in a relationship that involves sexual contact with an instructor or staff member, even though a crime has not been alleged.

Scenarios that we saw here where somebody got involved with an instructor, but it was a consensual relationship. And the instructor is being court-martialed, but you have to look at the person, the subordinate also, that they may need representation during that time. There may be victim rights that need to be asserted during that time.

And so even though it was a consensual relationship, there is some sort of a proceeding that's taking place where the commander or the superior is being
adjudicated. And so during that time, the
victim would also need an attorney.

JUDGE JONES: What kind of
proceedings are we talking about?

MS. FERNANDEZ: I think my
understanding, and I think, Lisa, you're the
one who clarified this for me, it would be in
a situation where you've got an instructor
who's having a relationship with a
subordinate.

BG DUNN: He's being prosecuted
for, I mean, especially in training
environments, absolute prohibitional contact.

JUDGE JONES: So he's being --

BG DUNN: He's being --

JUDGE JONES: -- that there's no .

BG DUNN: Yes, because the
relationship was consensual, so there's not a
rape. It's not a sexual assault, it's a
consensual relationship prohibited for good
order and discipline.
MS. SCHENCK: Right. It would be considered to be an inappropriate relationship or violation of regulations, including the Department of Defense, and that actually is a crime. But it would be more of a consensual sexual relationship, as opposed to a sexual assault, per se. These are now treatment of subordinate charges, inappropriate relationship charges, violation of regulations charges, those kind of . . .

PROF. HILLMAN: I'm confused by the recommendation which ends with the clause even though a crime has not been alleged because you're describing things that aren't criminal.

MS. SCHENCK: The end phrase is inaccurate because they are military crimes.

MS. FERNANDEZ: So it's outside of an Article 120.

MS. SCHENCK: There would be some rights, I believe. If it went to a court-martial, obviously there would be some rights
of the victim if there was a motion made
regarding, you know, the psychotherapist, the
513, Military Rule of Evidence 513. There may
be some like that. I have personal views
regarding this conduct.

JUDGE JONES: What are the SVC
policies now with respect to representing,
let's say, a --

MS. FERNANDEZ: Because there's no
sexual assault, it's not an Article 120.

JUDGE JONES: It's not a 120.

MS. FERNANDEZ: So the SVC
wouldn't be called in. And what we're saying
is --

JUDGE JONES: Right now they're
only handling 120s.

MS. FERNANDEZ: Correct.

MS. SCHENCK: And these are entry-
level individuals. In other words, they're
brand new enlisted individuals, recruits.

JUDGE JONES: Well, are they
typically going to be asked to testify, for
instance? I don't know.

COL COOK: Page 18 and 19 of the draft subcommittee report in the first finding says that the Army and the Air Force do provide the SVC representation for entry-level personnel in these situations. It's the Navy, Marine Corps, the Coast Guard that do not in this situation for the entry-level personnel.

I guess my question is the policy doesn't provide for it expressly. Do you know if the Marine Corps or the Navy, are they actually getting that representation, even though their policy doesn't say it? And if they're not, I guess my question would be why not? Was it a resourcing issue for why the policy for them said that? I mean, again, it's feasibility and resource, and you don't want to put a right out there if they can't fulfill it. I'm not sure if you know that or not. I'm sorry.

MS. SCHENCK: I cannot speak to that. But I've got to tell you the Marine
Corps has a very expansive SVC program, so I'm not sure it would be a resource issue. They include child victims in there, and I think it's all crime victims in the Marine Corps. It's all victims of crime, not just sexual assault.

COL COOK: That they get an SVC?

MS. SCHENCK: Yes.

BG DUNN: And this case is a little different because the woman is not a victim.

JUDGE JONES: Yes, the problem is technically not a victim.

BG DUNN: Right. Technically not a victim. Right. Because it was a consensual relationship.

MR. BRYANT: I was just going to question the use of "victim." I understand the concept of entry level. And if I understand your recommendation, it's just that it be limited to these entry-level training situations because, otherwise, the other
person in that event is an unindicted co-
conspirator in the civilian world.

COL COOK: It's just something
that maybe we do like we did with the other
one. We say that, because the Services, for
whatever reason, are implementing it
differently in their own way but maybe as part
of that metrics and the evaluation of
measuring is this effective or not, is it a
problem. If it's a problem then give the
right. If it's not, I don't have any --

MS. FERNANDEZ: I think that the
rationale behind this was you get somebody
who's an entry-level position coming right in
and you have a superior who is engaging in a
relationship with you, and you may think it's
consensual, but you're so young and you don't
know what you should be doing or how you
should be doing it. And so if somebody says
did he force you to do this, your answer is
no. But did you really have the wherewithal
to make that decision? No.
So I think that that's what this is going to: making sure that individuals who find themselves in this situation are apprised of their rights because after somebody talking to you for a while you may say, what you may realize is that you've been being groomed. And then you find yourself in what looks like a consensual relationship but is actually not.

JUDGE JONES: Go ahead, Professor.

PROF. HILLMAN: I wonder if we should -- I actually see this as a big issue with the SVC program. That is, who gets one and how are we drawing those lines? Because it is different across the different services, and you flagged one of the issues that is different. But I think there are more because crime victims across the board -- this came up in our site visits. Some of the counsel providing these services questioned what the parameters are and whether they're the appropriate ones, given the needs of the crime victims that appear.
So I wonder if we can roll this into our recently pumped-up recommendation number 21 and say a part of the evaluation, establishing metrics, assessing the organizational structure, and considering who qualifies for Special Victims' Counsel should be done on an annual basis or on some regular basis. Would that satisfy these concerns? These could remain in the findings about entry-level people, but I'm not sure that --

MS. FERNANDEZ: Yes, I think that's a good, friendly amendment.

JUDGE JONES: Everybody in agreement? Thank you, Professor Hillman.

MR. BRYANT: I'm going to agree with that. I just want to add the comment to what I said earlier that, instead of entry level or the training level, maybe we need to say something to the effect of a year or less in service. In other words, don't necessarily limit it to those first 16 weeks of training.

I'm not sure what your
subcommittee had in mind when you meant entry level. If you want to put a rank on it, as opposed to say anyone who's had less than a year service. I realize we're going a different route now with the Comparative Systems' findings and recommendations but --

JUDGE JONES: And we're actually just broadening it and telling them to assess who should be --

MS. FERNANDEZ: Who should be getting it and for what -- yes. I think that your concern could be also subsumed into the recommendation that Dean Hillman just made.

JUDGE JONES: Thank you. All right.

MS. FERNANDEZ: We're done with the victims' counsel section. We're moving on to victims' rights now. I think our intent with looking at these recommendations is that we were trying to make military law and the CVRA as parallel as possible. We also recognize that there's different mechanisms at
play in the military that don't exist in the
civilian world or vice versa, so there was
times where what was done in one system
couldn't automatically be done in another
system. So that was just sort of our thinking
behind this.

The first one deals with a right
to confer with a convening authority. It
says, "The Secretary of Defense direct the
creation and implementation of mechanisms
where not currently in place requiring trial
counsel to convey the victim's specific
concerns and preferences regarding case
disposition to the convening authority so the
convening authority may consider on the
victim's concerns and preferences prior to
making the decision on a case disposition.
These procedures will account for the
convening authority's role in the disposition
of cases under the military justice system and
create a process more analogous to a victim
conferring with a prosecutor under the CVRA."
So in the civilian system, the victim has a right to confer with the prosecutor. That's not quite the same in the military system. So we wanted them the right to confer with the convening authority, and that was sort of the change that we were looking to make here.

MS. SCHENCK: I just want to address something that occurred in the subcommittee meetings. Basically, the members understand that the convening authority is actually the one that refers the case to trial. As in the civilian sector, the prosecutor would be the equivalent party.

My comments during the subcommittee involved the fact that the accused doesn't get to see the convening authority even through counsel. It's a very limited scenario. And so I think this is more agreed-upon language in this recommendation to ensure that the victim's concerns are actually getting to the convening authority. And I
think the judge advocate retirees here would attest to, generally, we know the trial counsel is doing that. But to ensure that there is some equivalent to the CVRA, that's our agreed-upon language.

JUDGE JONES: Do we have -- and I can't find it. In your report, in the appendix, is there the current legislation that has passed for the Crime Victim Rights Act for the military?

CDR KING: Yes, ma'am. It's Appendix J.

JUDGE JONES: J? Thank you. This is some appendix.

COL COOK: Is it the portion that says, on page J2, the reasonable right, underneath the middle column where it says the reasonable right to confer with the attorney for the government in the case, although it doesn't say at what point. It just says the right to confer with the government counsel.

CDR KING: The first column is
always the NDAA language, and the second is
the CVRA, third is the policy in effect under
the DoD.

JUDGE JONES: Okay. So in the
first and third columns, we have the law and
we have the DoD directives as they exist now.
I just want that context while we're looking
at these recommendations.

Unless someone disagrees, I think
we all agree that this is information that the
convening authority, you know, should get. So
I don't have any disagreement with the, you
know, the right, as it's --

COL COOK: As it's written, where
it says the trial counsel must convey the
information, as opposed to, Ms. Fernandez, the
comments of saying they have the right to
confer with the convening authority. You
don't have a right to an in-person visit, but
you can input in that stage the process is
important, it should be considered is what
your message is in here. Okay.
MS. SCHENCK: So the title of the recommendation is inaccurate because it's not --

COL COOK: It's not the right to confer. It's high level. It says right to confer on the slide.

MS. SCHENCK: Well, I guess it's confer with trial counsel.

COL COOK: Yes. But that's not what the recommendation says itself is where the concern comes in. It's the right, the trial counsel has to --

MS. SCHENCK: It may convey those concerns to the convening authority.

COL COOK: So this is a right to input.

MS. SCHENCK: Because, I mean, there was one issue with the General Sinclair case, if you remember, where the victim, Special Victims' Counsel provided that information to the convening authority, and the convening authority announced on making
this decision to go forward with the court-
martial based on, solely based on the victim's 
assertion that she wants to go to trial or the 
victim's concerns. And so that, the judge, I 
think, considered that to be command 
influence, and so, to avoid those type issues 
and requiring convening authorities to come 
for or see victim counsel or the victim, we 
thought this compromised language would do 
what everyone, address everyone's concerns 
equally.

PROF. HILLMAN: Let me just ask a 
qualifying question then. Are we then, are we 
constraining what special victims' counsel can 
do by making this recommendation? If that's 
our intent, that's not clear to me in here 
because we're not talking about the SVC in 
this finding at all.

MS. SCHENCK: No, I think there's 
dual concerns. There's a concern that the 
information is not getting to the convening 
authority and the convening authority is
convening the court-martial. In the civilian sector, the prosecutor would be doing it. That's the first concern.

The second concern is that we, some of the members on the panel wanted to actually have a conference, allow for this conference with the convening authority. That's what probably in the civilian sector does occur, right? The victim can go see the prosecutor and urge that prosecutor directly, even without a special victim counsel.

In the military, we have command influence issues which need to be taken under advisement when we're looking at our recommendations. We have to be weary of how this is going to be viewed. When we tell DoD to do something, they're going to likely do it. I mean, that's what DoD does. They take the report and then they report on which recommendations they've taken and which they have not and have to explain why they have not.
With those concerns and the concerns addressed by all the parties on the subcommittee, this is how we believe it would address both of those issues.

MR. BRYANT: I think I have a corollary to Dean Hillman's concerns. Excuse me, Judge Jones.

JUDGE JONES: No, go ahead.

MR. BRYANT: Are we saying that the trial counsel must but the victim counsel cannot, should not take these concerns to the convening authority, or that they both can?

MS. SCHENCK: No. I believe the special victims' counsel, and if I were a special victims' counsel I would be requesting a meeting with the convening authority, you see? I mean, you can do that, and some convening authorities may actually see both parties, defense counsel with accused and special victim counsel with victims. They can do that. That's all still out there, that availability. And it does occur. It's just
that no one directed regarding that. And
those special victim counsel are very good at
advocating for their clients.

MR. BRYANT: And then requiring or
asking an implementation of a procedure where
the trial counsel does it also, I'm just, what
are we gaining by ensuring that trial counsel
presents these issues to the convening
authority when the special victims' counsel
can also do the same thing?

COL HAM: Sir, remember the NDAA
crime victim rights apply to all crime
victims, so most crime victims are not going
to have an SVC. So all of these crime victim
rights are legislated for all crime victims.

MR. BRYANT: Is that the
difference we're talking about, when there's
not an SVC in a court-martial case, a general
court-martial's case?

BG DUNN: It just provides another
option. I mean, the SVC, as a matter of
course, go to the convening authority. It
would be a relatively exceptional case where that would happen. So this, I think, taking what Colonel Ham just shared with us into consideration, this, A, provides a mechanism for all crime victims to get their information to the convening authority because many of them are not represented by SVCs, and it also provides an additional option for the SVC representing the sexual assault victim to say, wow, you know, I think that fairly captures my concerns, and the staff judge advocate can take it to the commanding general for discussing during the referral process. You know, if the SVC makes a request to speak to the commanding general directly, that option is out there, as well.

MR. BRYANT: Well, I'm in favor of this absolutely. I'm just wanting to clarify whether or not we're duplicating who's going to be going to the convening authority on behalf of a victim in a particular case or victims in general, in general court-martial
situations. That's all I was trying to get
some clarification on.

MS. FERNANDEZ: Mr. Bryant, I
think you raised a --

COL COOK: But here's the
procedures, just to understand it. In a
general court-martial situation, it's
generally not the trial counsel that's going
to be bringing it to -- this thing says that
the trial counsel has to convey it. That
means when the trial counsel is preparing the
file, it's going to go up to the general
court-martial convening authority. It's the
staff judge advocate at that installation that
takes it into the general court-martial
convening authority.

And one of the documents that
Colonel Morris had mentioned yesterday was
something called a pretrial advice. Depending
upon the stage at which this case is going on,
in that pretrial advice, it's a written
document that's going to be part of the record
at trial that says is there jurisdiction, is there probable cause for the offenses, has there been an Article 32 in a general court-martial convening authority, do we have input from the victim is what I would envision that being and it being attached.

So what you've done is put the onus on the trial counsel to capture the information from a special victim counsel or the victim, attach it to that document, and ensure it is part of the packet that is then seen by the convening authority at the general court-martial level.

Trial counsel has access directly to a commander if you're talking about your company commander, well, lower-level commanders. It's different than the other Services. That's from the Army perspective. But it would probably go in the SJA advice that's going to the convening authority, not a special visit by the --

MS. FERNANDEZ: We didn't
contemplate that, but I think that provides the mechanism.

MR. BRYANT: No, I want to make it clear I'm in favor of this happening. It's just I have some questions about --

MS. FERNANDEZ: No, and I think the Colonel just gave us the way, too. We saw the problem, but I don't think that we had fleshed out the actual mechanism to solve it. Thank you.

JUDGE JONES: So maybe we should just take out requiring trial counsel and say direct the information implementation and mechanisms that are not currently in place to convey. Is that what you just said? Okay, great. Then that's accepted.

MS. FERNANDEZ: The right to be heard at a plea agreement. The right to be heard on a plea agreement is not directly analogous to the military justice system due to the differences in the manner in which pretrial agreements are accepted under the
military practice as compared to the civilian system. The analogous opportunity for victim's input to be heard in the military justice system is before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement submitted by the accused.

So we wanted, again, to make it analogous to the CVRA, and this is the recommendations, 32 through B, "Secretary of Defense recommend to the present changes to the Manual for Courts-Martial and prescribe appropriate regulations that provide victims a right to be heard regarding pretrial agreements. The proposed changes should provide victims the right to be heard regarding a plea with appropriate consideration to account for military pretrial agreement practice. The recommended changes include the right to be heard before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial
agreement offer submitted by an accused. The convening authority should retain discretion to determine the best means to comply with this right and consider the victim's opinion, e.g. submission in writing or in person."

So, again, we're just trying to line up the civilian law with the military law on plea agreements.

JUDGE JONES: Is there a reason why -- I'm sorry -- we're asking the Secretary of Defense in 31 to create and implement mechanisms, but we're asking him to recommend a change in the Manual for Courts-Martial in the second one? I'm just curious.

MS. FERNANDEZ: There is. I am not currently privy to that information.

COL HAM: Ma'am, this is a specific statutory direction to the panel to examine a provision of a CVRA that was not implemented by the National Defense Authorization Act.

JUDGE JONES: Right.
COL HAM: If you look and see what
the victim has a right to be heard on right
now, there is no --

JUDGE JONES: It doesn't say that,
right.

COL HAM: So Congress directed the
panel to look and see if that should apply.

JUDGE JONES: Oh, I see. So 31 is
just implementing -- I got you. All right.
That helps. Thank you very much.

COL COOK: Colonel Ham, can you
tell us more about what is the exact right to
be heard on a plea under the CVRA? I mean, a
plea in the military is the offer to plea
which has got substance, it's got a cap.
Nobody sees that beforehand.

COL HAM: That's to confer -- if
Meg Garvin was here, she'd be much better at
this. That's the right to confer with the
counsel for the government on pretrial
agreement, on negotiations and things like
that. There's a separate right to be heard.
So there's a right to confer with the
government for some things, the government
counsel for some things, and there's a right
to be heard, which would typically be in court
during the proceeding.

PROF. HILLMAN: Colonel, it's on
J1 and J2 here in the second column, the right
to be reasonably heard at any public
proceeding in the district court -- this is
from the CVRA -- in the district court
involving release plea or sentencing or any
parole proceeding. And that's where I think
the right to be heard is set up.

And then the right to confer that
Colonel Ham just mentioned is in the next box,
second box on J2 in the second column that
says reasonable right to confer.

COL COOK: So the right to be
heard is during the court process, not in the
decision of the -- I mean, right to be heard
is in court at the end of the plea agreement
or before it's accepted? I guess I'm just
trying to figure out where it's a right to be heard. If it's in court or at a public hearing and you have an accused in a military court-martial in there offering to plea, making their statement about what they're going to plea to, are we talking about in the process where before the judge accepts that plea or not the victim gets to be heard at that point? Are we talking about pretrial before the convening authority even says it?

That's, I guess, where my questions come in. I don't understand where that right is right now or, comparably, if it's public hearing in the civilian side, then, arguably, it's when somebody is standing in court saying it maybe before the judge makes a decision. Do we know how it works?

COL HAM: I don't want to speak for the subcommittee members. The discussions they had reflected an understanding in the difference in, for the issues that would be caused if a victim had the right to be heard
on the plea before a sentence was announced
because the sentencing authority does not know
what that sentence is. I don't think the
subcommittee members heard about legislative
history as to why the right to be heard on a
plea was left out of the recently-enacted
military victim rights act. That's not the
right name for it, but that's what the
subcommittee referred to it as. So their
discussions reflected how are we going to give
an analogous right to a victim, understanding
the differences between the pretrial agreement
negotiation in the military versus the
civilian system.

BG DUNN: Just so I understand
this, so rather than using the term "heard,"
which might imply some sort of appearance in
court, what we're really looking at here is
the victim being able to comment to the
convening authority on a proposed plea
agreement, correct?

COL HAM: Correct.
COL COOK: I'm raising the question do they get access to the entire plea agreement? Because in the military, there's two parts to it, one of which doesn't get seen by anybody except the convening -- I mean, having that input to them and telling a victim what the plea agreement is that they're going to come in, they'll plea guilty to the non-sexual part or not the assault, whatever their terms of it are, to making sure they understand that and that the sentence is not determined and will be determined by the court but not necessarily being given the cap, the quantum portion -- thank you -- process, the how much, what is a person pleading in exchange for? Because that is not something in the military system that's left out there.

But I think the right to input by a victim is usually what happens. I think it happens now. What you're doing is codifying it in some way, and I think that would be great.
MS. SCHENCK: There's nothing that's parallel in the military. But when we had our discussions, it was more along the lines of, well, you would approach the victim and tell her this is the window of a potential sentence he may get and this is what he's likely to plea to, are you okay if we dropped the rape but we kept this other charge on? So you will get into those kinds of discussions, which already occur and they do already occur. But there's nothing in writing to show the civilian sector that we actually do this, so there's no equivalent right.

BG DUNN: But the act already provides for that conference with the military prosecutors.

MS. SCHENCK: But if you look at the chart, there's no equivalent provision regarding specifically.

BG DUNN: But if we do that, we have to specifically indicate that that does not mean that the SVC or the victim are
entitled to the quantum portion of that agreement because the next thing you -- you know.

MS. SCHENCK: But I think you can make your recommendations broad enough such that the Department of Defense, the Joint Service Committee is really who is going to do this. The Joint Service Committee is going to be the group that sits down to craft this language, and those are the military justice experts of all the services.

So I think the goal of the panel should be that you make the recommendation broad enough such that they can work their magic but restrictive enough to address your concerns. You know, the word "heard" is problematic, but right to be heard is --

MS. FERNANDEZ: Well, my sense is also, before the convening authority has made their decision, she'd want input into the plea agreement so that whatever I say as the victim the convening authority will consider in how
they come out with the agreement. So I think it's important that it's in the correct portion of the process. I think that's what we are aiming for. We wanted to be heard in a moment where it was going to make a difference. If it was going to be after the plea was baked, then there was no sense in it.

BG DUNN: And you want to include that was one of the items the convening authority considers. The convening authority can no longer consider the characterization of service. That was taken out, right? But now the theory would be you put in the convening authority, prior to referral, will consider, you know --

JUDGE JONES: Victims' input or something.

BG DUNN: Right. And I think, having been part of that Joint Service Committee, I know those military justice critics will know the correct language.

MS. SCHENCK: But we can't say,
yes, but we have to make it clear that that
doesn't mean the victim and the SVC have the
proposed plea agreement quantum portion and --

MS. FERNANDEZ: We look at the
language to figure out what the amended, what
we need to amend.

COL COOK: What I was going to
suggest is that we go back to recommendation
number 31 because I agree with you: having it
at the right portion before the convening
authority takes a deal. A case, It goes to a
general court-martial convening authority.
They're going to bring the case to the
general, to whoever the convening authority is
to make a case referral. They're going to
bring it back to the convening authority if
there's an offer to plea. That might be the
same visit, it might be a separate visit.

But in recommendation 31 where we
said that the Secretary of Defense direct the
creation and implementation of mechanisms
where not currently in place requiring trial
counsel to convey the victim's specific concerns and preferences regarding case disposition and just say concerns and preferences to the convening authority so that the convening authority considers victim concerns and preferences prior to making a decision on case disposition or to accepting or declining any plea agreement. I mean, it would incorporate the same thing, that they get the right to input at both stages of it before they make any decision. Does that meet your requirements, too?

MS. FERNANDEZ: Yes.

JUDGE JONES: All right. I'm still, I still think we should take out requiring trial counsel just to --

COL COOK: Right. I'm sorry, yes, yes. Thank you. Just it gets to the convening authority at the right time, and that's before.

JUDGE JONES: All right. Is it ten to three?
PROF. HILLMAN: Yes. Can I ask one question?

JUDGE JONES: Yes, go ahead.

PROF. HILLMAN: Just a question.

Did you consider victims' perspective on the beat-the-deal phenomenon of pretrial agreements?

MS. FERNANDEZ: No, we did not.

PROF. HILLMAN: Do you think that that's of concern in assessing whether or not victims have -- I mean, you're giving them a right to confer with the convening authority to establish a ceiling on the sentence, but not the actual sentence that will be adjudicated at the court-martial, unlike in civilian jurisdictions where this right, as this right plays out. So when we're looking at something and comparing the national Crime Victims' Rights Act to the NDAA, that seems a relevant distinction because of the plea --

MS. FERNANDEZ: I think you're right.
PROF. HILLMAN: -- process being different in the military.

MS. FERNANDEZ: We didn't consider it, but I think it may be a friendly amendment.

JUDGE JONES: And we keep saying confer, but we mean convey. All right. We're going to break now.

(Whereupon, the foregoing matter went off the record at 12:23 p.m. and went back on the record at 1:15 p.m.)

JUDGE JONES: All right, Ms. Fernandez.

MS. FERNANDEZ: Judge Jones, I have a suggestion which I would like to put forward to the panel.

In looking at Recommendations 31 and 32 over the break, I realized there was some level of confusion between the right to confer, the right to be heard, and the right to convey. Our specialist in the Crime
Victims Act is Meg Garvin. She is not here today. We would like the opportunity to talk to her and have her input before we make any amendments to these findings because we could be doing something that we don't mean to do, if we don't talk to the expert.

So, I would ask that we put aside Recommendations 31 and 32 and bring them back up next Friday, when we meet again.

JUDGE JONES: That sounds fine to me. Good idea. So, we will deal with them again, discuss them again, with Ms. Garvin available to us on next Friday.

Thank you.

MS. FERNANDEZ: Thank you.

So, we are on to Recommendation 33. And this deals with standing to enforce victims' rights.

The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6(b) of the UCMJ at trial at appellate courts.
Specifically, the Secretary of Defense recommend to the President changes to the Manual for Courts Martial and prescribe appropriate regulations to expressly provide for a victim's ability to assert a violation of his or her rights in the trial court in which the crime occurred at any relevant time in the proceeding, including pretrial, during trial, and post-trial.

The Secretary of Defense will provide procedures for a victim to seek mandatory expedited review of any alleged violation of those rights listed in Article 6(b) of the UCMJ for an appellate court.

So, this asserts standing. Also, we are asking for the Secretary to figure out the procedure by which it would go to the appellate court, so that it wouldn't disrupt the trial for too long a time. But we feel that there is a need for there to be some appellate review when a victim's right is violated.
PROF. HILLMAN: Judge Jones?

JUDGE JONES: Yes.

PROF. HILLMAN: I just have a question. Would the JSC craft these procedures?

MS. FERNANDEZ: We put down the Secretary of Defense. I don't know.

JUDGE JONES: I'm sorry, you should finish your point. I have another.

PROF. HILLMAN: It is just a military justice process essentially that would be standing, that would be crafting the way in which standing would -- so, I support the recommendation for standing, but I just wondered if the JSC ought to figure out we do it rather than having the Secretary. I mean, I think it would go to the JSC regardless, but --

JUDGE JONES: So, my question is I think if I am reading this chart correctly, the NDAA that has been passed has directed the Secretary to consider mechanisms for reporting
rights to victims, mandating that regulations include mechanisms for the enforcement of such rights, including mechanisms for application for such rights and for consideration and disposition of applications.

So, I am just wondering if they don't overlap.

MS. FERNANDEZ: The FY14 NDAA did not specify any enforcement mechanisms. Rather, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual of Courts Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications for such rights.

That was Finding 33.1.

JUDGE JONES: I think we are saying the same thing.

MS. FERNANDEZ: CVRA provides for the legal standing. So, we wanted to make it
equivalent in the UCMJ. And it also provides for expedited review.

JUDGE JONES: Where does the CVRA have -- could you point me to the language where it provides --

MS. FERNANDEZ: If you look at Finding 33.2 --

JUDGE JONES: Uh-hum.

MS. FERNANDEZ: -- we would have to look in the chart in the back, Commander King, to show where.

CDR KING: I'm sorry, it is under enforcement in the middle of the page.

JUDGE JONES: It seems to me, though, that that is what they are doing in the civilian courts. And we are asking the Secretary to give us a similar explanation.

MS. FERNANDEZ: Also, looking at our terms of reference, if we could all the way back to our terms of reference, the last one says that we need to address standing.

Right there, the last one.
Commander King, if you could read it?

CDR KING: Sure. It says, "Assess the feasibility and appropriateness of extending to victims of crime covered by the UCMJ the rights afforded the crime victim in civilian criminal legal court proceedings under Subsection 17(a)(4) of Section 3771 of Title 18, United States Code," which is the CVRA, "and the legal standing to seek enforcement of crime victim rights provided by Subsection (d) of such section."

So, it is basically one of the terms of reference of this Committee is the Subcommittee's understanding.

COL COOK: Was this also something that Meg Garvin was particularly knowledgeable on in terms of how it works in a civilian court and, then, how we can then analyze it in terms of the military court? And if we are deferring the other things, do we want to defer this one as well?

I don't know whose idea --
MS. FERNANDEZ: I mean, we could.

This is pretty straightforward. It is providing for standing.

JUDGE MARQUARDT: I am wondering if in the fifth line, I think the words "in which the crime occurred" are not accurate because, you know, it is not the trial court in which the crime occurred. I think we need to delete those words.

JUDGE JONES: Well, are you thinking that you need similar language to the enforcement section in the CVRA? Is that what we are talking about?

MS. FERNANDEZ: Yes.

JUDGE JONES: Which doesn't actually say "standing," but it does say, "The rights described above shall be asserted."

And obviously, it wouldn't be in a District Court. It would be in a military court.

MS. SCHENCK: On page 139 of the report, there is a list of the Article 6(b) UCMJ rights that we are talking about. And if
you look at that, and you keep those in mind, my recommendation would be to keep it broad. But the view would be what Professor Hillman said. The Department of Defense, the SECDEF, is going to hand this off to the Joint Service Committee. That Committee is going to craft proposed changes to the Manual for Courts Martial, which I believe is going to end up to be sort of an extraordinary writ process for victims.

Am I clear? So, what will happen is the Manual for Courts Martial will be modified to ensure that there is some enforcement capability for victims who don't get those Article 6(b) rights on page 139?

When an accused doesn't get rights, an accused uses the extraordinary writ process to get to that appellate bench, to get the appellate bench to issue a writ, a writ of prohibition, make them stop; a writ of mandamus, make them do this.

And I believe for enforcement of
victim rights that is what the Secretary of Defense and the Joint Service Committee would have to look at.

I agree with Judge Marquardt, the language "in which the crime occurred" is not applicable for the military.

COL COOK: Do you know, is there a time limit in terms of even on the extraordinary writ process for an accused who has a writ that way? What is the timeline that those are usually turned around and get the trial stopped at that point?

MS. SCHENCK: Right, and it depends. So, a petition for a writ an appellate court will look at as soon as possible. That is the appellate bench process.

However, I have seen writs where it took quite a while to get the pleadings from the parties. So, while the court may act on it quickly, the pleading process will not, and that is driven by regulation for the
Services.

COL COOK: And is the court martial itself stayed while the writ is pending?

MS. SCHENCK: So, it depends.

MS. FERNANDEZ: Can I narrow the issue?

MS. SCHENCK: Yes.

MS. FERNANDEZ: I mean, is there something in the language of how the recommendation is currently written that people, other than in the court which the crime occurred --

COL COOK: The beginning of even the terms of reference says, and it was up there, it was like "the feasibility and accessibility". And that is what I am trying to figure out, yes.

Thank you.

"The feasibility and appropriateness" of extending that right to the victim.
So, what I am trying to figure out is what the impact that would have. You know, in a military setting, where it is expeditionary, where it is done no matter what the environment is, whether I am in Baghdad, Ft. Hood, Texas, Virginia, it doesn't matter.

I am just trying to figure out what that impact is on it before saying -- should they have the opportunity to say something? Yes. Is that appellate process standing in the courtroom itself, is it through a written process? I'm not sure that's not the better way to do it. We didn't get a lot of information on that in any of the testimony we have, although your Subcommittee did. So, getting that information to you --

MS. FERNANDEZ: Well, I think part of the problem is that you can't wait until the process is over to assert the right because at that point, if something -- because double-jeopardy will attach. So, you have got to assert the right in the middle of the court
proceeding and, then, be able to appeal it, because you are not going to have a chance after the trial is over.

JUDGE JONES: You know, did we skip away from 33, though?

MS. FERNANDEZ: No, we are still on 33.

JUDGE JONES: Okay. I think I understand now. And basically, what you want is for the Secretary of Defense to essentially recommend changes to the Manual for Courts Martial, but, first, clarify that victims do have standing to enforce their rights.

MS. FERNANDEZ: Assert their rights. Correct.

JUDGE JONES: Okay. Well, does anybody disagree with that?

COL COOK: No, standing to enforce their rights.

JUDGE JONES: Okay.

MS. FERNANDEZ: And then, I think that the second part, I understand where the
Colonel is coming from, but at the same time you have to have a mechanism by way you can do this in the middle of a trial.

COL COOK: But what that mechanism is I am not sure. You know, I am not sure I can articulate in my own mind to be confident of what that process would be. So, I would want people who what that impact — right now, I have got page 139, and what I am looking at is exactly, reminding myself again, what are the rights that we are saying that they get, that a victim would get to have enforced? The right to be protected from the accused; the right to reasonable, accurate, timely notice of the following; the right not to be excluded from a hearing; the right to be reasonably heard at a public hearing, a sentencing hearing; their reasonable right to confer with counsel representing the government.

MS. FERNANDEZ: Well, let's say you were excluded from a hearing.

COL COOK: That's right, you want
to be able to -- that is what I am trying to understand, what the rights are. So, what is the best time to do.

MS. FERNANDEZ: Right.

COL COOK: If you are excluded from the hearing, the question I would have is, who would exclude you? You could take that to the judge in which the case is pending right there. You know, this Special Victims Counsel would be able to go into that court and say to the judge there and then, "Hey, I have asked to be included. I'm not on the witness list. You should hear me."

If the judge says no, where do you appeal that?

MS. SCHENCK: That would be the interlocutory appeal that normally parties to the case would have, the capability or right --

COL COOK: Right.

MS. SCHENCK: -- or, too, the Petition for Writs for the accused. Now put
the third party in there who has rights that
in the civilian sector have an opportunity to
appeal when they are not given those rights.

So, the trial judges make
mistakes. So, the trial judge may not fulfill
these rights. And so, the question is, how
does that work?

Now, on the other side, remember,
the accused has a right for a speedy trial.
So, you have got these two things, these two
rights, and they are in tension with each
other.

So, I think that, again, allowing
for the broad language, let them figure it
out. I mean, but, remember, our mission is,
one of our requirements is to look at just
that, legal standing. It is well beyond our
ability to tell DoD how to go about that. We
just know that they should have legal
standing, as their counterparts in the
civilian sector do, right?

MS. FERNANDEZ: Okay. Let's say
that we agree with the first two paragraphs of (3). The last is open-ended language on what the procedure would look like.

COL COOK: I'm sorry, the last two --

MS. FERNANDEZ: The first two paragraphs of 33.

COL COOK: Sentences?

MS. FERNANDEZ: Yes.

COL COOK: Okay.

MS. FERNANDEZ: I guess they are very long sentences.

There's disagreement, or I don't even know if there is disagreement of the final sentence. I mean, there has got to be a way to be able to appeal the right, if it is denied. But I don't know if we are in a position right now to come up with that mechanism.

COL COOK: Right. That is where my concern comes in.

BG DUNN: Back to what Judge Jones
said at the very beginning, the FY14 NDAA did not specify any enforcement mechanism, but requires the Secretary of Defense to recommend changes, prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights.

Isn't that what we are trying to do, is ensure that -- I mean, the law has already required him to consider this.

JUDGE JONES: I now appreciate that you want to have it clarified that they have standing.

MS. FERNANDEZ: Yes.

JUDGE JONES: And that seems to me to be fine. Beyond that, I think the mandate in NDAA '14 will take it from there.

MS. FERNANDEZ: Fourteen?

JUDGE JONES: Pardon me?

MS. FERNANDEZ: Fourteen?

JUDGE JONES: Fiscal year '14 NDAA.

BG DUNN: Oh. So, that we would
say, "The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6(b) at trial and appellate courts." Period.

And then, the mechanism, he --

JUDGE JONES: Yes, he has already been told that he has a year to recommend changes to the Manual for Courts Martial to implement these rights.

BG DUNN: Okay.

JUDGE JONES: And we can leave this open for more discussion, if we are misreading this or there is a different or additional argument.

But I certainly agree that, I understand the need to have the clarification that there is standing to enforce the rights.

So, on that, unless there is a disagreement, that is accepted?

MR. BRYANT: I am not sure what we are recommending at this point. I would, if I may, Judge Jones, ask Ms. Fernandez, is part
of the concern of your Committee the mandatory expedited review? Because that language is not in NDAA FY14.

JUDGE JONES: No, I am suggesting we don't even go beyond the first sentence, that we leave all of these essentially implementation mechanisms to the review that has been mandated already. Actually, it is not even a review. The Secretary of Defense has a year to recommend, under the statute that has just been passed, changes to the Manual for Courts Martial to the President to implement these rights.

MR. BRYANT: Yes, ma'am, I understand that, but I was just asking whether part of what the Subcommittee was looking for that is not provided specifically is a mandatory expedited review of any alleged violation.

JUDGE JONES: Well, that would be a specific mechanism that the Subcommittee would like to recommend, right.
MR. BRYANT: I am asking if that is beyond your worthy suggestion that we leave it at the first sentence. But I am just wondering whether that cuts out the intention that there be some mandatory expedited review.

MS. SCHENCK: I think I can respond to that. I think if you look at (j)(3), when you are talking about the enforcement, you will see the writ of mandamus capability in the civilian sector. And so, that is the method of expedited review in the civilian sector. So, we were trying to create an equivalent.

BG DUNN: But if we leave it up to the Secretary of Defense to sort through this, I mean, to enforce -- it just seems to me that to enforce the rights, you have to have that piece of it.

MS. SCHENCK: I also believe that there are other mechanisms that we could, the military could put in place that do not involve a writ of mandamus, that do not
involve petitioning the appellate court for review.

BG DUNN: Right. They could structure something else.

MS. SCHENCK: Right. There could be some other structure. Because we are a closed organization.

BG DUNN: Right.

MS. SCHENCK: And we would be able, perhaps be able to address those issues without, you know, aside from --

MS. FERNANDEZ: Also, for clarification, one of the concerns of the Subcommittee was that the rights could be asserted at anytime during the proceedings, pretrial, during trial, and post-trial. So, I think that that is important for whatever language we adopt, that that needs to be reflected in the language.

COL COOK: And I would like to make a friendly modification. I agree with leaving it to the first sentence, but I would
like to take out of that first sentence in
here the last few words that say "at trial and
the appellate courts," and put in the words
you just said, "during pretrial, trial, and
post-trial".

And the reason I am saying that is
because some of these rights, the right to be
reasonably protected from the accused, I don't
need the court; it doesn't have to be a trial
in the appellate. I expect the Commander is
going to be helping for that.

MS. FERNANDEZ: Right.

COL COOK: So, this should be an
enforcement mechanism. Let SECDEF decide how
best to do that, not limit the location or the
fact that you have got to go to a judge to do
it. And using the words you just did
addresses your concern and, for me, it takes
away the location, but allows the Secretary of
Defense the opportunity to consider --

MS. FERNANDEZ: I like that. That
is a good change.
JUDGE JONES: Do you want to recommend consideration of a mandatory expedited review as opposed to --

MS. FERNANDEZ: That works also, Judge.

JUDGE JONES: What do people think about that?

MR. BRYANT: Yes.

COL COOK: I think it is almost unnecessary because the speedy trial clock of the accused is going to be the one that is going to ensure that it is an expedited review. I mean, the speedy trial clock in the military in terms of getting a case to court is much more reduced than in the civilian sector.

I want to say, Colonel Ham, 120 days, 90 days, or what is the speedy trial clock? Because the defense attorney is not going to take a delay to accommodate a victim's request, and they don't have to. But the speedy trial clock is usually how long?
JUDGE JONES: It is 120.

COL COOK: A hundred and twenty days. So, it has got to be quickly resolved, if it is an issue of getting a victim into court. I think that all their procedures actually will make that happen.

PROF. HILLMAN: Then, they could dispense with the mandatory expedited review because it would happen quickly. I mean, we are just articulating what we want for victims in terms of victim rights and seeking a parallel structure.

MS. FERNANDEZ: Are we just saying eliminate the word "expedited" or just put in "availability of review"?

MR. BRYANT: They are looking at the parallel language in the Criminal Rights Act under the federal statute. And I think the speedy trial clock in felonies is 70 days. But the Congress felt that it was necessary to still put in those words about expedited review and put a time limit on it of 72 hours.
So, I am not sure that, when we say, well, the defendant has got speedy trial rights that he going to enforce, that that is necessarily -- necessarily; maybe probably -- but it won't necessarily cover all the issues that might be brought up by a victim who wants to exercise a right that is turned down and --

MS. FERNANDEZ: I think leaving the language in about expedited review is important.

MR. BRYANT: I agree, and that is why I was asking, wasn't that the Subcommittee's intent?

MS. FERNANDEZ: Yes.

MR. BRYANT: I am not trying to get on your Committee. I just wanted to ask some questions.

(Laughter.)

MS. FERNANDEZ: You're welcome.

BG DUNN: But I think expedited review, but I don't think we should say by an appellate court because, as Lisa points out,
there might be a different mechanism for expedited review.

MS. FERNANDEZ: Okay. That's fine.

JUDGE JONES: All right. So, "The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6(b), UCMJ, at any relevant time in the proceedings, including pretrial, during trial, and post-trial."? Is that what we have agreed on?

MS. FERNANDEZ: Yes.

JUDGE JONES: All right. And then, the Secretary will examine or evaluate a procedure for expedited review of any alleged violation. Is that the sense of what we have an agreement on?

MS. FERNANDEZ: I think so, yes.

JUDGE JONES: Okay. Great.

Thirty-four.

MS. FERNANDEZ: Thirty-four. We want victims to know about their rights. So,
we want everybody to tell the victims that they have these rights.

So, our recommendation here,

"Implement mechanisms to ensure that victims are notified of and accorded the rights provided by Article 6(b). The Secretary of Defense recommend to the President changes to the Manual for Courts Martial and prescribe appropriate regulations to ensure that the military investigators, prosecutors, and other DoD military and civilian employees engage in the detection, investigation, or prosecution of crime, notifying victims of the right specified in 6(b)."

And we want to make sure that -- go ahead.

BG DUNN: No, no, no. Finish.

I'm waiting for you to finish.

MS. FERNANDEZ: "The Secretary of Defense recommend to the President changes to the Manual of Courts Martial and prescribe mechanisms that make military courts
responsible for ensuring compliance with the rights afforded to the crime victims in court proceedings under 6(b)."

So, we want, if it is a SARC, if it is the prosecutor, if it is an investigatory agent, we want everybody to notify the victim of their rights. And then, we want another check for the judge to say, "Have you been notified of" this right, this right, this right, this right, this right, this right, and go down the checklist.

BG DUNN: But you have an SVC. I mean, why don't we have the SVC programmed for this very purpose? I mean, investigators are not lawyers.

So, that point only, I mean, we have the SVC who represents this victim.

MS. FERNANDEZ: Ostensibly, you could say that you don't want an SVC.

BG DUNN: Yes. I'm sorry, Patty, is this also applicable to all crime victims?

Okay. So, I am in error about the SVC then
because it is applicable to all crime victims.
Okay.

So, maybe something like the
process in court now where an accused is
advised of his post-trial rights?

MS. FERNANDEZ: Well, that is kind
of what we were thinking about when we
discussed this. It was that everybody in the
process tells the victims, even if it is
multiple times, if it is by the SVC, that is
great. But if you hear it also from the
prosecutor, you hear it from the SARC, anybody
who is involved with you, and then, you have
a second check by the judge going down and
just saying, "Were these rights afforded to
you?"

COL COOK: I would rather not see
it in the courtroom by the judge, but there
is, I thought, in the process for the victim
was liaison. There used to be -- somebody has
got to tell me what today's process is -- but
there used to be a form that was given out to
every victim when they came through the trial
counsel. You know, why couldn't this piece be
provided the victim? Incorporate these
rights, because, otherwise, they are going to
get multiple sources of information. And the
victim's liaison is afforded to somebody in
any case. It is not --

MS. FERANTEZ: I think that there
is really something about the judge getting up
there and the judge being the ultimate
gatekeeper of the rights and making sure that
it happens, that the rights are afforded.

COL COOK: Is that what happens in
any particular civilian case? Do you know?

MS. FERANTEZ: Yes.

COL COOK: I mean, during the
trial, they stand -- so, how do they do that?
In our cases where the accused is given their
sentence and, then, they are notified, you
have the right to appeal, you have all these
rights, and it is listed before the judge
closes the court. And in the civilian system,
where would this advisement of the rights for a victim in relation to when the accused -- I don't know if there is a rights advisement of the accused; they're taken away in a federal court. I don't know what they are told in a courtroom. Our judges have to go through this. Where would you put that in the process?

JUDGE JONES: I think I am correct. I think you are talking about ensuring compliance by asking probably the trial counsel whether he fulfilled his obligation.

MR. BRYANT: I think that is the way to handle it. I don't know that the judge -- I understand your concern that the judge actually tell the victim this. I would like to see a process where the form that Colonel Cook referenced, somebody is responsible for getting that in the file. Because I am concerned that, if we have multiple people who are responsible, and let's say the trial
counsel does it, then somebody else does it,
but the investigator failed to do it, that
somehow the investigator, even though this
person has been told three times, they are
going to get told four times, and somebody is
in trouble for failure to do their duty.

So, I would just like to see maybe
the trial counsel ensure, cause and ensure,
that the victims have been advised of their
rights, and some notation of it.

I can't answer the question that
Colonel Cook rightly has, whether or not that
practice is still in effect, that they are
filling out the form.

COL COOK: I'm pretty sure that it
is.

MR. BRYANT: Yes.

MS. FERNANDEZ: This is what is
afforded in the CVRA. "In general, in any
court proceeding involving an offense against
a crime victim, the court shall ensure that
the crime victim is afforded the rights
described above. Before making a
determination to exclude the victim from a
public proceeding, the court shall make every
effort to permit the fullest attendance
possible by the victim and shall consider
reasonable alternatives to the exclusion of
the victim from the criminal proceeding, the
reasons for any decision denying relief under
this."

That is on J(2), if you would like
to look at it.

MR. BRYANT: Yes, but, Ms.
Fernandez, that still does not say -- unless
it has changed in the last 14 years, federal
judges do not specifically advise victims of
the rights listed in the Victim Rights Act.
What they do insist on is hearing from the
prosecutor whether or not the victim was
advised of what was going to happen, you know,
either in a plea or a plea agreement, or that
sort of thing.

So, I think that to require the
military judge to do the same thing doesn't hurt anything. I don't see that it is harmful in any way. It is just a question of, is it necessary if trial counsel is required to certify somehow that that victim was advised of his or her rights?

MS. SCHENCK: This goes to Finding 34.2 describing what is going on, you know, the equivalent in the civilian sector.

JUDGE JONES: Could I just interrupt? I am not aware of any practice where the judge in federal court advises victims of their rights.

I am aware of judges inquiring of the trial counsel from time to time whether they have advised the victim, so that they could either write letters or appear, or whatever, to weigh-in, and know that they have the right to appear.

And you're not actually prescribing that the judge would advise the victims, correct? This says --
MS. SCHENCK: No, they could just ask on the record, "Counsel, has the victim been advised of her rights under Article 6(b)?" You know, one line in the thing. We have a script in the military.

PROF. HILLMAN: This is close to a recommendation from the Comparative Systems Subcommittee to ensure trial counsel comply with obligations to afford victims their rights to have the court on the record inquire, did trial counsel comply with statutory and policy requirements, which could certainly include the 6(b) requirements for victims' rights.

JUDGE JONES: Which recommendation is that?

PROF. HILLMAN: No. 40.

JUDGE JONES: Okay.

BG DUNN: But, see, I have just had this large flag go up in my head. We are having this big discussion as if we are talking about sexual assault victims only,
but, really, the CVRA applies to --

MS. FERNANDEZ: It applies to everybody.

BG DUNN: -- all victims. And when you translate that into a court martial process, now we are talking about my roommate stole $450 from me and he is being court martialed. And we are expanding these rights out, so they are going to apply to every court martial that is done in the United States.

You know, sexual assault victims are in a special category. So, I could subscribe to some special treatment for them, but I think we have to be very careful about wholesale pulling this in for all victims.

Now what Professor Hillman just read in terms of the broader recommendation of CSS I think is easy enough to --

MS. FERNANDEZ: If we could take that recommendation and if we could add the 6(b) rights to it, I think we might be getting to what we need.
JUDGE JONES: Why don't we take it after we have gotten the final CSS report and when we review 40 --

MS. FERNANDEZ: Okay.

JUDGE JONES: -- their Recommendation 40.

MS. FERNANDEZ: That's fine.

JUDGE JONES: And we can see them together.

COL COOK: I'm sorry. If I may, though --

JUDGE JONES: Yes.

COL COOK: One thing, though, if you are going to incorporate them together, I am fine with that, but I would also --

JUDGE JONES: I don't know what we are going to do because we haven't deliberated that.

COL COOK: As part of the consideration of deliberation, then I would suggest not making it more onerous on a military prosecutor than we have on a civilian
prosecutor, investigator, because the wording in your Finding No. 34.2 says that the CVRA requires prosecutors and investigators to use their, quote, "best efforts". If you say it in the military processes, the words "going to do it," as Mr. Bryant has just said, you have imposed a duty upon them.

And they will do that, but depending on where they are and where the victim is and whether somebody wants to be contacted, it is not going to happen every single time. If you tell a military prosecutor or investigator that they have got to use their best efforts, they will do exactly that, but don't make it this absolute right that can, then, be appealed when it doesn't work out.

BG DUNN: Yes, and one startling example would be a foreign victim in a foreign country, and the trial of the U.S. soldier has been moved back to the United States. And, you know, you may have language barriers. You
might not be able to find the victim. I mean, there are all sorts of odd issues that can attach that wouldn't in a civilian proceeding.

JUDGE JONES: I am not entirely sure I agree with 34(a) at all. I am sympathetic to the notion that we are asking for regulations that would affect people like investigators, civilian employees. And I think if we are going to get into the weeds like that, we should let the Secretary of Defense take his first run at it because it is a mechanism for ensuring that victims are notified. And that is what he is supposed to be doing to implement the rights within a year.

So, I am going back to NDAA -- I don't know what section it is, but it looks like 1701. I just think we are going too far in the weeds on 34(a).

BG DUNN: And with the understanding that sexual assault victims will have their Special Victim Counsel, and that is
going to put them in a special category in
terms of all the law being explained to them.
They have got somebody to guide them
specifically through the system, unlike other
victims.

JUDGE JONES: Okay.

MS. FERNANDEZ: Is there a way
that we could review No. 40 from Professor
Hillman's Subcommittee and this recommendation
together?

JUDGE JONES: You want to do it
now or --

MS. FERNANDEZ: No, no, no.

JUDGE JONES: To review them
together, we have to do them once we have the
complete report.

MS. FERNANDEZ: Yes, that's right.

JUDGE JONES: So, we could do that
on the 16th or later, if we can't accomplish
it.

MS. FERNANDEZ: I think on the
16th would be the right way to do it.
JUDGE JONES: All right, and we will include the set of Recommendation 34, 34 itself, 34(a), and 34(b).

Okay? Great.

MS. FERNANDEZ: This next one has to do with time limits for the victim to contest his or her rights.

"The Secretary of Defense recommend to the President changes to the Manual for Courts Martial and prescribe appropriate regulations establishing the time period under which a victim may petition to assert their rights to reopen a courts martial plea or sentencing hearing, to ensure clarity regarding when a court martial hearing can be reopened based on the request of a victim or a victim's counsel, to ensure the finality of the court martial proceedings. This time period should be sufficient so as not to limit or interfere with a victim's right to present matters to the convening authority prior to his or her taking action on this case."
Really, this is just, it is finality that we are looking at and putting time limits on asserting rights.

COL COOK: So, when you read it, when it says "to reopen the case to assert their right to have input," was the intent behind this to draft an enforcement mechanism for those times when, as we just discussed, they should have the opportunity to have input to the pretrial agreement --

MS. FERNANDEZ: Yes.

COL COOK: -- to the case disposition? If it is skipped and that is not done, is this your response to say, "Okay, well, here's the process. Because they got ignored, you get to go back and reopen what has been done," without their input? Because I am not sure there is -- I mean, I think you have got some constitutional considerations if you are going to reopen.

I am not saying that the ignoring of a right is the right answer; it's not.
But, then, making that right higher than a constitutional right at a court martial, depending upon where you are, at what stage after it has been ignored, that that is the right enforcement mechanism.

So, I am just trying to figure out why this is here and what you are trying to address.

MS. FERNANDEZ: I think, again, we were trying to make this parallel to the CVRA, which puts time limits on the ability of a victim to petition for his or her rights.

COL COOK: But I don't think they can reopen a case once it has gone beyond a certain procedure. I am not sure you will reopen a plea agreement or you accept a plea or that you will reopen a court martial to assert those rights.

JUDGE JONES: You know, if I could just read the CVRA, which is pretty specific, "The failing to afford a right under the CVRA will not provide grounds for a new trial. A
victim may make a motion to reopen a plea or a sentence only if the victim asserted the right to be heard before or during the proceeding at issue and such right was denied, and the victim petitions the court of appeals for a writ of mandamus within 14 days, and in the case of the plea, the accused has not pled to the highest offense charged."

So, I don't need to read the whole thing, but these are the specifics in federal court that we are talking about.

BG DUNN: And again, the FY14 NDAA requires the Secretary of Defense to look at this and recommend mechanisms to enforce such right, and he has that year to do that. So, it seems to me this is --

COL COOK: I would rather defer to that on that comprehensive UMCJ review process.

BG DUNN: Right.

JUDGE JONES: As we already know, there are so many dissimilarities. I mean,
the sense of it, yes, there should be a mechanism.

MS. FERNANDEZ: I think we can give it over to that, but I think it is sort of like when we were talking about the budgetary concerns. There are certain things that we need to rise up to ensure it gets done. We don't want a year from now to come back and say, "Oh, we didn't do this."

So, I think that is why it is important to fit something like this in a regulation.

COL COOK: And I would disagree. On this one, the National Defense Authorization Act covers and allows that process to be looked at. This one, there is too much of a balance on the opposite side. So, for me, I would have a problem with it.

JUDGE JONES: Well, I think ultimately my position is we should leave it to the Secretary under the mandate that he already has. But I would say that the time
period, it is really regulations that would establish, it seems to me, the conditions under which a victim may petition.

MS. FERNANDEZ: If you look at Finding 35.2, it is what you just read, Judge.

JUDGE JONES: Uh-hum.

MS. FERNANDEZ: Is it really trying to create sort of that litany of situations when a victim can assert his or her rights? I mean, are we just trying to sort of recreate Finding 35.2 into law in the UCMJ?

PROF. HILLMAN: Judge Jones?

JUDGE JONES: Yes?

PROF. HILLMAN: It seems to me that that last sentence of 35 is what is unique about the military, that we want to make sure that the convening authority hasn't acted before the victim's rights are asserted, right? That is really, that last phrase has the time period that is set up shouldn't limit or interfere with the victim's right to present matters to the convening authority, or
whatever language we are using about the conveying information, the convening authority, prior to the convening authority taking action on that case.

So, it seems to me that is what -- am I correct that that is what you want to highlight?

MS. FERNANDEZ: Yes.

PROF. HILLMAN: Because we are applying the CVRA to the military here. So, we could recommend the Secretary's implementation of the NDAA and consider a time period or ensure there is a time period sufficient, so as not to limit or interfere with the right, I think, for the convening authority. Does that account for the uniqueness of the court martial system compared to the civilian criminal justice?

COL COOK: I would change one word, that it would be not interfere with an opportunity, because even under -- well, we are giving them the right to have something
heard before the convening authority. So, I
guess we are affording that right, and now, we
are saying don't interfere with that right.

But that is just to note that the right before
a convening authority doesn't exist except if
we give the recommendation here to tell them
to consider it. Okay?

BG DUNN: But we are talking post-
trial here, just making sure the victim has --

MS. FERNANDEZ: So, Professor

Hillman, can you just reiterate your --

PROF. HILLMAN: "The Secretary's
implementation of the FY14 NDAA requirement to
implement the CVRA allow for a time period
sufficient -- allow the victim sufficient time
to assert the right to reopen" -- I mean, I am
drafting on the fly here. I am not sure this
is that helpful. It is sort of a long
statement.

But that is essentially what we
are looking for, right? You just want the
time period to be long enough --
MS. FERNANDEZ: Yes.

PROF. HILLMAN: -- so the convening authority isn't precluded from responding effectively to that?

MS. FERNANDEZ: Yes, that is exactly what we want.

COL COOK: At this point, I don't want to say anything that has the word "reopen" in it. I would rather see somebody actually make a conscious decision and assess the feasibility of taking that particular aspect of the Act and applying it in a military context.

BG DUNN: You see, I think our discussion is reflective of the decision by Congress to give the Secretary of Defense a year to consider how to apply the CVRA to the military, because there are a lot of complicated issues here. And we are kind of on the fly here with the entire court martial system.

I mean, I understand that we want
to make sure the Secretary contemplates
certain things within that process, but --

COL COOK: Such as the time

limits. Mention that the time limits should
be an expedited process and not prevent the
opportunity to be heard, and let them figure
out what the process for making that happen,
what happens if that time is passed. Let them
consider that as part of that review.

JUDGE JONES: Yes, I don't think
this is an easy situation for a
recommendation.

MS. FERNANDEZ: Does anybody want
to take a crack at looking at the language we
have?

MR. BRYANT: Well, I am sure the
Subcommittee's concern about putting some sort
of indication that it needs to be expedited or
within a timeframe that allows the victim to
do this before things are written in concrete,
to use laymen's terms, I am all in favor of
that. And I am sure the Secretary of Defense
would not mind suggestions, your suggestions
and our suggestions, about how he might do
that and implement that and promulgate
regulations within the next year.

And I don't think we have gotten
away from that. Professor Hillman's
suggestion as to how to merge these two, so
there's still some indication of the time the
victim has to assert those rights before the
doors are all closed, is I think a worthy one
and something I can certainly support.

JUDGE JONES: Okay. We have six
panel members? Okay.

I don't know. I would leave this
to the Secretary.

Professor Hillman?

PROF. HILLMAN: I think that the
findings, it would still be -- sometimes we
have findings without recommendations. I
would be --

MS. FERNANDEZ: I thought we
couldn't vote on the findings.
PROF. HILLMAN: We are not, but it will be in the report. I mean, we are not voting on that, you're right, but it is --

BG DUNN: I mean, if the issue is pointed up in our report, but --

MS. FERNANDEZ: During the implementation of the NDAA '14, they can look at the findings that we put in here.

BG DUNN: Right, right. And, I mean, I think I am willing to accept that the Secretary of Defense is doing his job and has the right people considering how to apply these provisions in the military system, and will come back with a relatively-robust proposal, which Congress, of course, then, has the opportunity in the future to stick its finger on certain points.

And if we raise issues here, at least, and we point up the differences --

JUDGE JONES: Yes, I don't feel qualified to try to craft something for the situations in the military along the lines of
what the CVRA provides in federal courts. I think it is more complicated than we can do, and I think it is exactly what, at least in the first instance, we should let the Secretary do. And the findings remain, obviously.

MS. FERNANDEZ: Recommendation 36. This has to do with the creation of an ombudsman, one entity to investigate complaints of violations of victims' rights. The equivalent right now in the CVRA is the Office of Victims' Rights Ombudsman that receives and investigates complaints filed by crime victims against its employees.

So, what we are asking is Recommendation No. 36. "Congress enact legislation requiring that the Secretary of Defense designate one entity" -- right now, each Service has an entity to receive these kinds of complaints -- "within the Department of Defense to receive and investigate complaints related to violations of failures
by military and civilian employees from all of
the Military Services to provide the rights
guaranteed by Article 6(b)."

If you look at Finding 36(b), we
were worried that, by creating a different
institution in every Service, there could be
disparate procedures and rules and standards.
This is a way of unifying all the processes
into one office.

PROF. HILLMAN: Do civilian
employees have any rights under the UCMJ?

BG DUNN: I think maybe that means
the employees who are working in the process.

MS. FERNANDEZ: Yes. The
military, yes.

BG DUNN: I mean, to be an
employee, there would be a post-trial
processing, et cetera. There could be --

PROF. HILLMAN: So, they would
have been the violators of rights?

MS. FERNANDEZ: Yes, correct.

PROF. HILLMAN: Understood.
BG DUNN: Well, what is the different mechanism in the three, in the Services at the moment, and how are they each handled?

MS. FERNANDEZ: FY14 NDAA requires "the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard, when it is not operating as a service of the Navy, to designate an authority within each Armed Force to receive and investigate complaints relating to the provision or violation of such rights."

COL COOK: Do we know what entity was designated? Was it the IG? Was it someplace in SAPRO channels? I mean, this is the National Defense Authorization Act telling them to do it. Do we know if they have done it and what they have done yet or not?

MS. FERNANDEZ: We don't have that information. That was not put before us.

BG DUNN: Okay. So, the NDAA has told the Secretary, "Designate a person in
each Service."?  

MS. FERNANDEZ: In each Service, and we are saying consolidate it into one office.

BG DUNN: Okay. So, just in terms of process, I would just ask you to think about the fact that this will be a bureaucratic process regardless. And anything that comes to a consolidated place within the Department of Defense comes now from wherever that victim is down there, and there will be some process it will go through. It will have to go through both military and the civilian side of the Service, and then, it is going to have to come up.

I mean, I think from an efficiency perspective, you are better off with --

MS. FERNANDEZ: Well, if you look, on the civilian side there is only one office also, and you are actually looking at even more individuals involved on the civilian side.
BG DUNN: Yes, but you are talking about one DOJ and one authority that spreads over those.

I am just thinking it might be better to say that the procedures or the process will be --

MS. FERNANDEZ: Uniform amongst all of the --

BG DUNN: -- among the Services, and then, let the Services, from an administrative perspective, do it, only because, I mean, I honestly do believe that it is better for the victims and they will get a faster turn time if they administer it by the Services.

COL COOK: And this might be something that we go back and we add to that other recommendation you had done earlier, where we talk about, hey, the metrics to evaluate what the effectiveness is. If we now have different procedures followed within each of the Services --
MS. FERNANDEZ: I think that is for the SVC, though.

COL COOK: Oh, that is just SVCs and this is --

MS. FERNANDEZ: Yes, this is --

COL COOK: I mean, the statute is out there. I think they will be more responsive if it is within each Armed Services. If the concern is consistency or having somebody watch what is going on, then maybe the recommendation is that OSD provide oversight to all representatives of the Service tasked with this, and just put that oversight responsibility on them, as opposed to this direct -- and I can't imagine that OSD wouldn't perform that oversight responsibility anyway without a recommendation.

MS. FERNANDEZ: You say that there would be oversight and all the things that we are looking for as far as consistency and --

COL COOK: You know, if you are going to designate authority within each Armed
Forces to receive and investigate complaints, recommend DoD monitor and evaluate the -- just watch the process. I mean, I don't know what the concern is. By putting it into one entity, what is the problem we are trying to solve, since we haven't got a process to even say there is a problem yet?

MS. FERNANDEZ: Well, I think it is the last finding. Just for procedures, rules, and standards. So, what you want to have is uniform procedures, rules, and standards.

So, if DoD can ensure that that happens, I think that we could have it in each Service.

BG DUNN: Yes, and they could create a report process that will feed them the data that will allow them to perform the --

PROF. HILLMAN: Pardon me, General Dunn.

I think that it might be -- this
is, as I have said, administrating in an arena that is nascent. Victims' rights have not matured, and we are trying to set up some structures for how they might work out.

So, I am concerned that directing the enactment of legislation that would require a particular administrative structure might not be the most effective way to highlight that concern.

So, stating, you know, asking the Secretary to assess the uniformity or effectiveness of the processes by which complaints related to these violations are considered seems closer to where we might aim at this point in the process.

MS. FERNANDEZ: One more time?

PROF. HILLMAN: Ask the Secretary to consider the effectiveness of the processes by which complaints related to violations of or failures by military and civilian employees, you know, that the rights violations go forward.
MS. FERNANDEZ: Yes. So, an evaluation of the situation rather than an actual --

PROF. HILLMAN: Right.

MS. FERNANDEZ: --

administrative --

PROF. HILLMAN: Rather than that. So, we would be eliminating the enacting legislation. We would make the Secretary the actor, and we would say not designate one entity, but, instead, assess the effectiveness of processes to receive and investigate complaints.

MS. FERNANDEZ: Can we put in there "and to look at whether a single entity is needed or individual entities for each"? Because I want them to assess whether one entity is better versus one in every Service.

MR. BRYANT: Yes. I think that is a good idea because I understand where your Subcommittee is coming from, and I really agree that it should be consolidated. It is
consolidated for the 97 Districts of the U.S. Attorney's Office that exist across the whole country with, I think we would all easily agree, far more victims who are potential complainers.

So, it is consolidated in that one office, and it might be better if it is an entity at the Department of Defense that is seeing, well, I got this complaint from this Service and this complaint from this Service. And if we address these complaints and these deficiencies in a uniform way, then that is going to be better for everybody.

Whether or not time is of the essence, as suggested by General Dunn, I am not sure, because these are just complaints, not assertions of rights to stop trials, as I understand what we are trying to address.

JUDGE JONES: Just complaints?

MR. BRYANT: Yes.

JUDGE JONES: All right. After the fact or during, I suppose.
BG DUNN: But the military justice expertise resides in the Military Services. It doesn't reside in DoD just generally. I mean, from a victim's perspective, I think you gain a faster turnaround from the Services.

MR. BRYANT: Most U.S. Attorneys' Offices would tell you that we are applying the same manner about what exists at the Department of Justice in terms of whoever has been in a courtroom.

MS. FERNANDEZ: But I think, when you are used to the civilian side or the Department of Justice, the way it works, and you see that it works, you think, well, we can transpose that onto the military. What you are saying is it is a different animal. I think Professor Hillman's language is a good mix. Let's see what works best in the military. We are thinking on it on a civilian basis. It worked better when there was one entity. Let them examine that, and, then, come out with a recommendation.
JUDGE JONES: So, we are saying the Secretary is going to --

MS. FERNANDEZ: The Secretary will assess -- using the Professor Hillman's language --

JUDGE JONES: Right.

COL COOK: Will assess the effectiveness of the processes to receive and investigate complaints relating to military and civilian employees.

MS. FERNANDEZ: Specifically, looking at whether --

COL COOK: You could add "and determine whether a more uniform process is needed." They can do the assessment of does it work.

MS. FERNANDEZ: Determine if a more uniform process is needed across Services.

JUDGE JONES: Okay. Is everybody in agreement with that?

MS. FERNANDEZ: Yes.
JUDGE JONES: Thank you.

MS. FERNANDEZ: We are skipping 37 and going to it last because I thought that was going to be the most contentious. Little did we know.

(Laughter.)

Thirty-eight.

JUDGE JONES: I'm sorry, I missed it. Why are we skipping 37?

MS. FERNANDEZ: We had a dissenting opinion on No. 37, but we could go straight to 37 and, then, go to 38. I don't think it would matter if we want to go consistently.

JUDGE JONES: Oh, it's up to you in which order. It's fine with me.

MS. FERNANDEZ: Let's see if we can do 38 quickly and, then, we can go into the dissenting opinion on 37.

JUDGE JONES: Fine.

MS. FERNANDEZ: "The right to be heard through counsel. The Secretary of
Defense recommend to the President changes to the Manual for Courts Martial and prescribe appropriate regulations to clarify that all victims' rights that include the right for the victim to be heard include the right to be heard through counsel."

What we had done here was, absent formal clarification regarding whether references to a victim's rights be heard includes through counsel. Litigation on this issue is likely to continue. So, we thought we would make it explicit.

BG DUNN: But I raise that concern again about sexual assault victims who have Special Victim Counsel --

MS. FERNANDEZ: Right, but we don't have --

BG DUNN: -- relative to all other victims --

MS. FERNANDEZ: Yes, but --

BG DUNN: -- who have no counsel.

MS. FERNANDEZ: That's okay. If
you don't have counsel, you assert it
yourself. But if you do have counsel, it is
saying you have a right to have a counsel, and
he or she can assert your rights.

So, it is really not a problem for
the person who doesn't have counsel. It is a
problem for the person who does, and then, the
court says, "No, the victim has to assert his
or her rights."

COL COOK: And in the report
itself, for anyone who has not seen it yet,
Mr. Cassara, who is also a member of the
Subcommittee, he wrote dissenting opinion on
page 153.

MS. FERNANDEZ: No, no, no, no,
no, no.

COL COOK: But that's not the one
we are looking at, then?

MS. FERNANDEZ: No, we are on No.

38.

COL COOK: Thank you.

JUDGE JONES: You know, I think my
confusion was just that it sounded like they had to be provided with counsel.

BG DUNN: Yes, that's how it reads to me as well.

MS. FERNANDEZ: No, it just gives you --

BG DUNN: Victims, if represented by counsel.

MS. FERNANDEZ: Represented by counsel; it doesn't require --

BG DUNN: But, again, this does appear to be, since it is being -- it does appear to be an additional purview at the moment.

JUDGE JONES: I mean, is there actually some concern -- I gather there is -- that judges are not accepting the proposition that, if a victim comes in and has counsel, they have the right to use their counsel?

MS. FERNANDEZ: That's correct, yes. That's correct.

PROF. HILLMAN: So, can we, just
to clarify that last clause, if they have counsel --

MS. FERNANDEZ: Right.

PROF. HILLMAN: -- because it sounds a little bit like we are giving them the right to be heard through counsel, and perhaps we are also suggesting they have a right to counsel, which we haven't actually supplied means of.

MS. FERNANDEZ: Yes. No, I think you're right. I think that is a good clarification.

COL COOK: And I don't understand. If the right to be heard through counsel -- does this mean that if you have decided, if you are a victim and you have decided to participate in the court martial process and you are called as a witness, that you would not, in fact, have to take the stand, and your counsel could provide the information that you would provide? You get to be heard through your counsel?
MS. FERNANDEZ: No, it is an assertion of your rights, the right to be heard through counsel. So, the Secretary --

COL COOK: The right to be heard through counsel where, though? I mean, this isn't a courtroom.

MS. FERNANDEZ: Appropriate regulation to clarify that all victims' rights should include -- that all victims' rights, that include a right for a victim to be heard, include the right to be heard through counsel. So, it is your rights to be heard can be enforced through counsel.

COL COOK: Okay. But if you have a right to be -- I'm looking at page 139 again -- and you have a right to be heard at a public hearing on a confinement, a sentencing hearing relating to the offense, a public proceeding on clemency, am I right to say that it is telling you that, instead of the victim being the one that puts their voice out there, the Special Victim Counsel can provide that
MS. FERNANDEZ: Yes.

COL COOK: -- for the victim?

MS. FERNANDEZ: Yes.

COL COOK: And the defense wouldn't get the chance, if the defense is going to cross-examine or challenge --

MS. FERNANDEZ: Right.

COL COOK: -- that information, are they cross-examining or challenging the Special Victim Counsel as opposed to the victim? Or do they have to bring in rebuttal evidence if something is not quite accurate?

I mean, I am looking at all the rights, and for some of them it makes perfect sense. For others of them to be heard through counsel -- I think the Special Victim Counsel gets to advocate on behalf of their client. I am not sure it is in every forum.

BG DUNN: Yes, I mean, I'm not sure.

COL COOK: Or it is a
substitute --

BG DUNN: It is a substitute --

COL COOK: -- for their -- yes.

BG DUNN: -- requirement under

certain -- if the accused has a confrontation

right, then I don't see how you could have the

counsel on the stand making statements.

MS. FERNANDEZ: So, in those

moments where there would be an opportunity to

cross a victim, to cross-examine a victim, you

are saying that it would be, obviously,

inappropriate for the --

COL COOK: For counsel to be

providing the information to start with,

instead of the victim as a witness under oath

at a trial.

Is there something that that is

different than a civilian?

MS. FERNANDEZ: I think I am going
to say that this is one that we need to

consult Meg Garvin on.

COL COOK: Fine. That is what I
was going to ask you. Is this something that
Meg might --

MS. FERNANDEZ: Yes.

COL COOK: It is a comparison?

MS. FERNANDEZ: Yes, because she
was adamant about this recommendation. I
hadn't thought about the ability to cross
somebody in certain circumstances.

COL COOK: Then, waiting for Meg
to have that discussion?

MS. FERNANDEZ: Yes.

COL COOK: Fine.

BG DUNN: Yes. I mean, I think
this can be crafted to make it clear.

MS. FERNANDEZ: Yes, right.

The next recommendation may bring
some clarity to that. This is the victim's
unsworn statement.

So, the CVRA includes the
opportunity for a victim to be reasonably
heard at sentence by allowing him or her to
make a statement that is neither under oath
nor subject to cross-examination.

Under the military rules, a sexual assault victim may present evidence of financial, social, psychological, and medical impact of an offense the accused committed. Unless there is an agreement from the defense, however, the victim must testify under oath and is subject to cross-examination.

This could clarify the proceeding.

Maybe we should have done 37 before 38.

"The Secretary of Defense recommends the President changes the Manual of Courts Martial and prescribe appropriate regulations to provide victims the right to make an unsworn victim impact statement, not subject to cross-examination, during the pre-sentencing proceeding, with the following safeguards:"

Some of these were adapted from Mr. Cassara's dissent. The last three, I believe, were adapted from Mr. Cassara's dissent. So, there was sort of a mix of our
thinking here.

"The member should be instructed similarly to the instructions that they receive when the accused makes an unsworn statement. If there is a new matter brought up in the victim's unsworn statement, sentencing should be delayed, so the defense can respond, and the unsworn statement should be subject to the same objections available to the government regarding the accused's unsworn statement."

I am going to let Commander King now read into the record Mr. Cassara's dissent.

CDR KING: "I write separately to explain why I stand apart from my colleagues on the issue of whether the victim should have the right to make an unsworn victim impact statement at the sentencing hearing.

"While the reality is that victims are not always cross-examined at the sentencing hearing, it is crucial that the
accused retains that right. The Rules for Court Martial are written to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

"Allowing an unsworn victim statement subverts these goals. Retaining the adversarial nature during sentencing is inherently fundamental to the military justice process. When combined with the recent changes to the Article 32 hearing, this proposed change is drawing us ever so close to a system which is devoid of due process for a military member accused of sexual assault. I cannot abide by such changes.

"As an initial matter, due to the ability to cross-examine the victim, the defense may learn for the first time during sentencing that the victim receives mental health counseling that was previously not disclosed to the defense. This problem is" -- I'm sorry; yes, I couldn't say it now --
"exacerbated by the recent changes to the Article 32 hearings which severely limit the right of the accused to a pretrial interview of the alleged victim.

"This can move to post-trial 39(a) sessions where evidence relevant to the defense is disclosed. The relevant information would not come out without the ability to cross-examine the witness.

"And in post-trial 39(a) session, the military judge could reopen the case on the merits, which could lead to a different result entirely. In the very least, the ability to cross-examine the victim leads to additional information on sentencing that makes for a more informed and fair result for the accused.

"More generally, the unsworn victim impact statement does not allow the accused to question the victim about inconsistencies between his or her statement at sentencing and his or her testimony on the
merits.

"To illustrate, I recently had a case in which the victim's testimony at sentencing was so inconsistent with her trial testimony that it led the panel members to ask the military judge whether they could reconsider their verdicts on the merits regarding guilt. It was precisely the tool of cross-examination during this sentencing that brought the witness' discrepancies to light.

"The Subcommittee heard similar testimony on this topic, as a federal defense attorney discussed unsworn victim impact statements at sentencing."

And this is a quote: "`What frightens me is that when they' -- meaning victims -- `say things that no one else has said in the process before, and it's the first time you're hearing it when you're up there, the judge ends up taking that fact and using that fact to give my client a longer sentence.'
"My example, it was a pimp-prostitute relationship, and at the sentencing the victim submitted a statement saying that, as a result of her activities, she was sterile. And the judge used that fact from her statement -- it wasn't backed-up by any medical reports or anything else -- used that statement to imply what is called a permanent physical injury enhancement, which significantly increased the defendant's sentence.

"We objected and appealed, and what ended up strengthening our appeal greatly was between the time of the sentencing and the appeal she had a baby. It got remanded back and his sentence was reduced. But if we hadn't filed the appeal or if she had gotten pregnant later in life, this person would be doing a lot longer on the basis of a statement that she submitted that was really just her say-so and not backed-up by any medical evidence or anything like that."
"No one knows what a judge or a panel may take away from an unsworn statement. Due to the peculiarities of the military system, there is no pre-sentence report and the first time that the defense would hear the information in an unsworn statement would be at the sentencing hearing, especially given the new, limited pretrial access to the alleged victim.

"It is of no moment that the accused retains the right to rebut the victim's unsworn statement. That right is meaningless when there is no time to prepare a rebuttal with witnesses or evidence.

"It is, likewise, an inadequate safeguard to say that the victim would get the same limiting instruction that the accused receives when the accused gives an unsworn statement. The accused should have the right to an unsworn statement because at that point of sentencing guilt has been determined and
the accused is facing constraints on his or
her liberty. Any mistakes made by the panel
regarding the proper way to accord the
accused's unsworn statement only inures to the
benefit of the accused, which is an
appropriate safety net in the military justice
system.

"Conversely, the victim's role at
sentencing is completely dissimilar. Although
the victim may be facing a cathartic moment
with an unsworn statement, the purpose of
sentencing is not therapy. That is a
counselor's job.

"Any mistakes made by the panel
regarding the proper way to accord the
victim's unsworn statement would be to the
detriment of the accused and would raise major
appellate issues.

"A colloquy between the trial
counsel and the victim, similar to a colloquy
between the defense counsel and the accused,
may be interpreted as sworn testimony. Even
the specter of sworn testimony would be unduly prejudicial to the accused. We must not lose sight of the fact that, even after conviction, the accused is a Service member who has served his or her country, oftentimes at war.

"The discussion given the Manual for Courts Martial regarding the accused's unsworn statement is clear. It should ordinarily not include what is properly argument, but inclusion of such manner by the accused when personally making an oral statement normally should not be grounds for stopping the statement.

"Similar latitude to the victim is impermissible. The accused must have the ability to object and to contest improper argument during the sentencing, so that the accused gets a fair sentence that fits the crime for which he or she was convicted, and to ensure that the government's and victim's evidence and argument fit within the narrow provisions set forth in Rule for Courts
"If the RSP adopts the recommendation of the majority of the Subcommittee, I would like the panel to consider adopting with it the following safeguards:

"One, if the victim refuses to provide a pretrial statement, the victim should not be allowed to make an unsworn statement at sentencing.

"Two, the statement must be provided to the defense five days in advance of trial to allow the defense the opportunity to provide meaningful rebuttal.

"Three, the members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement or, if there is a new matter brought up in the victim's unsworn statement, sentencing should be delayed so the defense can respond.

"And, five, the unsworn statement
should be subject objections such as relevance and hearsay."

PROF. HILLMAN: May I ask a question?

MS. FERNANDEZ: Please.

PROF. HILLMAN: So, it says that, it looks like the recommendation of the Subcommittee adopted three of the five safeguards that are in --

MS. FERNANDEZ: That's correct.

PROF. HILLMAN: -- Mr. Cassara's statement, but not the first two, which are about, if there is no pretrial interview, the victim is not allowed to make an unsworn statement, and, second, there has to be five days in advance of trial.

Are there negative consequences to those two things that you think preclude us adopting, putting those in here?

MS. FERNANDEZ: Yes. The five days prior to trial, you just don't know what the unsworn statement is going to be at
sentencing. I mean, we are asking somebody to
come up about what the effect of this all has
been before the process has ended. So, five
days before trial just doesn't seem feasible
or doesn't get at the reason for the unsworn
statement.

The first one, let me just refresh
my memory. Sorry.

PROF. HILLMAN: "If the victim
refuses to provide a pretrial interview, the
victim should not be allowed to make an
unsworn statement at sentencing."

MS. FERNANDEZ: I mean, the
Subcommittee didn't feel that the right to
make a statement at sentencing should be
attached to he or she providing a pretrial
interview. It just didn't seem like there was
a reason to attach the two.

JUDGE JONES: Can I just ask
quickly, who does the pretrial interview, the
opposing counsel?

MS. FERNANDEZ: I believe so.
That is what I would assume --

JUDGE JONES: Yes.

MS. FERNANDEZ: -- since what they are talking about is --

JUDGE JONES: No. We have no probation department here. So, right.

MS. FERNANDEZ: Right.

COL COOK: In the federal courts -- in the military, it is a victim-impact-type statement where the victim can come in and say what impact has it had on you and this is a fact to consider in aggregation or extenuation at the sentencing portion of a hearing. The fact that the financial consequences, the mental hardships, physical hardships, whatever that might be, and all of that is taken into consideration by the sentencer, which could be a panel or it could be a judge in the military, in determining what, if any, jail time, kick from the military, what the sentence is in a court martial.

Is it the same thing in a --
BG DUNN: The big difference here is that in federal court you get notice of everything. The probation department does a huge report. It contains the harm to the victim in the report. So, you have all that notice.

It is rare that --

COL COOK: Which means it is also the opportunity, then, to look into the --

JUDGE JONES: You have got it and you have it weeks before the sentencing. So, if there is facts in there that you want to investigate, you can do it.

If a victim got up -- and, typically, victims are not sworn when they make a victim impact statement in federal court. But there are also no surprises.

And if a victim were to say, "Oh, and by the way, I actually lost a million dollars, not $250,000, with this," and changed the seriousness of the offense, for instance, there would be no way that that unsworn
statement would be accepted by the judge. And it doesn't happen because lawyers and victims, you know, understand this.

The victim would have to, at a minimum, put in an affidavit. And if the defendant asked to have the victim put on the stand, they would be put on the stand.

So, in practice, we have a huge luxury in the federal system of a lot of information and a lot of notice. And frankly, if a victim said anything that would materially affect a sentence -- and I gave just an easy example where it may the crime more serious than you thought it was to begin with -- then that defendant, if they asked for a hearing with the victim on the stand, would get it.

Now do people cross-examine victims if they talk about their depression or those kinds of conditions? No, they do not, unless they really gild the lily and it bears no relationship to what they have provided to
the probation department in terms of the harm
that has been caused to them, in doctors'
reports, et cetera.

But, I mean, even though we don't
swear them in, if there is going to be
something said that is going to make a big
difference, a material difference, that
defendant will get a hearing, and it could
require the victim taking the stand under
oath.

COL COOK: And in the military,
looking at those safeguards, I mean, it might
be easy to say, well, if they say something
they want to challenge, you delay it.

There are cases, and there are
enough of them, where an expeditionary force,
those court martials could -- in a deployed
environment I have had a case, and this
applies to all victims; it is not just sexual
assault, so it is all victims we are talking
about. But there are cases.

I can remember being in a deployed
environment where an offense took place on a
Friday. By Saturday, we had the defense
attorney who was in our office that says,
"Hey, the person screwed-up. We just want to
get this resolved." The victim wanted it
resolved. The command wanted it resolved.

By Monday, the judge is in
theater. There is a guilty plea. All time
limits are waived and the case is finished,
and the person is taken off to jail for their
sentence. And they didn't get a kick. They
were returned back to the operational
environment and the discipline within that
unit.

The morale, discipline in certain
environments, we don't have as much the luxury
of time. I am not sure that requiring a
victim who has the courage to put forth their
information -- this also says in Mr. Cassara's
report notes that it might be the first time
you are hearing from the victim. That would
assume that there was a guilty plea.
Otherwise, the victim, if they are a witness or the victim of an offense, they would have testified under oath at the last portion of a trial. If there is a guilty plea, they may not have.

BG DUNN: Yes, but they may not have testified about the impact on them.

COL COOK: No, they wouldn't have testified about the impact, but they had been under oath once.

BG DUNN: Right.

COL COOK: So, if they have got the courage to talk about the "what happened" --

BG DUNN: Right.

COL COOK: -- what the lasting effects would be, I don't think that is quite as -- I may be completely wrong; maybe it is more significant.

BG DUNN: If you are getting the why we need an unsworn statement, if the victim has been on the stand and done the
hard, hard, hard testimony of what happened, why does the impact need to be unsworn?

COL COOK: If they want to present evidence on it; they are not required to at that point, either.

BG DUNN: Yes.

MS. FERNANDEZ: What the Subcommittee discussed a lot was sort of the neurobiology of trauma and that --

BG DUNN: I'm sorry, what?

MS. FERNANDEZ: The neurobiology of trauma, and the need to make a statement about how this impacted you can really get you on the road to recovery much quicker. And that that kind of statement is for the benefit of the victim and not so that it can be cross-examined.

So, you may think it is easier to get -- it is harder to get on the stand and actually talk about the events that occurred, but that need to really put out there the impact, how this has affected them, is a road
to beginning the recovery. And I think that
that was why the Subcommittee felt it was
important to have the ability to do the
unsworn statement.

BG DUNN: But in the context of
the accused facing jail time, how you square
the fact that -- I mean, if we could limit
this somehow, so that the victims only talk
about how it made them feel, but how do you
prevent victims --

MS. FERNANDEZ: Well, I think you
do by --

BG DUNN: -- from making broad
statements of damages and --

MS. FERNANDEZ: We curtailed what
they can and cannot say by the bullets. So,
I do think that we are doing that.

You know, if they bring up any new
matter, then the defense has the right to look
at that.

COL COOK: But how do you define
"new matter" in the context of the defense
attorney who has never had the opportunity to
talk to that victim, if they haven't testified
on the trial list to the merits? And the new
matter in sentencing is completely -- even if
something was brought up as a point during a
merits portion of the case, by its very
definition, the sentencing portion of a trial
has a different purpose. And the evidence
that is put out in that time doesn't go back
and rehash everything that happened. It
rehashes or brings out new information of that
impact.

MS. FERNANDEZ: Well, I think new
information would be something along the lines
of the example you gave, but in a sexual
assault situation. What you have been charged
with, let's say, is a groping. And during
your impact statement, you talk about being
raped. Now those are completely different
crimes, and I think that that would be
something that you could, then, stop the
statement and get further information on.
BG DUNN: But, oh, you say that the stress caused me to have a miscarriage. I mean, there are just so many things that may well be perfectly true.

You know, the example he gives in here apparently was not factually correct, but there are so many things that are perfectly that a victim might -- and then, not be able to be cross-examined.

JUDGE MARQUARDT: Is it true that the convicted party gets to make an unsworn statement at sentencing?

COL COOK: Yes.

BG DUNN: Yes, but he or she is facing jail time.

JUDGE MARQUARDT: Well, sure, but, I mean, they can make the statement, and the advice is given that this is unsworn. And we are suggesting that you do the same thing with the victim's statement.

BG DUNN: Yes, but the thing is, it doesn't prevent the victim from saying
things that could, then, impact the forthcoming sentence.

MS. FERNANDEZ: Well, I think when you talk about the example of miscarriage, in some ways that was the same as Mr. Cassara's situation. It was the opposite, I guess, of being sterile and, then, she got pregnant.

BG DUNN: Yes.

MS. FERNANDEZ: I think that that could be information, new information, that could affect how long the victim, I mean the defendant's sentence is going to be. I think that we could put some sort of clarification in there that that would be the kind of information that the defense attorney would need to know beforehand, before it is made in a statement.

JUDGE JONES: I worry, too, with a panel as opposed to a judge sentencing. Because, you know, it comes out; you object. And there you have a panel and you have to instruct them, but that is a very important
part of the proceedings where you probably
don't want to rely on an instruction.

PROF. HILLMAN: We are trying to
solve that for you, Your Honor, with the
Comparative Systems Subcommittee sentencing
recommendations.

(Laughter.)

It seems, you know, even in this
statement -- and I know Mr. Cassara is not
here to talk about this -- but more than one
person I know has thought they were not able
to have children and been assured that by
medical professionals, and then, lo and
behind, found that not to be the case.

So, this is actually not a
shocking turn of events that ended up not
being true in this particular narrative of an
example of an inability to challenge on the
record an impression, and the harm to a victim
of having been under the impression of not
being able to conceive as the result the harm
that came from the crime, to me, doesn't --
even that particular example is -- so, with
the safeguards that are set in here, I am fine
with the recommendation.

COL COOK: My opinion would be,
even with those safeguards, I think that the
procedural safeguards that are in a federal
sentencing proceeding are complete and they
are thorough. Even with these safeguards, I
think that the accused are at risk of a
sufficient portion, that I don't think
allowing a victim to have an unsworn statement
during a sentencing outweighs the need of that
accused to be able to address and ensure that
their due process interests during the
sentencing portion of a trial are protected.

MS. FERNANDEZ: If we got the
unsworn statement in writing prior to the
victim providing it, would that be --

JUDGE JONES: Well, that would be
notice --

MS. FERNANDEZ: That's right.

JUDGE JONES: -- which at least
then, you know, it would seem to me quite likely opposing counsel, 99 times out of 100, is going to accept that letter, that sworn statement, whatever it is, as long as it is under -- it's notice.

I mean, it is the thing you never heard about before, not whether it is true or not, the sterility issue, that causes the problem. And in the military system, you don't have a chance to do anything about it, apparently.

COL COOK: And if you got it in writing in advance, even if it is provided the day of the trial, if the defense counsel has a true objection to that, that there are too many things that are in it, they could always litigate that in front of the judge and let the judge make that final decision of whether or not --

MS. FERNANDEZ: I would say it would have to be after the trial, when the trial has ended, because it is an impact, and
the trial is a huge part of the impact.

COL COOK: You're saying when the trial has ended, after the --

MS. FERNANDEZ: The findings -- thank you -- after the findings.

COL COOK: That's what I am saying, getting it there prior to the sentencing and at least letting the defense counsel have the opportunity to see what, if anything, would be submitted, and at that point raising any concerns they might have. They might say, "You know what? We have no objection to that being out there." And they could either address -- defense counsel is not going to win their sentencing case by attacking a victim in terms of how it has affected their lives.

BG DUNN: Yes, which is why it doesn't happen, yes.

COL COOK: So, just allowing them the opportunity to submit a letter that says, "Look, this is what has happened to me since
the event has happened," and then, giving it in writing. Defense and the trial counsel get to review it. And if there is a true concern by a defense counsel or a convicted person at that point, they get to raise it in front of the judge, and the judge will decide whether or not it is problematic to submit.

And it may be the person has gotten the opportunity to write it. It has been considered at least by the primary actors within the court, even if it is not ultimately accepted into a court martial; it doesn't go to whoever that --

BG DUNN: Well, and there ought to be the option to make it sworn at that point.

MS. FERNANDEZ: So, do we just add that as a last bullet? Statement must be in writing at the end -- once the -- after the findings?

BG DUNN: But only if the victim is going to make an unsworn statement.

MS. FERNANDEZ: Yes.
BG DUNN: If the victim is going to make a sworn statement, there is certainly some requirement for that.

MS. FERNANDEZ: Yes. This is the unsworn only.

BG DUNN: Unsworn statement.

MS. FERNANDEZ: We are only talking unsworn here. So, it would just be the additional bullet.

COL COOK: I think additional protections would have to be discussed, you know, sending it back to the Secretary of Defense or the Joint Services Committee to consider allowing an unsworn statement by a victim to be submitted after the merits prior to sentencing, and determining how, then, it gets addressed.

You know, you are raising an appellate issue, but letting it be more considered. I just don't have enough -- I am concerned about it enough in the military system.
I am not so offended by allowing an unsworn statement by a victim. That might help them feel better. Depending on what it says, it may not prejudice the accused. But I have never been a defense attorney. I can't look at it from the perspective of the rights that are at issue and at risk without more information.

MR. BRYANT: The other thing I would add, Judge Jones, if I may --

JUDGE JONES: Yes, please.

MR. BRYANT: -- is, when we are talking about the new matter, the new matter that would result in a delay in the sentencing would have to be relevant either to the elements of the crime or impact upon sentencing.

Because defense attorneys, trying to do their job, if a victim says, "It destroyed my pair of brown shoes," and her statement said it was black shoes, or "We were in my father's car," and it turns out it was
actually her sister's car, that is a new
matter, but it is not relevant.

MS. FERNANDEZ: Right.

MR. BRYANT: And so, I think we
want to -- and I would assume anybody
promulgating these regulations would take
those things into account, but defense
attorneys sometimes are desperate to find
something. And anything new that wasn't
presented originally, they will jump on it.
And I say that as having been one.

JUDGE JONES: Well, I think the
main guideline is whether the information in
there is new and would have a tendency to
affect the sentence.

MR. BRYANT: Or the elements of
the offense or both, something like that.

JUDGE JONES: To me, I like the
idea of at least suggesting --

MR. BRYANT: Sure.

JUDGE JONES: -- that notice, some
amount of notice, if a victim wishes not to
testify and be subjected to cross, but wants
to make an impact statement, I would like to
see notice and I would like a provision that
says, if there's something in there that is
new and would have the tendency to impact a
sentence --

MS. FERNANDEZ: You're asking for
notice further than just notice that you're
going to give a statement? You want notice --

JUDGE JONES: Oh, notice of the
contents.

MS. FERNANDEZ: Notice of the
content.

PROF. HILLMAN: How much notice?

JUDGE JONES: You know, look, if
you gave a good defense lawyer an impact
statement of two pages 15 minutes before, they
would know what arguments to make. But they
also might need two weeks to track down some
piece of information that is in it, you know.

PROF. HILLMAN: And that would be
the new matter. So, could we amend this to
say the first bullet is fine; members should be instructed, right?

The second bullet, if there is a new matter that could affect the sentence -- does that meet your concern, Mr. Bryant?

MR. BRYANT: Well, I also have in mind the elements of defense because we have the example of, you know, if this statement says something that would change the findings of the panel in terms of guilt or innocence -- and I guess we could sit here and go through 100 examples, but that is one of the things I had in mind.

I think we are primarily concerned how it would affect the sentence, since there has already been the finding. But if a victim comes in and says, her statement, his or her statement, for the first time, says, "And when that knife was put in my side" -- and that is the first time anybody has heard anything about a knife in this --

BG DUNN: Well, I mean, if we
provide some limited, the statement if the
victim wants to make an unsworn, uncrossed
statement, that it has got to be provided in
writing to the defense at the end of findings
and before the sentencing begins. You know,
there should be some time period in there, 20
minutes, 30 minutes, something that allows the
defense to review it.

But if there is one sentence or
one topic in there that the defense objects
to, you know, you could agree, "Okay, I do not
object to this statement except for this last
line. If you take that out, have at it and we
can move on."

I mean, it is true that in the
vast majority of cases defense counsel do not
cross-examine the victim.

MR. BRYANT: Right, that's
correct. Yes.

COL COOK: And they would probably
prefer to see an unsworn statement where you
don't have a visual of this person who has
been so horribly affected by -- and yet, if
you are a victim, I mean, the victim always
has the right to make that sworn statement.
That is not what the issue is. It is if they
don't have the strength or they just don't
want to make it, for whatever reason --

BG DUNN: They don't want anybody
asking them any questions.

COL COOK: -- and they want to do
it another way, because I am sitting here
trying to think, if you are a defense counsel
and you agree to allow this unsworn statement
in, are you in any way subjecting yourself to
ineffective assistance of counsel by saying
yes without objecting to it, and forcing the
victim to make an unsworn statement, the
victim to make a sworn statement --

BG DUNN: Yes, but you have to
show --

MS. FERNANDEZ: I mean, I wouldn't
go that far. I just wouldn't. I mean, I
think you would have to show that there was
something in that statement --

BG DUNN: Right, that was new or
different.

MS. FERNANDEZ: -- that was new.

BG DUNN: Yes.

MS. FERNANDEZ: And I think what
we are saying here is, you know --

MR. BRYANT: Part of the wisdom of
maybe requiring the written statement is that,

once that is submitted, counsel on both sides
may agree that trial counsel or someone can
simply read that statement, and that that
victim won't have to make their unsworn
statement. If everybody is in agreement like,
okay, this is fine, either the judge can read
it to the -- somebody reads it.

MS. FERNANDEZ: Yes, but I think
there was a reason that, if victims wanted to
read it, they could.

MR. BRYANT: I agree.

JUDGE JONES: The victim can read
it if there is notice and we don't run into
problems after counsel has read it in terms of
fairness about the content. I wouldn't even
think it would be problematic to have the
victim read it. The victim has to stick to
the statement, but --

MS. FERNANDEZ: Right.

COL COOK: But if they don't stick
to the statement, you are now in court, they
don't stick to the statement; I mean, you are
beyond it. You have created an issue that, if
they were under oath, wouldn't be an issue.

JUDGE JONES: Do you want to give
up on this? I think I am at the stage where
I may think that we should leave this to a
longer discussion for someone else, yes.

PROF. HILLMAN: I think this is
why we value judges so much. They have to
resolve these things, right? And there might
be things that come up that they would manage.

But what if we added, if there is
a new matter that could affect the sentence
brought up in the victim's unsworn statement,
sentencing -- we say "should be delayed".

Maybe "could be delayed" or leave that to the judge. "Could be delayed, so the defense can respond."

And the final bullet I would change to add the notice requirement. And I would say, "The unsworn statement should be in writing, available to defense counsel before the sentencing, and subject to the same objections available to the government regarding the accused's unsworn statement."

JUDGE JONES: All right. I am going to do something very bad to you. I would like you to write that up, and then, we will have for May 16th.

(Laughter.)

It sounds good, and I like it.

Okay? Thank you.

MS. FERNANDEZ: Can we agree to the content of it?

JUDGE JONES: I am prepared to say I like it. And there are three other members
of the panel who aren't here. So, let's write it up. I think it sounds like a very good proposal.

BG DUNN: I think it could be made to work. It is just the --

JUDGE JONES: And we are sort of making the whole problem what the real problem is, instead of -- you know, we are bringing this down to reality, which is it is rare that there is a cross-examination of the victim. If we can give the victim the opportunity to speak for her reasons, but to also inform the court, which is the primary purpose of it, without more victimization, more pressure, that is great.

And I really do like it. I am inclined to agree to it. I am not doing it now. So, we will look at it on the 16th.

Anything else?

MS. FERNANDEZ: We have no further recommendations, Your Honor.

(Laughter.)
JUDGE JONES: Pardon me?

MS. FERNANDEZ: We have no further recommendations.

JUDGE JONES: Well, you know, we clapped for Professor Hillman yesterday. I think you are entitled to at least the same.

(Applause.)

I said "at least" because you have been here a long time. It has been great. Thank you.

We should take a quick break.

(Whereupon, the foregoing matter went off the record at 2:55 p.m. and went back on the record at 3:14 p.m.)

JUDGE JONES: We are now going to begin the report out of the third subcommittee, which is the Role of the Commander Subcommittee. And we have – for all of you who are trying to follow along with our slides, we have rearranged our presentations, so we're going to start with the Role of the Commander with respect to prevention of sexual
assault in the military. Then we're going to
go to the Commander's being assessed with
climate assessment techniques, and then to the
very important topic of Commander
Accountability.

And my two Subcommittee members
who are here who will do the report out are
Joye Frost and Geoff Corn. And Joye is with
the Department of Justice, and head of the -
and you'll have to forgive me, Victims -

MS. FROST: Office for Victims of
Crime.

JUDGE JONES: Right, Office for
Victims of Crime, and has an amazing
background working with victims here and
internationally.

And Geoff is a professor of law.

He was in the Army for 20 years. You ran the
- remind me again. You forgot what you ran?

MR. CORN: I ran a lot in the Army,
ma'am.

JUDGE JONES: I know you did. I
thought you were in charge of —

MR. CORN: Yes, I ran the Law of
War program.

JUDGE JONES: That's right. Okay.
And he's written a number of articles and
books, and has been a tremendous asset, as has
Joye, and subject matter expert for our
Subcommittee.

All right. I'm moving us along.

I'm not talking about our goals and our
missions. Essentially, we were asked and
tasked to review the Role of the Commander in
responding — preventing and responding to
sexual assaults. We were also tasked to look
at the Commander specifically with respect to
the issue of Senior Commanders being Convening
Authorities, being the Disposition Authority
in sexual assault, and all serious felony
cases. But we are going to begin today with
prevention, and then climate assessment, and
accountability. Thanks, Joyce.

MS. FROST: Good afternoon. And I
do want to start by also thanking the staff who supported this Subcommittee. And I also want to thank my colleagues. It's been a privilege to serve on this Subcommittee on the Role of the Commander, and one of the most meaningful experiences for me in a career of serving victims.

I do want to briefly put our recommendations within a framework. We, of course, know that sexual assault poses unique challenges for the military, but we also believe that the military is uniquely positioned to drive exponential progress in our society on this issue. We, of course, believe that the Commander plays a pivotal role in combating sexual violence, and this is especially true in the area of prevention.

We talk a great deal about — we talk a great deal in the government about leadership and accountability, and I think we all know there is no brighter spotlight than the one that is shining on military Commanders.
and the issue of sexual assault. So, when we came up with these recommendations, we do so in the context that Commanders must be held accountable for the success or the failure of not just responding to sexual assault victims, as important as that is, but to the goal of creating a military culture which we believe can set benchmarks for the rest of society in reducing, and dare I say coming as close as we possibly can to the ideal of eradicating sexual violence and victimization.

But in order to hold Commanders accountable to that admittedly lofty standard, we have to give them the tools and the best tactics and strategies for moving forward. And we hope that those recommendations will serve that purpose.

I have to say that I'm also very grateful for the two Subcommittees who have presented before this Role of the Commander Subcommittee as they have laid out a fund — what I believe is a fundamental and
profoundly important goal, and that is that, ultimately, we must move forward based on a foundation of evidence. We must have data, comprehensive data that is standardized, transparent, and accessible, not just by the military but researchers and others with an interest in this issue.

With that framework in mind, I would add that our recommendations are consistent with those that were released last week in the White House Task Force to Protect Students from Sexual Assault Report, and those principles include that prevention programs must be sustained and comprehensive. We have heard over and over again in the last two days that there is no silver bullet, there's no silver bullet for responses, and certainly not for prevention.

Bystander intervention programs must also move beyond a singular focus on sexual predators, and instead extend to the need to change social norms and cultural
beliefs that are sexist and diminish the role of women. And then, of course, they must be based on evidence.

And what we do know must be tempered with an understanding that there are major gaps in our prevention knowledge. We know very little, actually, I would say astonishing little about male-on-male sexual assault. We need to know much more about risk and protective factors, and I think most importantly how to implement programs that build on those factors.

So, I will at this point jump into our recommendations based on prevention, and I think we start with Recommendation 5, and that is that the Secretary of Defense should direct appropriate DOD authorities to partner with researchers to determine how best to implement promising evidence-based alcohol mitigation strategies and the availability of alcohol.

We heard from researchers from the
CDC that indicated that alcohol mitigation policy and programming was one of the most promising practices.

JUDGE JONES: And I guess we should add, and I think everyone knows this, that alcohol abuse, use and abuse, are major factors in military sexual assault cases, and those demographics are in the Workplace and Gender Relation Survey.

MS. FROST: Recommendation 6, the Secretary of Defense and the Service Secretaries should direct DOD SAPRO, and the Services respectively to review bystander intervention programs to ensure that they do not rely upon common misconceptions, or over-generalized perceptions.

In particular, programs should not over-emphasize serial rapist and other sexual predators and should, instead, emphasize preventive engagement, encouraging Service member attention and vigilance towards seemingly harmless attitudes and behaviors
that increase the potential for sexual assault.

We know from the research that sexual assault is a crime that is in the majority of cases committed against young people. And that is, in fact, the population most impacted in the military, but we again have to take a far broader perspective in bystander intervention.

We also - well, I'm jumping ahead, there are - bystander intervention also has to address retaliation, not just from the Command perspective, but from the Service member perspective.

Recommendation 7 addresses that particular issue. We are recommending that the Secretary of Defense direct DOD SAPRO to establish specific training and policies addressing retaliation toward peers who intervene in our report.

Bystander intervention programs should include training that emphasizes the
importance of guarding against such
retaliation. It should ensure protection from
retaliation, not just against the victims, but
also peers who speak out and step up on their
behalf. And Commanders must encourage members
to actively challenge attitudes and beliefs
that lead to offenses, and interrupt and
report them when they occur.

Recommendation 8, and I believe we
-this is dealing with, or asking the
Secretary of Defense to direct DOD SAPRO to
evaluate development of risk management
programs directed towards populations with
particular risk and protective factors that
are associated with prior victimization. And
we had a rather extensive conversation on
this. I think that was Recommendation 13 with
the Victim Services Committee.

I think there were questions as to
are we talking about new programs and new
interventions? Are we talking about how we
would identify and assess, and I think the
answer is both. I think there is still much to be gained in this particular area.

I would caution that we have to do so in a way that is respectful of each and every victim. I get uncomfortable when we start developing policies that make broad assumptions about every victim. Resilience is something that increasingly researchers are studying, so what has happened in a victim's prior to coming into the military? There's a lot of different variables that may or may not lead to a higher risk for repeat sexual victimization. So, we think much more research is in order.

Recommendation 9, the Secretary of Defense and Service Secretaries should ensure that prevention programs address concerns about unlawful Command influence. And, in particular, Commanders and leaders must ensure that sexual assault and prevention response training programs, and other initiatives do not create perceptions among those who may
serve as panel members at Court-Martials, that they may go in with the expectation that Commanders expect particular findings or sentences at trials, or compromise an accused Service member's presumption of innocence, right to fair investigation and resolution, and access to witnesses or evidence.

Recommendation 10, the Secretary of Defense should direct DOD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.

There is such huge stigma associated with male sexual assault, not just in the military, but in our society at large, and this is where I think that the military, in particular, has a huge opportunity to drive real progress.

And when we say that prevention efforts should ensure Commanders directly acknowledge the potential for male-on-male sexual assault in their Commands, and directly confront the stigma associated with it, I
think we have to begin by talking about it. I cannot tell you the number of colleagues of mine that were surprised when they learned that in terms of total numbers, that there were more male victims of unwanted sexual contact than females in the military. Again, we're not talking about percentage, but they were shocked at the large numbers.

Prevention efforts should also ensure that Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing, or labeled as horseplay in the past may, in fact, constitute punishable offenses that should not be tolerated.

And, again, DOD SAPRO should seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military, and should develop targeted prevention programs for male-on-male sexual assault offenses.

Recommendation 11, the Service
Secretaries should direct further development of local coordination requirements, both on and off the installation, and expand requirements for installation Commanders to liaison with victim support agencies. I think it's no surprise that many military installations are part of a larger community in some instances, and it will take these innovative, collaborative partnerships to address issues. And I think one that comes to mind, in particular, is alcohol mitigation policy.

During our visit at Fort Hood, for example, we heard from a Commander who certainly supports the idea of alcohol mitigation policies, but cautioned us that you had to be careful because what you don't want to do is drive Service members completely off the installation where there is, you know, little or no control. So, those partnerships are going to be critical.

Recommendation 12, the Service
Secretaries should ensure Commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DOD's prevention approach and its principles, and they must ensure members of their Command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

This seems like a pretty benign recommendation on the surface, but this is something in my agency that's our mission is to do training. And doing training in such a way that we are building on other policies and programs, that these are integrated and synchronistic, and that they are, in fact, engaging the Service members, not these rote-types of training. It's incredibly important, and we think that more attention needs to be given to supporting Commanders in this specific area.

And I will say, as well, that
Commanders have come up with some pretty innovative programs in the installations that we visited, but it's without them being evaluated, and back to that need for data and research. It's hard to know the impact of those programs.

And then finally, Recommendation 13. Given existing training and curricula mandates, the Department of Defense should not promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the armed forces has with regard to matters of sexual assault prevention and response. And our two findings –

MR. BRYANT: May I ask a question at that point, Judge Jones, please?

JUDGE JONES: Sure.

MR. BRYANT: Ms. Frost, would that include – and I notice, and I compliment you for having been here through large portions of the last two days. Would that recommendation
include the recommendations of the two previous Subcommittees, that there be additional training, such as entry-level advisement of rights that we discussed at length here today, and other training recommendations that we made, that be implemented? I'm just wondering whether or not this is a recommendation that from your —

JUDGE JONES: Which recommendation are you on, Mr. Bryant?

MR. BRYANT: The same one she just finished.

MS. FROST: 13.

JUDGE JONES: 13.

MR. BRYANT: 13.

JUDGE JONES: You know, let me point out that number 13 is in direct response to a mandate from Congress which was they tasked the panel with "an assessment of whether the Department of Defense should promulgate and ensure the understanding of, and compliance with, a formal statement of
what accountability, rights, and responsibilities a member of the armed forces has with regard to matters of sexual assault prevention and response as a means of addressing those issues within the armed forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement."

This — I don't think this is so much a training mechanism, as it is asking us whether there is some formal statement that we would give to every Service member. At least that's how I read it.

MR. BRYANT: Well, that's why I — excuse me, Professor Hillman. That's why I asked the question because I was wondering — and I see the technical difference in the language between a formal statement and training, but it does go into accountability, rights, responsibilities a member of the armed
forces has with regard to matters of sexual
assault. So, I'm - how I'm looking at this
now is it's a recommendation that, in effect,

enough is enough. We have enough in place
already, we don't need to add to what we've
got. But the implementation, perhaps, and the

training on what we have should continue. Is

that - am I -

JUDGE JONES: Absolutely.

MR. BRYANT: All right.

JUDGE JONES: I shouldn't say this,

but I'm going to anyway. We probably didn't

want to sit down and try to write this

statement, because I think it's vast and would

encompass almost everything. I think there is

enough out there, and that was, essentially,

the consensus of the - we weren't sure what

purpose it would serve at this stage of the

game. Let me put it that way. Any comment,

Professor Hillman?

PROF. HILLMAN: I just - I shared

Mr. Bryant's concern about that one, that it
would preclude other recommendations that we
make about enhanced training or, you know,
because of the breadth of it. I understand
it's a response, but the recommendation itself
doesn't have that response, but I'm - so long
as we're not actually precluding any of the
rest of that, then it's -

MR. BRYANT: I think it has to be
read within the context of the broader
recommendations. And the next section includes
a number of recommendations designed to
enhance the understanding by Commanders and
subordinate leaders of their responsibilities.
So, within that context, I think it's fairly
clear that its purpose was limited.

MS. FERNANDEZ: Is there a way just
of eliminating the first clause given the
existing training and curricula mandates?

JUDGE JONES: And just go right to
the heart of it?

MS. FERNANDEZ: Yes, and that way
you don't get any confusion.
JUDGE JONES: That's a good point.

I agree with that. What about the rest of the panel?

MR. BRYANT: I like that. That's very good.

JUDGE JONES: All right. Then the panel accepts this recommendation and we're going to remove the first clause and just begin with, "The Department of Defense." All right?

MS. FERNANDEZ: Yes.

JUDGE JONES: Thank you. Now, we should go back and go through the others and take comments on Recommendations —

MS. FERNANDEZ: Do we have the slide to go back to one?

JUDGE JONES: Yes, we need to go back to Section —

MS. FERNANDEZ: Or to whatever we started with.

JUDGE JONES: To Recommendation 5.

PROF. HILLMAN: Your Honor?
JUDGE JONES: Yes?

PROF. HILLMAN: Can I move adoption of these with the modification of 13?

JUDGE JONES: You're moving for the adoption of all of these recommendations that Ms. Frost has just presented? Any objections?

COL COOK: I have two slight comments I would offer. On Recommendation 5, are we going to actually - this was the minor one, the other one I'd be more concerned about. Recommendation 5 where you're saying that we're going to actually partner with the researchers. Do we want to consult with researchers or - I mean, when the Department of Defense enlists the researchers and does a study I'm not sure we actually enter into a partnership with them. We consult with them, we want to get the expertise that's there, we want to share the information that's out there, but I'm not sure I want to advocate that we partner with these outside entities would be my comment on Recommendation 5.
And my comment on Recommendation 9 would be in the last line where you talk about "the Service member's presumption of innocence, right to fair investigation," and "trial" is what I would put instead of "resolution," because I'm not sure - I mean, his right to have the investigation, the trial and the whole process, but I'm not sure an accused or somebody is going to say that have a fair resolution in that process.

MR. CORN: Could I suggest disposition, maybe? I think that the rationale was the proceeding might not necessarily be criminal.

COL COOK: Okay, and that's fine, because we do - I mean, then it's semantics. Yes, I would go with the disposition. I'd be fine with that.

JUDGE JONES: All right. So, then we have accepted Recommendation 9, and I guess we just need to go back. We feel pretty strongly about working with these partners,
and I guess that's why we said partner with researchers. It's a little stronger than consulting, I guess, but the Subcommittee felt, as I recall, pretty strongly about it.

COL COOK: What do we do now? Do we actually partner with the researchers?

JUDGE JONES: I'm not sure that it's a term of art. I think it's just meant to be let's be serious about this, and bring them in, more than just a consulting basis.

BG DUNN: I think the language is fine. I think Colonel Cook suffers from PTSD from having been the Chief of Administrative Law for the United States Army.

JUDGE JONES: I thought you were going to say PTSD from attending the session today.

BG DUNN: No, no, no, no. From having been the Chief of Ad Law for the United States Army and the term "partner" and "partnership" is a very technical term that brings many legal issues up.
COL COOK: That's sharing of
information always, and I'm not sure that we
do.

JUDGE JONES: Yes.

MS. FROST: Well, we could say
work.

COL COOK: We could say works with.
I mean, works with, I mean, what the
parameters of that as a partnership is equal
in - I mean, the partnership would have to be
- so, works with researchers, or work with
researchers.

JUDGE JONES: Thank you.

MR. BRYANT: Just out of curiosity,
may I ask, do you recall some of the programs
that local Commanders have initiated to
mitigate alcohol consumption, because I know
- I don't know whether it's Service-wide, but
in the Navy, incoming ships, when the Task
Force comes in, they fly out representatives
from Mothers Against Drunk Driving to conduct
programs that they have that are very
effective. And in full disclosure, I'm a member of Mothers Against Drunk Driving, but I'm just wondering if that is some of the things, or if there are other innovative programs that Commanders have come up with, other places?

PROF. HILLMAN: Mr. Bryant, we heard things at site visits of moving the location of the liquor and alcohol in the post exchanges, base exchanges from when you walk in the door to way in the back, so there were -

JUDGE JONES: Reducing the number of stores. There were all sorts of strategies.

MS. FROST: Hours of the Class 6 store, for example.

MR. BRYANT: Okay.

MS. FROST: But I think the point is there was no real evidence that these were effective.

MR. BRYANT: Okay.

JUDGE JONES: I would like to go
back to - Colonel Cook, did we cover both of your -

COL COOK: Yes, thank you.

JUDGE JONES: - suggestions?

Okay. I think you mentioned this, Joye, but recommendation - our Recommendation 8 is very closely connected to - was it Recommendation 13?

MS. FROST: Right, 13 on the Victim Services.

JUDGE JONES: In the Victim Services, so we really don't have to do this now. Everyone is in agreement with that one, and this one, but just to make a note of it for the record that we may want to combine them.

All right. Then all of the Recommendations 5-13 have been accepted by the panel. And I wanted to - oh, there was one other thing I noticed, and that is Recommendation 10. And it, basically, says in the second bullet, "Prevention efforts should
also ensure Service members understand sexually demeaning or humiliating behaviors that may have been minimized as hazing, or labeled as horseplay in the past." And then, Joye, you put the word in "may" constitute, you put the word in "may," which I think is actually appropriate there, as opposed to just constitute. I don't think we're trying to say that they always constitute punishable offenses, but may - at least that's my opinion. Does the panel have a view?

MR. BRYANT: Great.

JUDGE JONES: Okay. So, with that amendment then, that may have been speediest and most successful presentation so far, Joye. Thank you. All right. Geoff?

MR. CORN: Thank you, Your Honor. And I'd like to echo the thanks to the Committee members, but especially to the staff who've been really remarkable in their ability to collate so many diverse thoughts into such great work product. And with the Judge's
challenge to be the most efficient, I will
pick up on Ms. Frost's review of the
recommendations.

I think three overarching themes
from Climate and Accountability that we
focused on. One, situational awareness
requires more than just looking at the
institutional-wide surveys and assessments.
It's an ongoing process, and Commanders have
to be innovative in their sources of
information.

Two, Commanders and subordinate
leaders have to have clear guidelines on what
the expectations are in their process of
performing this mission-essential task of
mitigating the risk of sexual violence in
their units.

And, three, the term "Commander"
has risk of being both over-broad and under-
inclusive. And in this part, it's the under-
inclusive piece that we focused on to make
sure that when we talk about mechanisms to
create a climate, an institutional or unit climate that mitigates the risk of sexual violence that obligation extends to all leaders in the organization, and not just the leader that is formally titled the Commander.

So, let's start with Recommendation 20, please. DOD and the Services must identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response. This goes to that basic premise that a Commander's obligation to maintain awareness in order to ensure accountability requires the Commander to tap into all relevant sources of information.

I think it was Colin Powell who said that, "No Commander ever knows ground truth, and bad news is always filtered up." Knowing that, and knowing that this is an ongoing issue in military units, the Commanders have to be vigilant and not simply
relying on the institutional surveys as their source of information.

Other sources of information that were discussed in our Subcommittee meetings included going to organizations or individuals on the installation who might have access to information like chaplains, the Military Judge, members of JAG office, Inspector General. One area we talked about would potentially be a rich area to get real candid feedback are professional military schools. When officers and non-commissioned officers are transitioning from one unit or one operational assignment to another, they have the opportunity to maybe reflect a little bit more deliberately on the experience of their last organization. And we should be tapping into these opportunities to try and get a more comprehensive assessment and understanding of what's happening in individual units, and also in the institution at large.

And that's connected to
Recommendation 21. In addition to personnel surveys, DOD, and services, and Commanders should identify and utilize other resources to obtain information and feedback on the effectiveness of SAPRO programs and local command climate.

This is really intended to emphasize that the feedback that Commanders get from the institutional surveys cannot be viewed as the endpoint, but have to be viewed as the start point. And Commanders bear an obligation to drill deeper to identify what the source of some of the concerns are that are identified in these institutional or periodic command climate surveys. So, the surveys have got to be understood by Commanders at every level as a tool, as an intelligence-gathering tool which they will use to gather more intelligence, which will then be used to formulate courses of action to respond to the concerns that are ultimately identified by that inquiry.
Recommendation 22, the Secretary of Defense and Service Secretaries should ensure Commanders are trained in methods for monitoring unit's SAPR climate, and they should ensure Commanders are accountable for monitoring their command's SAPR climate outside of the conduct of periodic surveys.

The Commanders must be taught in their professional development at every level how to maintain or establish situational awareness over the climate as it relates to the risk for sexual violence in their organizations and, of course, they must be responsible for their foreseeable failures. And this is the essence of Command responsibility, that Commanders are held accountable, not only for the derelictions that they are complicit in, but also for the failure to properly discharge their duties when that failure sets the conditions for violations committed by subordinates within their organization. That has to be emphasized,
we believe, in the area of sexual assault mitigation efforts, just as it is in other areas of the Commander's function and responsibility.

Recommendation 23, the Secretary of Defense and Service Secretaries should ensure Commanders are required to develop action plans following completion of command climate surveys that outline steps that Command will take to validate or expand upon survey information, and steps the Command will take to respond to issues identified through the climate assessment process.

So, again, the purpose of this recommendation is to make it clear to Commanders throughout the institution, throughout the Department that when they get these command climate surveys, it's an action obligation. It's not just information for the purpose of information, and their action is two-fold. First, if there are issues identified, they have to identify a plan for
gathering further information, for gaining
more knowledge on what the source of some of
those concerns raised in the survey were. And
then, ultimately, all of that information,
that totality of intelligence, if you will,
has to form the basis for a course of action
that the Commander will implement to address
the concerns or problems that have been
identified.

   It is really – it should be
second nature for Commanders to conceive of
dealing with the problem this way because
this is how they conduct or plan and execute
missions in any other context, so one of the
points we were trying to emphasize was, if
this is an essential component of your
mission, you should address it and conceive of
it no differently than you do any other
mission you're entrusted to accomplish.

   At this point, there are – we
found there's not a consistent methodology for
doing this. I think that we found the Marine
Corps has the most precise guidance for subordinate Commanders on developing an action plan, but all the Services need to focus on giving Commanders a very clear expectation of what's required in response to the command climate surveys.

Recommendation 24, the Secretary of Defense should direct periodic and regular evaluations of DOD SAPR programs and performance to be conducted by independent organizations, which would serve to validate or disprove DOD's own internal assessments, and would provide useful feedback to the Department, and enhance public confidence in the SAPR programs and initiatives.

The purpose this should be very clear. There has to be some external objective validation of the methods that DOD is using to expose and respond to the problem of sexual violence within the ranks. I know Ms. Frost was significant in proposing this recommendation, and the - we're agnostic in
this recommendation on whether or not what DOD is doing is good or bad. That's not the point. The point is trust and confidence of the public at large, and that trust and confidence would be enhanced, we believe, if there's external review. And that external review would either validate what DOD is doing as positive or, in the alternative, would identify areas that could be improved upon. Either way, the outcome can only be positive.

Recommendation 25, DOD SAPRO and the Defense Equal Opportunity Management Institute should ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors, in addition to Commanders. And this recommendation is directed specifically at that concern that the term "Commander," as it's used in this broader discourse risks under-inclusiveness. Supervisors and leaders at all level of the
organization have a profound influence on implementing these type programs, and impacting the culture of the organization.

Commanders rely on subordinate leaders even if they are not technically in a position of command to implement their vision, to implement their concept of how their organization is supposed to run, so non-commissioned officer, junior officer, leaders who are not in a position of command, and potentially even civilian supervisors must be fully invested in this process, and must fully understand and embrace the objectives that the Command sets or else it will undermine, we believe, the efforts of the Commander to produce the type of climate that is so important to mitigate the risk of sexual violence in the unit.

Recommendation 26, DOD and the Services must be alert to the risk of survey fatigue, and DOD SAPRO and DEOMI should monitor and assess what impact increased
survey requirements have on survey response
rates and survey results.

The ultimate issue here is to both
connect back to the requirement or the
expectation that Commanders will use other
methods or other sources of information to get
a comprehensive picture of what's happening in
their Command, but also is directed to the
organizations that conduct these surveys, to
be cognizant of the fact that the more surveys
that are required, and the more comprehensive
those surveys become, the greater there is a
risk of diluting the probative effect of the
results. So, they need to be alert to that,
which will then enable Commanders to be more
sensitive to the possibility that the
information they're receiving from the
institutional surveys might not necessarily be
a fully comprehensive picture of what's
happening within their Command.

Recommendation 27, DOD and the
Services should consider opportunities and
methods for effectively factoring accountability metrics into Commander performance assessments, including climate survey results, in discipline trends, sexual assault statistics, and equal opportunity data.

I think this is a very challenging recommendation to try and conceive and implement because what we're talking about here is the formal evaluation process of officers in Command, and perhaps even of other subordinate leaders who are formally evaluated. And what are the metrics superior leaders or Commanders should use to judge whether or not they fulfilling their obligation to implement DOD's efforts to mitigate the risk of sexual violence.

So, while it may not be possible to have a comprehensive laundry list or checklist, you've done this, you've done this, you've done this, having some metric, some kind of general framework for accountability,
or what are the indicators of failure, is a very important component if we're going to make evaluations a method of enhancing Commander accountability.

That's linked to Recommendation 28. The Service Secretary should ensure assessments of Commander performance in sexual assault prevention and response incorporates more than results from Command climate surveys. This, I think, is the flip side of the coin.

I think we all recognized in the Subcommittee that there is some risk in using just the results of a Command climate survey as the touchstone of whether a subordinate Commander is implementing DOD's mandate to create a climate that mitigates the risk of sexual violence. That risk is that if it's purely just a statistical outcome from a survey, the Commander actually might be hesitant to probe more deeply to find more information that reveals the depth of the
problem because of the fear that exposing that problem could have detrimental impacts on an ultimate evaluation.

So, the expectation here is really reflected in Finding 28-2, the last sentence, "Commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of the unit's actual Command climate, and the Commander's contribution to that climate."

So, superior leaders who are responsible for evaluating and mentoring subordinates have to be very - they have to be cognizant of the obligation to assess a subordinate's contribution or lack thereof to the efforts to mitigate sexual violence in a comprehensive manner that considers the totality of that Commander's efforts, and the information that is made available.

JUDGE JONES: Thank you. All right. Go back and begin with any comments on Recommendation 20.
PROF. HILLMAN: Judge Jones?

JUDGE JONES: Yes?

PROF. HILLMAN: Just taken in total, I think these are terrific suggestions, and I endorse the essence of them. My struggle with all of these is that because in the other recommendations of the Subcommittee, the Commander retains the control to prosecute and the Convening Authority has control of the prosecutorial discretion. The Commander's ability to be successful in all these different measures, and our ability to hold the Commander accountable, I feel is undone by that prosecutorial discretion, because we're asking the Commander to decide who's prosecuted, to make decisions about seating panel members, and to essentially run that Criminal Justice process. And I think it's very difficult for the Commander to get out in front of these Command climate issues when the Commander has that role that conflicts as the Criminal Justice, essentially, as the
prosecutor in the Military Justice System. So, while these are, I think, well crafted suggestions, I don't support them because I don't think that Commanders can be effective in these roles while they still have control of the prosecution process.

JUDGE JONES: Okay.

MR. CORN: Well, I mean, I would only say speaking from my own recollection from the Subcommittee that, certainly, when these recommendations were formulated there was an expectation that there was also going to a recommendation that the Commander - the Convening Authority retain that function. And I think part of my response to that goes to that -- that's the over-inclusive use of the term "Commander." Commanders at multiple levels will have the ability to influence the culture of their unit, and they personally, particularly at the low-level unit, the company, the flight, whatever the case may be, they are not going to be the Commander
entrusted with the ultimate Convening Authority decision.

I would also respond that there are other contexts where Commanders are expected to influence the climate of a unit on issues that could ultimately involve criminal sanction. For example, the response to the use of drugs in a unit. Commanders are responsible for establishing certain aspects of the unit climate, and they still - the Convening Authorities still perform a function related to prosecution. But, ultimately, you know, I acknowledge the concern, but I think these were formulated under the expectation that Commanders would retain that authority, so the recommendations are premised on the assumption that Commanders will do this while the senior Commanders will retain Convening Authority responsibility.

JUDGE JONES: It's also premised on the way the system works today, and I understand your dissent with respect to these
recommendations, Professor Hillman. Are there any other comments, discussion about 20, or any of the other recommendations?

COL COOK: I do. I applaud — what I really appreciate is, I agree, surveys can't be the only baseline. They may be the first step, and you have to look at other things in encouraging the — you know, encouraging to go to all sources of information or for Commanders to do a deeper dive. And I also acknowledge that most of the time this will be done at the lower Command unit level, which is also not the ones generally on the more serious offenses controlling how we get a case to court, the Convening Authority level. So, we're talking about the unit level Commanders for most of these Command climate surveys, although the higher Commanders have the same obligation. But I'd want — you know, I think it's great that your suggestion is in the body of the report you go to the chaplain, social services, providers, military judges,
Inspector Generals, but I just would hope that we put some qualifying language, or just caution to young Commanders who still learn, as they're doing their deeper dive it doesn't mean an absolute entitlement to information about personal information. They're looking for trends, they're looking for lessons learned and best practices that are captured through reports in other areas that perhaps we haven't always maximized utilization of.

And I think right now in terms of, Professor Corn, your comments, and then the fact that there isn't a more specific comment here, that they go out and look for it. And Commanders are going to be diligent, they will go out and they will look for anything they can get.

I want to make sure that the chaplains and the providers know you're talking about the trends, you're talking about the lessons learned. You're not to provide the victim information, because I think one of the
sentences in here actually says "Victim Satisfaction Interviews." I don't want them looking at the Victim Satisfaction Interviews. You want them — whoever gets those, has the obligation to look at them, and to assess them, and to come up with the points that were taken from them, not to share them. And the Commanders have no right to that information, no new right to that information based on what we have here. So, that would be a comment just generally in terms of how far a Commander can go.

JUDGE JONES: Are you recommending any change to —

COL COOK: I'm not recommending a change to the recommendations themselves. I'm recommending a clarification within the body of your report itself, mainly on page 119, to explain — the words I heard today, "deeper dive, to get more intelligence to inform, all relevant sources." The paperwork here talks about Victim Satisfaction Interviews. I just
want to make sure that there are other – with
my Ad Law hat on, other rules and things that
are out there that will control and limit,
perhaps, some of the information to which they
get access. So, in terms of training the
Commanders, and in terms of training the new
sources of information in terms of what they
can provide to make sure on both sides, I
would just maybe add a recommendation that
that training understand what are the
parameters of what can be shared during this
process. And I do encourage the sharing during
this process. I think that is an untapped
resource. And they may be your first
responders in some cases if they receive the
report.

MS. FERNANDEZ: Does there need to
be additional language, though, then?
Something that clarifies that issues of
confidentiality need to be noted, victim
privacy. I'm thinking that we need specific
language in the recommendations to reflect
that.

COL COOK: Then perhaps in Recommendation 22 what we do is talk about the training, but the - this talks about Commanders are trained in the methods for monitoring a unit's SAPR climate. They're accountable for monitor - I guess, I want the Commanders trained, but I also want the others trained in terms of victim confidentiality and the appropriateness of getting some access to that information.

BG DUNN: But you're talking about training those who have that information.

COL COOK: That's right.

BG DUNN: And would presumably extract it for the Commander's use.

COL COOK: I'm saying both. I'm talk -- because I don't want a Commander saying look, this is my soldier. I have an obligation under the sexual assault policy. I'm supposed to find other ways to assess. And the only way for me to assess what's going on
in my unit is if I know. Well, you get to know
if it's an unrestricted report, if it was done
in a forum in which you're entitled to that
information, but it's not a complete blank
check to get the information.

MR. CORN: I mean, I think
Recommendation 22 was clearly -

COL COOK: For the Commander.

MR. CORN: - intended to
emphasize that any officer coming into Command
has to be prepared to manage this process
through training. I mean, the question would
become - I don't think we spoke about
training the recipients of that information
may be under the assumption that if you're a
chaplain, or you're a JAG, or you're a
Military Judge, you have training already in
terms of what your confidences are. But I
don't know about the other sources like the
repository for Victim Satisfaction statements.

COL COOK: I just know if their
goal here was to put out the words of saying
Commanders will go do a deeper dive, and they can even look - this thing talks about the local Command, the local climate which gets into the individual cases, Victim Satisfaction Interviews. My concern is without a clarifying language of we're not intending to create a new entitlement to information, you are looking at the results and the trends that the people receiving it see, not the individual case information to which you may not otherwise be entitled.

MR. CORN: Yes, I think we could qualify that.

JUDGE JONES: At a minimum, we can put a footnote in at 119.

BG DUNN: I think it goes better in the narrative than in the recommendation.

JUDGE JONES: Okay. I meant a footnote in the narrative, yes, at 119.

COL COOK: The question I have is on Recommendation 25, where you talk about DEOMI and SAPRO using the assessments to
assess and evaluate the effectiveness of organizational leaders and - I agree that we should use these surveys. This will be on number 27, as well. Where you use these surveys and the information you find to evaluate the effectiveness of Commanders. I guess my concern is when. The surveys always seem to be - they always fall behind, whereas Command assessments and Command evaluation reports are done on an annual, or when they're due because somebody is triggered to go to a school, or they're triggered for the next job, whatever it is.

My concern would be we're saying they should be factored into it, and that would be great in an ideal world. But I tend to think that the results of the surveys and the assessments of how effective something was is delayed. The reports go out, you can't go back and revise the reports. How do you -

MR. CORN: Maybe Kyle can help me with the details, but my understanding is
there are certain points now where the assessments have to be done. I think within what, 60 days of taking Command?

    LTC GREEN: The law requires 120 days, each of the Services have parameters between 90 and 120.

    MR. CORN: And then every year thereafter, and then the reports have to be reported not only to the Commander, but to the next supervisory Commander, the next superior Commander.

    COL COOK: Is that done through SAPRO and DEOMI, then, or is that done through - I mean, I just don't know.

    LTC GREEN: The surveys are administered through DEOMI.

    MR. CORN: DEOMI.

    LTC GREEN: And they're directly - the Commander requests the survey and the survey is provided directly back to DEOMI, so the Commander has to provide the supervising Commander's information, so it's provided
directly to both.

COL COOK: So, even if it's a delayed – you know, the results doesn't get to them until after an evaluation is there, it's something that will follow that Commander in terms of what's their history been, and impact their ability to take on a new Command. Is that –

MR. CORN: Yes, and that's discussed in the report, as well.

COL COOK: Okay. Then that's what my question was.

MR. CORN: Actually, I think in the report there's a specific reference to the fact that your obligation in relation to the climate you create doesn't terminate the day you hand over Command, that that's a factor that should be considered in the decision whether or not you should be given positions of future responsibility.

COL COOK: And I would agree with those.
On Recommendation 26, I agree. I'm glad somebody will look at the concept of survey fatigue, especially since even yesterday in the Comparative Systems Panel we talked about putting out a new survey, the Military Crime Victimization Survey, which we've never had before. At the same time we still have the Workplace Assessment Survey. Whether they should look at the survey fatigue, maybe the timing of them. Do you alternate them so that they don't all hit the Service members at once, because I know as a retired Service member when some of these surveys come through the mail, I admit on the record, I would tear some of them up because I had just gotten through it takes time to go through all of them. So, if you identify what do you really want to measure, when do you want to measure, and what are you trying to get at? If you can combine, great. If you can't, but having somebody look at that, I'm a big fan of that one.
And then the only other question I have is on number - that was just a general comment, no change to the recommendation.

Number 24, we're going to direct the SECDEF to have an independent - an external review of our organization.

I agree that's the ideal goal. I just look at the limitation of resources. That's a reality of what we're into, and I don't necessarily want a large contractor or research group to get the money that's going to be involved in doing that, and taking it away from the resources that might be needed to help prevent the program. So, I think it would be great to say that it's an independent organization do an external review, and if there were no caps on resourcing I would say great. My concern is, is that really where we want to put the - that's a lot of money you're talking about if you want to assess the way the entire Department of Defense does the SAPRO program in light of the problem and the
concerns that we've raised. So, I'm not - I agree with regular evaluations within the SAPR program. I think we've got it set up that we're going to be doing that ourselves, but I don't necessarily agree with tasking - using the resources, limited that they are, to pay for that piece, as opposed to some of the other important changes that we're considering in the sexual assault arena.

JUDGE JONES: Colonel Cook, I hear you. It's unfortunate, though, that obviously the resources is a huge problem, but it's so important to figure out if what you are doing and expending resources on is validated and working.

You're right, it will cost money, so maybe we have to pick our -

COL COOK: Pick our fights.

JUDGE JONES: Or pick our programs.

COL COOK: With a periodic or regular evaluations, how periodic or regular - I mean, do we want - you know, do you say
that every five years you do an – I don't know. I'm just saying in terms of the perfect world, this is a perfect recommendation. It's not perfect right now.

BG DUNN: But this does say – are you looking at 4?

COL COOK: I'm looking at number 24.

JUDGE JONES: 24.

COL COOK: And it says, "The Secretary of Defense shall direct periodic and regular evaluations of the SAPRO programs and performances to be conducted by independent organizations which would serve to validate or disprove, and it would enhance transparency, it would enhance confidence," it would do a lot of good things. It would cost a lot of money.

JUDGE JONES: Mai?

MS. FERNANDEZ: It would cost a lot of money but outsourcing it might be cheaper than keeping it inside the Defense Department.
COL COOK: Then perhaps even consider that. I mean, if we're doing it in-house now where we're evaluating our own process, then maybe have them look at that.

MS. FERNANDEZ: I think you might save money and actually get an independent review. You'll get both things by doing it that way, so I actually think having an independent organization is the way to go.

MS. FROST: And I would add that some of the discussion centered around the need to look at specific installations, not going to every Army installation, for example, but maybe looking at what you do on a forward deploy, you know, what do you do in a training command, but not - I don't think we were trying to say that every single program at every single Service, at every single unit or installation, but I do think there is some real benefit.

And I think the benefit, again, it accrues to the military. There are, quite
frankly, some credibility issues. This is —

when you do your own evaluation. The gold

standard in research and evaluation is

independent and external, so I think we could
certainly do some -- recommend some selective

COL COOK: Then I would recommend

that. And it doesn't have to be in this

recommendation. It could be, again, on page

121 in the dialogue, but the dialogue in there

is so brief, where you actually target, we

think this is so important to get an external

look, but understanding resources, you would

suggest whether it's a large — forward

deployed, CONUS, whatever it is, how often,

just if you give some parameters. The

Department of Defense is going to look at

something like this and say okay, we're

suggesting let's look at the SAPR program.

That's huge, and that's not necessarily what

we're advocating.

JUDGE JONES: Professor Hillman.
COL COOK: I have no other comments. Thanks.

JUDGE JONES: Thank you.

PROF. HILLMAN: But wouldn't we be looking at the SAPR program? I mean, aren't those the programs that we're trying to evaluate?

COL COOK: Yes, but not the entire Department of Defense. You're looking at components of it to measure effectiveness, more targeted reviews is what I think might be more focused.

JUDGE JONES: Professor Hillman.

PROF. HILLMAN: I just - I didn't read this at the Subcommittee drafted it as requiring a comprehensive or thorough going assessment, but instead actually could be done in narrow ways at specific posts by a local organization with experience in sexual assault prevention and response of a particular program. And we did see evidence of programs that Commanders are innovating with, which is
great. I don't think all those innovations will actually be successful, and I think we'll need to say some of them aren't working. So, this seems like — I don't think it was intended to — and it says SAPR programs and performance conducted by independent organizations.

My recollection of the discussion was that this contemplated a series of different initiatives rather than a — and perhaps not an especially expensive or, you know, huge contracted out work, but instead leveraging civilian expertise and interest in collaboration, and in the innovative programs that DOD is doing here people might well want to come in and see what sort of assessment they could do to understand how things were working.

MR. CORN: I apologize if I mischaracterized it when I presented it, but my recollection is the idea was more of the spot biopsy method. Right? Where you would
periodically –

COL COOK: Okay. But you all were part of those discussions. When it's read by somebody like me who wasn't part of the discussions.

JUDGE JONES: That's a good point.

COL COOK: It's just to make sure that what you talked about, or what you intended, or what's conveyed. So if you clarify it, that would be helpful.

JUDGE JONES: I think we need to make it more specific, because it reads broadly. I agree with you. So, we will endeavor to do that. I guess the Subcommittee is finished, so the panel will endeavor to do that, a sense of the panel. Okay.

Any other suggestions or objections with respect to 20, Recommendations 20–28? All right. Then they're all accepted with the caveat that we need to narrow, I think it's 24. Correct? Yes, we need to be more explicit in what we're talking about in
Recommendation 24.

COL COOK: I think we're going to clarify, too, the training for the Commander just to know the limits —  

JUDGE JONES: Yes.

COL COOK: — of the confidential —  

JUDGE JONES: And I think that's going into the text of the — in the report. All right. Then we're going to at this point leave the remaining part of the Role of the Commander Subcommittee report to May 16th, and we'll take a 10-minute break at this point, and then come back for —  

(Whereupon, the proceedings went off the record at 4:18 p.m., and went back on the record at 4:34 p.m.)

COL HAM: Public comment presenter.

MS. LEE: Good afternoon.

JUDGE JONES: Good afternoon.

MS. LEE: My name is Ginny Lee.

Most of you all met me previously on January
30th when I came forward, and the first time I found my voice and was able to come forward and say that I am a survivor of military sexual trauma.

For those of you who do not know, I was raped the second week of basic training, and seven weeks later when he thought that I had told him, I was then a victim of physical assault where he threw me against the wall.

As a result, the witness was my female Drill Sergeant who saw me pinned against the wall, and did nothing about it. She turned around said it – and then when I was called into their office I was told that if I ever said a word it would be their word against mine. That was my direct chain of command. And that is where a lot of us as victims in the MST community have our challenges.

There were so many times during these proceedings today I wanted to say something, and there's just two points I want
to say before I give my speech. One is, I want to caution this panel on addressing victims of prior sexual trauma because those members that reported on the SAPR report and the people that I work with at the MST community, those are occurrences that happen while going through the MEP station and through recruiters.

Yes, some of them had prior sexual assault issues. I am one of those because I was kidnaped when I was 13 years old. I did not share this with the Board prior. But since this has been brought up, and has become an issue of concern, I find myself where I have to say something about using caution with that, because if a victim is revictimized while he or she is in the military and suffered this type of crime at a younger age prior to coming into the military, and they get out and they try to get benefits from the Veterans Administration, it will be used against them.
I was honest about what happened to me. I was a 13-year old child. For 24 years I've been fighting the VA for my PTSD because they said my PTSD is not related to what happened to me in the military, yet it was related to what happened to me as a child.

If that was the case, why was I entered into the military with glowing recommendations from my teachers from high school, and from my employers that I worked for my senior year in high school?

I did not have PTSD entering into the military. I did not have it until after I was raped by my Drill Sergeant. So, I have to caution this panel when you're addressing that because it will hurt other victims when they go for their benefits, and God forbid they are raped while in the military.

As I listened to the proceedings yesterday, I have to say that I'm more positive with aspirations than I did just a few days ago. However, I'm still saddened by
the recent event that has happened just a few short weeks ago.

A Sharp Lieutenant Colonel at Fort Rucker, Alabama while she was doing Sharp training made this statement. "Victims generally fall into the category of being disenfranchised, isolated, a not well regarded soldier. That is how he or she is selected by a predator. Many soldiers are picked because they are on the fringe."

And to have that said by a Sharp Lieutenant Colonel Manager at Fort Rucker, Alabama, it's very disconcerting to me when we have been fighting for years to stop this exact type of profiling.

I started this journey after the findings that were reported by the Role of the Commander Subcommittee's report on January 30th, 2014. Knowing that this would be a task that could not be undertaken without my colleagues and fellow survivors - knowing that this would not be a task that I could do
myself, I contacted colleagues and fellow survivors.

Last fall in the Senate, arguments were presented proclaiming support for one legislative option over another to address the felony crimes of sexual assault and rape in the military. We cannot align ourselves with one single position or another as every option has its merit. We encourage dialogue with other organizations, and want to see at this table as a solution oriented options to move forward.

We must address military culture and toxic leadership. The nuances are critical and much of the conversation is lacking depth regarding the pervasive problems of toxic leadership and the need for culture shifting.

Our think tank wishes to respond to your questions in well referenced and considered White Papers. I provided you all with an example of what we're working on.

We are interested in answering
your specific questions, not presenting a myopic view of take it out of the chain of command. Our blanket convictions are command-driven convictions. We do not want accusations to always result in convictions. We believe there are innocent people.

It is our considered position that zero tolerance is a red herring, and all the statistical data derived in recent years has provided highly charged headlines and been rallying cries for forced and immediate change. Unfortunately, throwing everything possible against the wall in hopes that something tangible will stick creates virtually no foundation for actually addressing the atmosphere in which these criminal acts proliferate.

The recent SAPR report does not allow a real comparison to previous inclinations. The reality is thousands of sexual assaults and rapes are occurring in our armed forces every year. Too much emphasis has
been placed on knee-jerk fixes to placate Congress, organizations, and individuals. Every opportunity presented to give credence to statements of zero tolerance from the military has been so diluted as to render solutions ineffective.

The trial of General Sinclair reeks of privilege of added entitlement. Though the General himself admitted specific transgressions and functioned in a very unequal situation with a junior officer, he was given a pass. The General himself asked that he not be reduced more than two grades and be allowed to retire invoking the Good Family defense, when the Good Soldier defense was ostensibly taken off the table. He got fined under the UCMJ violations. Our Military Justice System clearly presents a very uneven playing field.

If this panel, Congress, and DOD want to get a handle on felony crime in the form of sexual assault and rape, they are
going to have to lower the boom in a very specific and public manner. We are downsizing as the second of our protracted wars comes to an end. What better time to limit toxic leadership and rehone the basic human rights skills, knowledge, and abilities of our remaining forces aboard.

Women do have access to more opportunities than any other time in history. If one gender does not have full and equal opportunity, they are diminished and targeted as bearing less burden than their male counterparts. We have allowed gender terminology to debase, devalue, and diminish women.

When the male in the Service is called a little girl, or any other terms of negative connotation, we are by proxy saying their contributions are unimportant, and can be disregarded and targeted.

On the flip side are the names given to women. Example, WM, technically
should mean for Woman Marine, but when you get
down to it, it also means walking mattress.
That is the culture.

We have training and conversations
about consent. With the military populated
concentrated in the 18-24 year old cohort,
training must be driven by expected
measurable, consistent competency-based and
gender neutral parameters. If training
diminishes one gender through terminology and
fear baiting, stay away from the women.
They'll get you in trouble. They are whores,
sluts, husband hunters, lesbians, or too dumb
and ugly to do anything else. They will accuse
you of rape if you look at them wrong. We are
creating fear-driven boundaries that empower
perpetrators.

The traumatic effect — excuse me,
mental assault and rape, vilifying either
gender hurts both genders. Presumptions about
rape being targeted exclusively at women, are
perpetrated exclusively by men, excludes same
sex assault and female perpetrators. The myths
about high incidents of false reporting are
not helpful. Getting factual information and
addressing bias must be a part of the new
model of educating Service members.

The traumatic effects on bodily
image, self-emasculating after sexual assault
and rape against a male start an inner war or
mental ethos that requires a significant and
profound level of empathy, compassion, and
specialized training.

I find myself in anguish that we
have to be sitting here to discuss a topic
that should be non-existent in our military.
We must be held to higher standard. Sexual
assault against our men and women in uniform
is an erosion of the military command
structure, if sexual violence in the military
is permitted to continue unabated.

There are other organizations with
national visibility that are helping to define
and address these issues. That is good and
important. Our objectives are to stay in this conversation and provide substantive, well-referenced briefing papers that will help this panel through logical and reasoned movements towards best practices that prescribe an ambiguous solution that may not be a solution at all.

In the case of serious widespread and unremediated UCMJ violations, the biggest threat to democracy is not judicial intervention, but judicial complacency.

Last year there were 5,061 felony crimes in the form of sexual assault and/or rape against the United States and her military. I have found my voice. I am a survivor among thousands of us survivors, and this is our voice.

According to Fiscal Year 2013 SAPR report, that cost an estimated $1.4 million and 783 pages long, it doesn't contain the same information of reports of years past. There is a lack of understanding and
definition where the victim panel sees the
number of assaults prior to the military
enlistment as an incident separate from the
military.

As I stated earlier, many victims
indeed include the opposite, recruiters, MEP
stations, ROTC training. The amounts of
reported sexual assaults have increased by 50
percent. The DOD and this panel proclaim that
this is a good thing, that in some way it
shows a greater confidence that military
sexual trauma has become a less anomaly of
fear, that these crimes have been and will be
handled with the full respect of the Justice
System.

There is likely some truth to
that, but our position is that both media and
social media outlets have raised an awareness
of this travesty by keeping focused on the
crimes, and that reporting has become more of
the norm throughout these decades instead of
the exception.
With this kind of assumption, and with the absence of the sheer numbers of Service members who have experienced some form of unwanted sexual assault not being included is a kind of manipulation that leaves us without a true picture of what occurred last year.

Since the SAPR reports of past have contained this important number, Fiscal Year 2012, 26,000, it is impossible to extrapolate and show how problematic the nature is as the military sexual trauma. Lack of clear definition of these findings leaves the community, both civilian and the MST community with questions.

The reality is we are taught from the beginning that those with whom we serve are our brothers and sisters in arms. This creates a familial aspect, and then when rape and sexual assault happen, it signifies an incestual breach when sexual assault occurs in the ranks.
Rape, sexual assault, and even sexual harassment have nothing to do with sexual intent or the hook-up mentality among the young surviving in the military, as stated by General Welsh a little over a year ago. The hardcore truth is in any form of sexual assault it's about power and control, power and control. What more appealing could someone's need for power and control be fulfilled than in the military where power and control is the assiduous nature of the U.S. military?

Rain provides statistics for rape and sexual assault in the United States. Unfortunately, the SAPR report and the reality of the brutality and the inhumaneness rape in the military are not much more diverse. Sixty percent of rapes go unreported, 97 percent of all rapists will not spend a single day in jail. We've learned that even in the last four months.

Eighty percent of the victims are
under age 30. What's the largest population in
the military Service members? Thirty-eight
percent are assaulted by a friend or an
acquaintance, our brothers and sisters in
arms, our comrades. Twenty-three Service
members commit suicide every day, and I have
to question how many are related to sexual
assault? About 33 percent of rape victims have
suicidal thought, and 13 percent of rape
victims will attempt suicide. Of these 23
suicides of our veterans and our active duty
that are successful every day, only three are
related to combat.

The APA reports that a perpetrator
will commit three to 600 rapes in his
lifetime, or her lifetime. We can no longer
afford to look at rape or sexual assault as
who could say or did not know how to say no.
Profiling victims has to change in the culture
of the military. Rape is not the result of
alcohol. It is not the result of weakness, but
what it is, is a systemic failure to stop rape
and sexual assault in the military.

Toxic clandestine moves are well taught among privileged leaders in the military who are leading by their example. It is an operational imperative for upward mobility. For example, he said or she knows what's going on.

We have to look realistically at the issues that continually astonish the public as a whole, the community of military sexual trauma victims and survivors. The number of rapes and sexual assaults that occur in the military occur at approximately one rape per hour still.

The Joint Chiefs of Staff have assured law makers and taxpayers that a single rape is unacceptable. This statement has been uttered so redundantly that it's lost its value. The film "Justice Denied," was co-produced by one of my colleagues, Gerri Lynn Weinstein-Matthews. That film documents the fact that a serial rapist, murder, and
cannibal, Milwaukee, Jeffrey Dahmer, was a military rapist. His victims Davis and Capshaw were both raped by Jeffrey Dahmer. There was no accountability when Jeffrey Dahmer raped these two men.

This still happens. If we do not get control of this monumental problem, we will by our inaction empower another Jeffrey Dahmer. In fact, in a way we already have. As in 2006 and 2007, a Chief Warrant Officer was given an option to resign after raping a colleague, a fellow officer, an enlisted underneath him. He was then investigated after he left the military for doing the same thing in the civilian sector. When detectives went to find him and to question him about what he was doing, two detectives lost their lives, as did the Chief Warrant Officer.

Where was and is the direct chain of command? Where were they during Tailhook of 91? It's sad to say that the chain of command was right there. Where was the chain of
command at Aberdeen Proving Grounds in 1996?
The chain of command was complacent in
committing these crimes. Where was the chain
of command at the Air Force Academy in 2003?
They were having a revival. And when the
Lackland Air Force training facility criminal
rape debacle in 2012, the chain of command was
surprised.

Part of the problem is the way the
military and media portray these felony
crimes. The military tries to police its own
and continues to make egregious mistakes,
especially at the junior officer level. The
media calls multiple offender incidents a
scandal, as a sex scandal. They are not
stepping out on your spouse, or embezzling
funds, or scandals, and often are also felony
crimes under the UCMJ. Sex assault and rape
are not scandals, they are felony crimes.

The scandal aspect is closing
ranks, victim blaming, and trying to police
felony crime within a unit rather than
engaging the very capable investigative and legal arms of the Services. It is unacceptable to refer to the assaults at Tailhook Convention as a sex scandal, or the Lackland trainer's raping, assaulting, terrorizing, and abusing recruits as a sex scandal. We must call these crimes what they are and avoid colloquial references that rape and assault were some kind of sex scandal than a felonious activity.

How long will it be before the next follies of accusations make headlines? Each time this breaking news imprints another black mark on our prestigious military and the country I hold with reverence and patriotic admiration. According to the military's own statistics a thousand more Service members were sexually assaulted in one year, and more ever discharged under Don't Ask Don't Tell. Congress and the military have tried and failed for a quarter of a century to remedy the problem of inter-military, excuse
me, to remedy the problem of inter-military rape and sexual assault. The only way to end inter-military rape is to radically change the system of reporting, improve investigation and prosecution of sexual crimes. Make it something someone remembers, not a 60-day stay in barracks restriction, a loss of rank, or a loss of pay. That's not going to change anything because rape is what it is.

Our think tank originated to explore and evaluate all these issues and positions being promoted to arrive at some core elements of concern and discourse. Our think tank members are academicians, researchers, professionals, activists, and advocates. We are survivors. We have an eye on researching the social paradigms in the military that squash growth and social responsibility.

I enlisted in the U.S. Army in 1986. I took an oath to support and defend the Constitution against all enemies, foreign and
domestic, and to bear true faith and
allegiance to the same. This oath has no less
meaning to me today than it did in November
1986. It has no expiration date. That's why I
advocate now, sit before you now, and spend
hours with other trauma victims and survivors.

A friend and colleague, an MST
survivor, Michael Matthews, presented a
concept that I, as a sexual assault and
physical assault survivor, had yet considered
of the - I can't even say it now - the
hyperbole that sexual assault and rape are a
violation of Article 3, Section 3 of our
Constitution. Any assault or rape of a fellow
comrade is, indeed, a purposeful act of harm
to the victim, but it's also a betrayal of the
allegiance to our country and our military.
The act of rape and failure to expeditiously
pass and implement not only policy change but
also proactive legislation to eliminate this
heinous crime is no less an act of treason
than a mortar attack on U.S. soil.
JUDGE JONES: Ms. Lee,

unfortunately a lot of us have to leave at
5:15, and I want to thank you very much for
your comments, as well as your outline of your
White Paper and your report to the panel. I
also want to say that it's good to see you
again, because you presented here on January
30th. And I do want to congratulate on both
getting into law school, and also getting into
your graduate program in the interim.

MS. LEE: Thank you.

JUDGE JONES: Thank you very much.

I think we have another —

(Off microphone comment.)

JUDGE JONES: Okay. Fine. Thanks
again, Ms. Lee. Good afternoon.

NOT A VETERAN: Hello, can you hear
me?

JUDGE JONES: I can just hear you.

A little bit louder, please.

NOT A VETERAN: Is that better?

JUDGE JONES: Yes.
NOT A VETERAN: Honor panel

members, thank you for having me today. For
the record, my name is Not a Veteran, and my
service in Balad, Iraq means nothing. I served
in the U.S. Army from May 2002 until January
2004. I deployed to Balad, Iraq in March 2003
until January 2004. I was in a blast in June
2003. I have already sent you medical
documentation to that effect.

On the early morning of New Year's
Day I was raped by two males, I was beaten,
kicked, and held down. When I came to, I was
in a tent with all males not knowing how I
arrived there.

Upon arriving to the hospital, I
was taken for a rape kit. All of the forensic
evidence proved that I had been raped, but CID
had other plans for me. After my rape I was
interrogated by CID for seven and a half
hours, and I know this from the time lines in

After CID found one witness they
decided I lied and told me to sign a paper and make another statement. Being junior enlisted I felt I had no choice so I wrote what was in my nightmares. After CID found one of the attackers, the attacker admitted to drinking but consensual sex. The men in the tent wrote some statements to that effect while others did not.

Once again my credibility came under fire. It was determined that I made a false allegation because I was late for work. Because of this, I was discharged from the Army with General Under Honorable Conditions for misconduct. I was raped on January 1st, I was put out of the Army 30 days later.

However, in 2005, the Board for Discharges upgraded my discharge to fully honorable, but the Department of Defense, the VA, and the Army data systems kept it in their system as General Under Honorable Conditions. One system had me with a bad conduct discharge. It affected all of my benefits with
the VA. However, officials speaking for Secretary McHugh's office cite that it was only a technicality for my discharge and that it doesn't matter that my discharge was upgraded.

In 2005, I requested my personnel file from the National Personnel Records Center in St. Louis. In my file was a draft copy of the investigation that CID conducted. The Commander of my attacker I learned requested statements prior to CID arriving on the crime scene.

One witness cited me being in a place that didn't even exist, and CID did not even check into it. They were not looking for a rapist. They were looking to find fault with me. They did not want to help me. My attacker was slapped on the wrist with - it was a Summary Article 15 for drinking, despite the fact that he was married and admitted to sodomy, and was of higher rank; yet, JAG never recommended charges for him on those facts,
even though it was supposed to be consensual
sex, and even though they had photographs and
a rape kit.

    CID never compared the statements.
CID in the Report of Investigation made up
things that I never said. They hired an
independent analyst person. Here recently when
I requested it, they have ignored that FOIA
request, and even the rape kit that they did
on my attacker, and other information such as
photos that could actually be seen. I further
learned that my attacker raped me three more
times that night because those statements were
leaked to me from the National Personnel
Records Center. I don't have memory of the
times that he raped me in that tent.

    I gathered intel about my
attacker, and learned that he had been
convicted of drugs. His first offense under
the same Commander that he was under that
cleared him of rape. He was sentenced to serve
prison time in 2000, four years before he
raped me. I learned that the agent lied in the official report by saying no derogatory information was found on him in the DCII, when in fact the DCII is connected to many law enforcement databases. There was no way that CID could have not seen this.

Recently under the direction of the Secretary of the Army, a letter was sent to me not denying that the systems were not connected, but the law did not require the agent to check those systems, so a technicality allowed my attacker to get away.

I learned that CID never checks on the witnesses or the association with my attacker. It was Iowa National Guard unit. Out of the six statements that they submitted to JAG in the Provost Marshal General's office, three of those men has committed serious crimes. One witness pleaded guilty to assault, another witnesses pleaded guilty to assault on a police officer, bodily injury to a peace officer, harassment, assault, that's all one
witness. The last witness was convicted in 2002 of failure to register as a sex offender, yet when I told CID it was two attackers, they didn't believe me.

One of the men that has minor traffic violations is friends with my attacker on my Facebook, and they hang out on regular occasions. The man arrested for failing to register as a sex offender is also friends with my attacker; yet CID managed to miss these important details in my investigation.

In 2010, CID took away one of the charges, false swearing. In the document they cited that the evidence was stored in the CID office in Camp Arifjan where I was attacked. Yet less than one week went by when an email was produced that said all the evidence pertaining to me was destroyed by setting fire to it. CID admitted that they didn't even bother to test it in a facility in Georgia, which is the protocol for sending rape kits from that area to the facility in Georgia.
Even in 2010, CID was still lying to me about my investigation which shows that it cannot be trusted.

In all of this, the DOD cites that they are serious about prosecuting sexual assaults, holding Commanders and leaders responsible. My case proves that they are not. I have been fighting nonstop for 10 years and they have done nothing. My attacker and his good old boy network still serves in the Iowa National Guard even today.

This is the damage I have suffered as a result of the Army and CID under the Army's direction, as well as the Department of Defense. The DOD is responsible because the Army falls under them. If the Department of Defense can't get them under control, then how are we as victims supposed to be - how are we supposed to believe them when they say that they're serious about getting rid of sexual assault, especially when this part of the DOD is not even following regulations, directives.
set out by them. If the Army will circumvent these, they will circumvent the new protocols in place.

My left shoulder was injured in the attack. Due to a paperwork glitch in the - it was - somebody wrote right shoulder instead of left. Because of that, the VA refused to treat it for over four years. After fighting with them for two years, I went to an outside provider. The bone doctor used the same x-ray and said I had a Level 2 AC joint separation and ordered an MRI, a MRI that the VA denied them. He found a paralabral cyst, and in the summer of 2008 I had surgery. He shaved half of my shoulder blade off and got rid of the cyst. He advised me that I still needed a screw to connect everything back together. Since the VA in Oklahoma City had denied me this treatment, the shoulder has escalated into a winged scapula. Doctors cite it's all right for me to walk around in pain, just strengthen the muscle and let the bone
not be connected. I must say this evidence was submitted to CID and the Army, and ignored.

In 2007, I blacked out behind our SUV. I didn't understand. I was advised by a family member to see a neurologist. The EEGs in 2007 started showing abnormal activity. I was diagnosed officially complex pressure seizures. In 2007, I began testing by Alabama VA Health Care for TBI screening. In 2008, a neuropsychologist diagnosed with a TBI from sexual assault I suffered on the night of New Year's Eve. From the report and analysis done it was shown that it was a moderate TBI. The VA has never helped me with speech, balance when I have fallen and fractured my feet, sprained my ankles to the point that they were almost broken. This is my tsunami, yet this was never considered as new material evidence to the VA, nor by CID, Department of Defense, or the Army in prosecuting my attacker.

In 2010, I stayed on medication to treat the seizures but they were getting
worse, to include my arms twitching and legs just on one side. It would seem that my tongue was moving but I didn't know how to explain it. I was being treated at the Oklahoma City VA Medical Center. Medical records I have stated I was a brain surgery candidate, and all three EEGs showed the same issues from 2007 that led to complex partial seizure diagnosis.

One day before being sent Wisconsin for an EEG telemetry to confirm the diagnosis, all care was terminated. I was told that I was not a veteran. All medication was suddenly stopped. I have the appointment letters where they cancelled all my neurology appointments. No doctors would see me. I had no insurance. Free clinics would not see me because they said that my problems were too complex. I went with no health care for two years and six months before becoming service connected for my colon at 30 percent.

In 2012, PTSD came for depression
at 70 percent, but not military sexual trauma. My EEGs are still abnormal, and no help was available to me for seizures. When I am sleep deprived they really act up.

I was finally able to go back to the neurology clinic and sent to Texas for an EEG telemetry under doctor's note to capture events. The tech note said the doctor was not evaluating the seizures because my VA in Oklahoma City said they were not real because I said I had been raped in Kuwait. While seeking a second opinion, this doctor said I was having seizures.

Medical records put civilian doctors against VA doctors because the VA has a proven track record of not wanting to treat rape victims much less compensation for injuries incurred in service due to rape.

In 2013 I filed inability to have children because of the meds I was on. The doctor in the Oklahoma City VA Medical Center I could just suffer with the pain to get
pregnant, so I suffered indeed. At a recent appointment my doctor said I could be put on blood pressure medicine to control the migraines, but yet they never suggested this when I wanted to have a child. It seems to draw simple conclusions that they want victims of sexual assault to suffer and not move forward.

The VA on paper states that they treat victims or problems related to military sexual trauma, but behind our backs they make VHA directives that state the provider has to believe that the victim was raped in order to receive health care from their facility. This directive is VHA Directive 2010-033.

I have been fighting with the Army and DOD for some time now. I asked some time ago, March to be exact, for five specific things. Nothing illegal. A political appointee by President Obama said that I could have them. He put someone in charge. This man gave a deadline of May 1st. That deadline has past.
Nothing this man said has been done.

The Army has made false promises and lied. They can't account on why their agency destroyed evidence before testing it, why they are letting males with criminal records run around and put other females at risk, why they are still violating their own regulations. They are not serious about rape in the military. This is why Commanders should not be in the prosecution process of rapists in the armed forces. Even higher ups are still covering for their own. I am proof.

Lastly, I would like to say that the DOD, Army, and the VA work together to not help victims of sexual assault. I am proof, even if they don't want to have any others. I tried to take my life after they took my care away in 2010. I laid in ICU for four days. My Glasgow Coma Scale was an 11, and my kidneys were on the brink of failing due to acidity levels of 769. A hospital that works with the VA in Oklahoma City advised them to run a CT
scan and to do a dialysis on my kidneys but they refused. The reason, they cited because I maxed out my eligibility for help. My blood work shows that I was not stable to leave ICU, but they made me leave anyway.

I was transferred and made to leave the VA hospital because I was not a veteran. To save the life of another sexual assault victim, please take Commanders out of the process. They cannot be impartial.

JUDGE JONES: Thank you very much for coming in. We really appreciate it, and we have your statement here, as well. Thank you. Okay, Maria.

MS. FRIED: There are no other comments?

JUDGE JONES: No other.

MS. FRIED: The meeting is closed.

JUDGE JONES: No other business.

Thank you.

(Whereupon, the proceedings went off the record at 5:21 p.m.)
discrepancies 277:10
discrete 159:15
discretion 76:9,10
78:21 81:5 105:5
187:2 354:10,14
discuss 90:15
100:13 154:15
162:21 200:12
386:13
discussed 99:5
148:18 149:2,4,6
154:19 160:1
228:8 241:8
277:29 291:8
301:11 328:4
342:4 366:10
discussing 79:14
182:13
discussion 4:1,4
14:3 100:18
217:12 234:21
248:15 272:10
281:6 309:15
357:2 371:11
374:8
discussions 4:1,5
190:19 191:10
193:3,9 375:3,5
Disease 42:8
disenfranchised 380:7
disparate 253:7
dispense 223:8
disperses 155:12
disposition 31:21
39:12 109:14
173:14,17,19
197:3,7 203:5,16
241:13 314:17
334:12,17
disprove 347:12
370:15
disregarded 384:20
disrupt 201:18
disseminate 93:4
93:10,13 94:3
disseminating 96:8
dissent 14:4 273:20
273:22 274:14
356:22
dissenting 264:11
264:19 266:13
dissimilar 280:9
dissimilarities 243:22
distinct 148:10
150:4
distinction 16:9
140:22 198:20
district 189:9,10
206:18
Districts 261:1
dive 357:10 358:4
359:20 363:1
diverse 339:21
390:17
division 102:15
122:1,2,3 148:10
150:1,5,17 151:1
152:5 154:12
161:5
division's 116:1
divisions 159:15
160:12,14
divorced 69:17
doctor 406:10
409:8,12 21 410:2
doctor's 409:7
doctors 288:2
406:20 408:16
409:15,15
document 124:9
127:17 128:5
183:22 184:10
404:13
documentation 124:13,14 399:9
documents 122:12
122:14,18 123:12
123:15 124:10
126:11,13,16
127:6,8,10,15
129:6 141:2,3,8
141:14 146:3
183:17 392:21
DoD 5:6 6:2,3,9,13
6:15,22 7:18 8:10
8:13 9:7,15 10:5,9
10:11 16:13 31:15
64:16 72:16 176:3
176:6 179:16,18
214:18 226:11
258:2,13 262:3
318:17 319:12
320:17 321:11
323:9 324:16
341:7 343:2 347:9
347:18 348:1,7,11
349:19,21 350:21
374:15 383:20
388:9 405:4,15,21
410:17 411:14
DOD's 326:3
347:12 351:16
352:16
doing 60:17 64:18
72:7,9 89:20
95:12 96:2 98:7
102:17,18,18
153:1,18 154:17
154:22 156:19
169:18,19 175:3
179:2 192:20
200:5 204:15
238:14 251:11
278:19 292:17
311:17 326:13
346:22 348:2,7
358:4 368:12
369:4,13 371:2,7
374:15 380:4
393:14,17
DOJ 256:2
dollars 84:4 286:20
domestic 26:8 34:8
397:1
door 337:11
doors 250:10
double 37:11 38:17
41:10
double-edged 46:4
double-jopardy 210:21
doubt 68:4
down sizing 384:2
draft 167:3 241:7
401:8
drafted 373:15
drafting 247:17
draw 89:1 106:3
410:6
drawing 170:13
275:12
drink 343:12 377:11
379:14
drinking 400:5
401:19
drive 315:13
323:16 325:18
driven 208:22
382:4 385:7
Driving 336:21
337:2
drop 91:8
dropped 193:7
drugs 356:8 402:19
Drunk 336:21
337:2
dry 69:10
dual 154:20 178:20
dual-hatted 152:22
156:9
dual-hatting 158:17
DuBay 111:19
112:2,8 118:11
121:1
due 103:17 110:4
119:5 185:20
275:13,16 279:4
297:14 364:11
406:5 409:18
411:20
dumb 385:13
Dunn 1:16 26:18
27:6 28:9,17,22
29:4,14 30:7 31:2
31:9 32:10 33:1
42:17 43:3 47:15
48:1,5,11 64:14
65:2,6,9,20 67:17
67:21 69:6,13
70:6 71:5 76:14
78:1 79:6 81:20
82:5 83:5,11 84:6
85:15 86:5,10,18
87:1,6 93:15
95:19 112:12,19
113:1,5 115:2,12
123:20 127:18
138:15,18,21
139:6,11 142:22
150:10 151:5
155:8 158:9
164:11,15,18
168:9,14 181:20
191:15 193:14,20
195:8,18 215:22
216:22 217:10
219:14 220:3,8
224:20 226:17
227:12,20 234:19
235:4 237:18
238:20 243:12,20
247:8 248:14
251:4,9 253:12,16
254:1,21 255:5
256:1,9 258:16,21
261:15 262:1
265:13,18,21
267:3,7,11 270:20
271:2,4 272:13
286:1 290:6,11,15
290:20 291:6,10
292:5,13 294:1,14
294:21 295:8
299:18 300:14,20
301:1,6 305:22
307:7,18 308:2,5
Neal R. Gross and Co., Inc.
202-234-4433
goal 29:14 57:19
194:12 316:6
317:1 362:22
368:7
goals 87:12 275:7
314:10
God 379:17
goes 14:8 31:4
59:14 62:8 82:18
92:15 97:11 108:7
137:7 149:18
196:11 233:7
341:12 355:15
363:16
going 7:6 8:17,18
11:19 13:12 22:21
23:13 24:9 28:14
28:15 30:9,19
34:13 39:20 40:2
40:4 43:22 44:1
45:18 54:6 55:21
55:22 56:4 58:9
69:2,18 74:8
77:21 80:11,15
81:21 82:19 83:21
92:6 95:12 99:10
99:19 103:22
104:18 105:2,14
109:6 111:6
112:15 113:9
114:5,16 115:10
115:17 116:1,2,6
116:12,13 117:5
118:2 122:3 125:9
127:14 134:12
135:11,14 136:21
149:16 153:19
155:3,22 157:11
166:22 168:17
170:2 171:15
172:4 179:16,17
181:13 182:19,20
183:8,12,20,22
184:20 190:6
191:10 192:7
194:7,8 195:5,6
196:7,13,15 199:8
207:5,6,8 211:2
221:11 222:11,12
222:20 224:3
228:14 229:4
231:5 232:19
233:8 235:9
236:14,17 237:5
237:11 238:9,16
238:18 239:1
241:20 255:14
257:10 261:13
263:2 264:3,4
270:7 271:19
272:1 274:12
283:22 288:5,6
295:12 298:3
299:15 300:21
301:1 304:9
310:13 312:15,21
313:1 314:19
312:5 330:12
332:8 333:9,12
334:9 335:16
342:5 352:2
355:12,22 358:15
361:22 368:4,11
369:4 371:13
372:17 373:16
376:2,9,10 378:6
384:1 392:7 396:8
53:12 372:2
4:20 36:9
43:15 56:17 59:22
60:20 61:12,15
64:20 78:22 80:14
81:1,10,15 92:8
99:13 100:16,18
116:18 120:1
143:11,16 144:6
144:17 153:15
161:14 164:21
171:12 181:2
200:11 221:22
260:20 262:18
268:11 304:16
310:17 311:2
314:22 332:1,5
348:2 370:17
375:6 376:19,20
383:14,15 386:22
388:10 398:6,16
405:10
gotten 74:3 96:11
162:18 236:2
250:5 278:17
300:9 367:16
government 79:8
98:22 121:22
122:15 124:15,16
126:10 129:17
138:22 141:4
150:19 175:19,21
188:20 189:2,2
212:19 274:10
310:10 315:19
government's 281:20
grades 383:13
graduate 398:10
graduated 106:16
granted 103:6
grapple 28:16
grateful 316:19
great 4:17 77:5,7
118:10 161:14
185:16 192:22
225:19 228:11
gold 53:12 372:2
good 4:20 36:9
312:9 315:18,19
339:12,22 357:20
364:16 367:20
368:15,18 374:1
greater 104:22
127:1 129:15
145:18 350:12
388:11
greatly 278:13
Green 1:20 365:4
365:15,18
grill 30:5
granted 293:17
Grostefon 111:7,10
111:14
ground 6:11 101:1
114:2 341:18
grounds 242:22
281:12 394:1
group 55:2 90:12
90:14,17,21 91:4
91:13,19 140:7
159:11 160:8
194:9 368:11
groups 63:2 90:4
grow 80:11,16
100:3
growing 97:3
grown 80:16
grows 100:11
128:12
growth 396:18
guarantee 82:12
guaranteed 253:3
Guard 163:3 167:7
254:8 403:15
405:11
guarding 321:1
guess 11:13 20:17
56:20,22 83:17
86:12 95:22 98:14
130:3 135:9
136:10 140:10
156:20 167:9,14
177:7 189:22
190:11 215:11
247:2 295:6
305:11 319:4
334:20 335:1,3
361:7 364:7
375:14
guidance 75:8
347:1
guide 239:3
guideline 303:13
guidelines 340:13
guilt 277:8 279:22
305:10
guilty 60:15 192:8
289:8,22 290:4
403:19,20

H
half 399:19 406:15
Ham 1:20 3:5,6
85:21 181:11
182:3 187:17
188:1,6,11,17
189:15 190:18
191:22 222:17
376:18
hand 43:6 44:15
80:2 97:15 115:3
115:6 207:5
366:17
handed 115:4
handle 10:17,19
83:8 142:11
230:15 383:21
handled 26:14
254:4 388:14
handling 42:18
156:15 166:16
handoff 7:2 115:20
hands 45:6 105:2
105:20 142:16
hang 404:7
hanging 117:14
happen 104:18
110:19 113:6

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we're wondering whether the...