

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL
ASSAULT CRIMES PANEL

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THURSDAY
MAY 29, 2014

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The Panel met in the Thurgood Marshall United States Courthouse, Courtroom 506, 40 Centre Street, New York, New York, at 8:30 a.m., Barbara Jones, Chair, presiding.

PRESENT:

The Honorable Barbara Jones, Chair
Harvey Bryant
Colonel (Ret.) Holly Cook
Brigadier General (Ret.) Malinda Dunn
Mai Fernandez
Professor Elizabeth Hillman
The Honorable Elizabeth Holtzman
Vice Admiral (Ret.) James Houck
Brigadier General (Ret.) Colleen McGuire

STAFF:

Maria Fried, Designated Federal Official
Colonel Patricia Ham, Staff Director
Lieutenant Colonel Kelly McGovern
Commander Sherry King

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

Call to Order and Opening Remarks Barbara Jones Chair	9
Recommendations of the Comparative Systems Subcommittee	11
Recommendation No. 1	12
Recommendation Nos. 1, 3, and 4	17
Recommendation 4	19
Recommendations 1, 3, and 4 Accepted	23
Recommendation 2	23
Recommendation 2 Accepted	28
Recommendation 5	28
Recommendation 5 Accepted	35
Recommendation 6	36
Recommendation 6 Accepted	37
Recommendation 7	37
Recommendation 7 Accepted	48
Recommendation 8	48

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C-O-N-T-E-N-T-S (CONTINUED)

Recommendation 9	63
Recommendation 9(a)	63
Recommendation 9(a) Accepted	71
Recommendation 9(b)	71
Recommendation 9(b) Accepted	72
Recommendation 10	72
Recommendation 10(a)	72
Recommendation 10(b)	73
Recommendation 10(c)	73
Recommendations 10(a), (b), and (c) Not Accepted	127
Victim Services' Recommendation 18	72
Recommendation 18 Accepted	126
Recommendation 11	127
Recommendation 11 Accepted	148
Recommendation 12	148
Recommendation 12 Accepted	174
Victim Services' Recommendation 2(a)	175
Victim Services' Recommendation 2(a) Accepted	176

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C-O-N-T-E-N-T-S (CONTINUED)

Recommendation 13	176
Recommendation 13 Accepted	199
Recommendation 14(a)	199
Recommendation 14(a) Accepted	208
Recommendation 14(b)	208
Recommendation 14(b) Accepted	214
Recommendation 15	215
Recommendation 15 Accepted	215
Recommendation 16	215
Recommendation 16 Accepted	217
Recommendation 17	217
Recommendation 17 Accepted	219
Recommendation 18	220
Recommendation 18 Accepted	222
Recommendation 19	223
Recommendation 19 Accepted	223
Recommendation 20	223
Recommendation 20 Accepted	223
Recommendation 21	223

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Recommendation 21 Accepted

227

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C-O-N-T-E-N-T-S (CONTINUED)

Recommendation 22(a)	227
Recommendation 22(a) Accepted	232
Recommendation 22(b)	232
Recommendation 22(b) Accepted	232
Recommendation 23	232
Recommendation 23 Accepted	232
Recommendation 24	232
Recommendation 24 Accepted	232
Recommendation 25	232
Recommendation 25 Accepted	232
Recommendation 26	233
Recommendation 26 Accepted	252
Recommendation 27	252
Recommendation 27 Accepted	252
Recommendation 28	252
Recommendation 28 Accepted	260
Recommendation 29	254
Recommendation 29 Accepted	260
Recommendation 30	260
Recommendation 30 Not Accepted	268

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C-O-N-T-E-N-T-S (CONTINUED)

Recommendation 31(a) and (b)	268
Recommendation 31(a) and (b) Accepted	281
Recommendation 32(a) and (b)	281
Recommendation 32(a) and (b) Accepted	282, 283
Recommendation 32(c)	283
Recommendation 32(c)	286
Recommendation 32(d)	286
Recommendation 32(d)	287
Recommendation 33	287
Recommendation 33 Accepted	287
Recommendation 34	287
Recommendation 34 Accepted	288
Recommendation 35	288
Recommendation 35 Accepted	290
Recommendation 36(a) and (b)	290
Recommendation 36(a) and (b)	292
Recommendation 37	292
Recommendation 37 Accepted	293

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C-O-N-T-E-N-T-S (CONTINUED)

Recommendation 38	293
Recommendation 38 Accepted	300
Recommendation 39	300
Recommendation 39 Accepted	301
Victim Services' Recommendation 34(a) and (b)	301
Victim Services Recommendation 34(b) Not Accepted	305
Victim Services Recommendation 34(a) Becomes 34 and Is Accepted	310
Recommendation 40	314
Recommendation 40 Accepted	323
Recommendation 41	323
Recommendation 41 Accepted	325
Recommendation 42	326
Recommendation 42 Accepted	332
Recommendation 43	332
Recommendation 43(a)	332

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

8:52 a.m.

CHAIR JONES: All right, good morning, everyone.

(Chorus of good mornings.)

With Maria Fried's permission, we are now opening our meeting of the Response Panel to Sexual Assault for the Military.

We had our first public hearings on June 27th of last year, after being created by Congress in the National Defense Authorization Act of 2013. We were given a very expansive and ambitious set of tasks to perform. We have done a lot of work.

We have listened to a lot of subject matter experts and other witnesses, survivors of sexual assault; victim advocacy groups; commanders, current and former; academics; investigators.

We have spent literally hundreds of hours amassing information and listening to people who have expertise in the areas, both in terms of trying to define the problem as well as comparing the military system with what is going on in the civilian world, and looking for best practices that can be used to support victims, encourage victims to report, and in many ways to try to do as much as can be done in a year's time to make some helpful suggestions and recommendations to the Department of Defense, which was our task, in order to try to help with this problem.

So, where we are at now is we have begun. Three

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Subcommittees have each created a report, one focused on victim services, one on the role of the commander in the military, and the other on comparative systems. We have already during this month, on May the 5th and 6th and again on May 16th. Each Subcommittee has reported out the substance of its report. And also, we have discussed in some instances, and deliberated in others and approved, many of the recommendations of two of the Committees, Role of the Commander and Victim Services.

The Comparative Systems Committee has done their report out. It was an interim report because their final report was not finished. It is now finished.

And so, what we intend to do today is to begin with the Comparative Systems recommendations. And as I said, many of them were already reported out and were discussed. They were not accepted, however, because the report was not finalized, but it is now, and it has been available to the members of the panel. So, we are going to start with the recommendations of the Comparative Systems Subcommittee.

And there are several Victim Services Subcommittee recommendations that are paired in a way that are on the same subject as some of the Comparative Systems ones. And so, as we reach those, we will also deliberate over whether to accept, reject, or accept with modifications those particular recommendations.

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So, I would like to start this morning with the Comparative Systems recommendation. I am going to begin with Recommendation No. 1, which I believe that there were two comments with respect to Recommendation 1 that we may want to discuss before I recommend that we accept this recommendation.

One of them was from Ms. Holtzman, and I think your concern was that we did not define "bounded" in the recommendation, Liz?

REP. HOLTZMAN: Yes, explain it, yes. "Bounded" and "unbounded," I don't know what an unbounded survey is or a bounded survey.

CHAIR JONES: I guess my reaction to that is -- and I am happy to have you speak, Professor Hillman -- that in the main report, and maybe I'm wrong -- I do remember listening to testimony from the Bureau of Justice statistics all about what bounded and unbounded was. But it isn't in the finding. Is it in the full report in detail?

PROFESSOR HILLMAN: Yes. Yes, Your Honor. It is not the recommendation language. Is the suggestion that we put it in the recommendation language or that we more clearly define it in the findings?

REP. HOLTZMAN: I just didn't want to have to go -- I didn't have the whole document in front of me.

PROFESSOR HILLMAN: Right.

REP. HOLTZMAN: And so, I didn't know what "unbounded" meant. Still don't know what "unbounded" means.

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(Laughter.)

And I am not asking for a major, lengthy definition, but maybe something that could just explain what that is briefly.

PROFESSOR HILLMAN: Sure.

REP. HOLTZMAN: Or say, you know, for further detail on this, look at the report.

PROFESSOR HILLMAN: Sure. In the recommendation we didn't put that in. It refers to a characteristic of some surveys, a survey that is time-bounded that asks for events that occurred during a specific timeframe. If it is requesting information about traumatic events, persons who are responding to the survey will often retrieve incidents that come from outside the time bounds of that survey. And therefore, the survey can overrepresent those number of incidents within that particular timeframe.

REP. HOLTZMAN: May I just make a suggestion? If we put the word "time" in front of "unbounded" and, then, "time" in front of "bounded" in sentence two, in line two and, then, in line four, that would satisfy me.

CHAIR JONES: You're talking about the findings?

REP. HOLTZMAN: The findings, the findings.

PROFESSOR HILLMAN: So, are we adopting the findings?

CHAIR JONES: No. We have actually --

REP. HOLTZMAN: Oh, I see. Okay. Sorry.

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CHAIR JONES: -- yes, decided that we are only adopting recommendations. And I think that that suggestion actually will be very helpful for when we do the final report. We will make sure that that definition is there in the final report.

Colonel Cook, I think you had a comment on this recommendation as well as three and four?

COL COOK: Right. The only comment I would make is I think doing -- and I mentioned this in the past -- but doing another survey, of course, there is a different purpose than the workplace survey that we currently do, is fine.

But I will tell you, being on the receiving end of some of these surveys, what I would suggest is perhaps doing them alternating years or something. Don't do both surveys out on the street during the same year, a victimization survey and a workplace survey. They do both have different purposes. They gather different information. But if we are concerned about increasing the rate of response to people, having two surveys out in any one given year, whichever one of them goes out first is probably going to have a higher rate of a response. If you alternate them in some way or somehow time them so that you don't oversaturate the Service members who get these letters in the mail and say, "Please go online and do these surveys," which have a lot of questions. I would suggest just deciding when to put them out.

CHAIR JONES: Did you intend to add modification language?

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I think we all agree with your concern about saturation points for people who are constantly being bombarded with surveys.

COL COOK: I don't know where to put it because it would apply -- I mean, I have it as Recommendations 1, 3, and 4, just to say, look, I think you're all very valid. I agree with the recommendations. Maybe in the bottom of one of them to say -- or the one that says that you could improve response rates to all surveys --

CHAIR JONES: That's 4, yes.

COL COOK: -- No. 4, maybe add a comment there. "For example, consider submitting these surveys on alternating years, so that only one major survey is out on the street at any one time." And just clarify it in there, and that would solve my concern.

CHAIR JONES: So, could we craft some language? Would that be acceptable, in 4, not 1 or 3?

PROFESSOR HILLMAN: As you said, I agree with the concern. I think that the statisticians who talked to us have many different ways they can improve response rates. One of them is to stagger -- already the WGRA only happens biennially. We have three datapoints on it. It didn't happen this year. It will happen next year. We made some recommendations about that. So, this isn't an annual survey that we are actually inserting another survey on top of. And we didn't actually specify any time. We didn't say this has to happen every year or

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when this should happen exactly.

So, my sense of the Subcommittee's recommendation is we meant to defer to the experts and set out what our goals are, which is have a crime victimization survey, to use the right definitions, to use the WGRA for what it is supposed to be used for. And then, finally, the fourth one, to improve response rates, which does include survey fatigue, and that is in the discussion language, as it was in the Victim Services Subcommittee report about that.

COL COOK: Well, if the one is already staggered, how often it goes out, I didn't realize how often it goes out. So, as long as this is given in a year when the other one is not, it's fine with me.

BRIG GEN DUNN: I think that Professor Hillman makes an excellent point, that surveys, military-wide surveys are administered by experts to some degree, and that they would be sensitive to that issue, and we would send it into the timing it, when we have already addressed survey fatigues.

PROFESSOR HILLMAN: And I'm fine with that.

CHAIR JONES: All right. Since I have mentioned 1, 3, and 4, I think there were no other comments with respect to 1 and 3.

General McGuire, did you have a recommendation or did you want to discuss Recommendation 4?

BRIG GEN MCGUIRE: Yes, Your Honor, and we kind of covered that already.

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My concern was, the way that it is stated is "seek to improve response rates." Again, we just discussed about survey fatigue. And to seek to improve response rates to me seems like a futile effort in a response of individuals. It is kind of hard to force or mandate or cover that.

I just said a plain reject because I didn't know how you could truly measure that. But I am certainly open for other discussion or means of understanding how we seek to improve response rates when, in fact, it is a voluntary survey. And there's so many surveys out there.

CHAIR JONES: Professor?

PROFESSOR HILLMAN: Thank you.

It's a great point, and we're concerned about that. What the social scientists reported to us, first response rate is incredibly important in getting reliable data.

CHAIR JONES: Right.

PROFESSOR HILLMAN: Second, there is really not a way to get at unreported incidents other than surveys. So, it is a tool that we have to use.

If you look just in the finding there, the response rates vary from a quarter to three-quarters. And the way in which the survey is administered, for instance, a captive audience of persons who don't leave the room until they complete the survey, that's a high response rate we get on those, not 100 percent, but a high response rate.

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And because the military has the opportunity to control environments, we want to encourage them to consider different ways to control environments and improve response rates. But, again, we didn't put a specific set of tactics in there on response rates because it varies depending on the unit and the objective of the survey, et cetera.

BRIG GEN McGUIRE: But mandating surveys, again, you know, in a unit environment -- I am just putting myself at the platoon or company level -- can be very negative and you're going to get a negative response. You know, first participation. Anyway.

CHAIR JONES: All right. Well, I would like to suggest that we accept Recommendations 1, 3, and 4, with the understanding that General McGuire has those concerns, and I gather so does General Dunn. Is that right or was that Colonel Cook on 4?

BRIG GEN DUNN: No, not on the mandate. My comment was just the oversurveying.

CHAIR JONES: Okay.

BRIG GEN DUNN: But if you are already staggering them, my concern is withdrawn.

CHAIR JONES: All right. Thank you.

BRIG GEN DUNN: I don't have any concerns.

CHAIR JONES: All right. Then, I would recommend that we

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accept Recommendations 1 through 4, and then, we can move on. I will go back to 2 in a minute.

(Pause.)

Does anyone want to have any further discussion or deliberation on 1, 3, or 4?

(No response.)

All right, then, they are accepted.

Recommendation 2 relates to the Secretary of Defense directing that a military crime victimization survey or surveys use the Uniform Code of Military Justice's definitions of sexual assault offenses, including rape, sexual assault, forcible sodomy, and attempts to commit these acts.

I agree. I think that recommendation makes a lot of sense in the context of everything else that we are doing to try to define the problem and know what we are responding to.

Were there any comments or deliberation on 2?

COL COOK: The only comment that I had offered on that, we don't have a crime victims -- to Professor Hillman -- we don't have a crime victimization survey right now, right?

The only concern I have, is this going out to all the troops, every level? I just suggested and said direct using it. I said consider having victimization surveys to allow some flexibility. So that when the language is not clear and it is

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going down to the most junior troops, you want to make sure that whatever they are reading may not track the UCMJ exactly, but it gets them the essence of what you want them to answer to.

So, I don't know how restrictive the report itself in terms of an actual complete discussion. I didn't read the whole thing. But, from that, I just saw the fact that I don't want just to take those elements, put them out there, and then, have somebody have to interpret it that is not a lawyer. We have enough problems with some of the lawyers interpreting them sometimes, depending upon the timeframe for the event, and allowing a little bit of flexibility in that.

BRIG GEN DUNN: I think the concept of the Committee was that we get to the conduct that is prohibited.

COL COOK: Right, and I agree with that, to get to that. But, usually, when you say using the definitions of the language, "Use the UCMJ definitions," there are specific definitions in the UCMJ. And my concern is just, are they as clear as we are going to want them to be at the most junior level of the force that is going to read them? So, that's why I say consider using those. I agree with the concept.

CHAIR JONES: I think that's what people who devise these surveys have to grapple with. I mean, I think some of the definitions could be complicated and misunderstood, but they are basically saying, I guess, use them. I don't know how much more specific we can be. If they are going to do a good

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survey, they will have to figure this out.

Professor, did you want to add anything to that?

PROFESSOR HILLMAN: No. There are concerns I think that the authors of the survey instrument have to make sure it is translatable. The language in the statute itself, it doesn't have to be used. I mean, we didn't say it's --

COL COOK: You weren't looking for a direct pull?

PROFESSOR HILLMAN: No, but it does have to be tracked very closely, actually. Part of maybe what would help you feel more at peace with these recommendations is the crime victimization survey would involve interviewed followups most likely. So, it wouldn't only be individuals who respond to the written text and understand it in a particular way. But the nature of the crime victimization survey's followups, that would try to make sure we were actually, people were reporting the things that were specified there. But, unless we use the precise definitions of crime, we won't have useful data that we can track.

COL COOK: On the crime victimization survey followups that you are talking about, is that what is done in the civilian sector? Okay. That will be interesting to see how that is followed up within the military system as well and how many people are responsive to that; is there usually a different response rate on the followup?

CHAIR JONES: I guess because they will have to find them, with everybody moving around.

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But the notion of having a crime victimization survey I think is almost undebatable.

COL COOK: I am debating that. If it is not a direct lift, I am just concerned you are not going to -- people still are not going to understand.

CHAIR JONES: I think that is something that we can put in the final report to highlight and leave the recommendation as it is.

COL COOK: That's fine.

CHAIR JONES: Great. Thank you.

So, Recommendation 2, unless there is additional deliberation or any other questions, all right, 2 is accepted.

All right, moving to Recommendation 5, yes, General McGuire, I think you had a comment with respect to this?

BRIG GEN MCGUIRE: Yes, Your Honor.

Again, it was related to No. 4 and just that I had some concerns, mostly about the futility and the implementation of improving responses to surveys. I just feel that the knee-jerk reaction or response to improving responses is going to be another thing that is going to be directed at commanders and holding them accountable to get this done at the expense of other things. And I just see a very negative aspect to it; that's all.

BRIG GEN DUNN: I think from our Committee discussion that you have to have data in order to determine the problem.

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BRIG GEN MCGUIRE: Agree.

BRIG GEN DUNN: I think you have got to have the responses in order to have the survey being valid.

BRIG GEN MCGUIRE: Right.

BRIG GEN DUNN: And, you know, it is true that the military does have the ability to control especially it's active-duty people in an environment where you can't make them necessarily answer questions correctly, but you can make them fill out the survey.

And I think with an issue of this breadth and magnitude that it is pretty critical that we have a handle on, as best as a handle as we can get on the depth and breadth of the problem.

BRIG GEN MCGUIRE: Couldn't agree with you more.

BRIG GEN DUNN: It is the only way to do it. I mean, there is no other --

BRIG GEN MCGUIRE: I'm just saying that we probably need to be very cognizant that the responses and how it is implemented, while we can try to improve the responses, I think that you need to go even deeper to figure out how that is going to be presented at that lieutenant level. Then, they are required to do so much.

You know, I think it needs to be positive, and we need to educate that population, the meaning and the value of it, rather than just being another two or three hours that they are going to have to take out of a very dense training day.

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CHAIR JONES: Did you want to add anything, Professor?

PROFESSOR HILLMAN: The good thing about Recommendation 5 is it doesn't require another survey.

(Laughter.)

This is actually just saying throw open the treasure chest and actually let us, let outside researchers look at the data we have already collected to make sure we have actually mined it with their eye towards all the biases that come out in the non-response rate, too. So, that is the good thing about this from your concern.

CHAIR JONES: Thank you. All right.

COL COOK: Following up on that, when you say "throw open the floodgates and letting independent researchers," I guess the question I had on this one, is says "direct a release". Are you just saying let it be out there in the public and let anybody who wants to look at it analyze it at any given time? Or you saying that, SECDEF, you should have somebody come in independently and analyze the information that we collect to determine what lessons were learned? That he somehow targets an organization to have full access, whatever it is -- it doesn't matter to me or alternate it.

That is my concern, is when I read this, I thought it was we collect this data, make it available to the public, and everybody can grab it all at once, and everyone is constantly analyzing and second-guessing what is going on within the

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military. And that can become disruptive.

Having said that, if you are saying that a third party look at what we have done, is it making a difference and what kind of information can we derive from the data that has been collected, I'm all for that.

So, if this isn't throwing open the floodgates, anyone come in anytime, constantly second-guess, versus having a third-party really review it, that's fine.

PROFESSOR HILLMAN: Judge Jones, it is just that the raw data be analyzed by independent research professionals. So, it is more that those individuals from whom we heard would be able to get access to the raw data. That is what it says, to assess how we can improve responses. It is not a public website with any information posted that everyone would get to, but to make that available to independent research professions. That is the right connection.

BRIG GEN DUNN: I mean, I think our sensing -- and I think the full panel heard some of this testimony; we certainly heard it at the Committee level -- is that there is a problem with that survey. And the interpretation of it was done in-house. It is probably beneficial to all of us to have other research professionals whose life it is to do and analyze research have a look at that data to comment.

The survey is kind of, you know, my sense is defend it in-house like this --

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COL COOK: I have no objection to --

BRIG GEN DUNN: -- and others need to have access to it and look at it.

COL COOK: I have no objection to others looking at it. The question, just having it controlled in some way, so it doesn't become disruptive. Everything somebody wants to know, they publish the results, and, all of a sudden, we have got the Department of Defense responding to a different organization at any given time.

And I am not saying that is wrong, but it is just there's got to be some control set on here.

BRIG GEN DUNN: But it says the "SECDEF direct" --

COL COOK: That it be released for analyzing.

BRIG GEN DUNN: Yes, be analyzed by independent research professionals. So, that seems to me that gives the SECDEF the control to direct to whom it is released and for what purpose.

COL COOK: If that is the intent, then I misread it. That is why I said "consider releasing". But if it is he controls who it is released to when gets that broad base, but he decides he needs to give it time, that's fine.

CHAIR JONES: I think that is the intent.

Did you want to speak to that, Ms. Holtzman?

REP. HOLTZMAN: No, I think everything has been said about

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that.

CHAIR JONES: Okay. Anything else?

(No response.)

All right. Then, I suggest that we accept Recommendation 5.

Any objections?

(No response.)

All right.

(Whereupon, the foregoing matter went off the record at 9:18 a.m. and went back on the record at 9:19 a.m.)

CHAIR JONES: Are there any comments or questions with respect to Recommendation 6?

(No response.)

This relates to the Defense Department who has already enlisted the RAND Corporation to develop and administer the next WGRA study, and recommends the Secretary of Defense direct the creation of an advisory panel of qualified experts from the Bureau of Justice Statistics and the National Academy of Sciences Committee on National Statistics to consult with RAND.

To me, that seems like an excellent recommendation. We heard presentations, particularly from the Bureau of Justice Statistics, that made a lot of sense in terms of how these surveys should be done and could possibly help to improve the one that the military plans to use.

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Any objections to this?

(No response.)

All right. Hearing none, Recommendation 6 is accepted.

All right. Recommendation No. 7. This recommendation relates to requiring Special Victim Investigators not assigned to a dedicated Special Victims Unit to coordinate with a Senior Special Victim Unit Agent on all sexual assault cases.

General McGuire, did you have a comment on that?

BRIG GEN MCGUIRE: Yes, Your Honor.

I just felt that the language "to require" -- a Special Victim Investigator who is not assigned to coordinate -- limits command and control of those commanders based on the investigative needs of that installation; that these are all trained investigators. And I just think the term "required" then does not provide the flexibility of that commander to put the resources where they are needed at the time. And if we may have a sexual assault case, but we also may have murderers, where is that priority?

By mandating that they require, we won't have -- I mean, these investigators do more than just, if they are not assigned to a Special Victims Investigative Unit, they are doing other investigations.

CHAIR JONES: Professor?

PROFESSOR HILLMAN: This wasn't intended an

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especially -- this is a requirement for coordination rather than a requirement for sort of operational control. So, our intent was to make sure there is a reachback there.

So, it is not intended to corrupt the control of the operational commanders because we did hear in the field the impact of the emphasis on sexual assault investigation affecting other law enforcement functions that are a high priority as well. So, it is simply that coordination with the Senior Agent, trying to leverage the expertise that is available, recognizing the far-flung nature of deployed environments, et cetera, creates a need to be able to coordinate with somebody with more experience on those instances. That is the intent of the recommendation.

BRIG GEN McGUIRE: I think if we could just soften that language then, I have no concerns about that.

BRIG GEN DUNN: But, I mean, I think it is very similar to the Army Special Victim Prosecutor Program where the Special Victim Prosecutors are available to provide regional support.

BRIG GEN McGUIRE: Right.

BRIG GEN DUNN: So, you know, you advance Special Victim Prosecutors out of Fort Bragg, which is a large installation, maybe not down the road at a small place. And so, when a sexual assault case comes up, then the remote installation trial counsel will do the coordination and work back and forth. I think it is the same.

I mean, our discussion is that we were talking about a phone call,

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email, and some back-and-forth because the agent on the ground may not have the same training.

BRIG GEN MCGUIRE: But he also may be the lead investigator in, let's say, a homicide. So, to require them, then, to do that in lieu of being the lead investigator of the homicide could take away.

BRIG GEN DUNN: I mean, all we are saying is, you know, if you are not a trained Special Victim Investigator, then when you have a special victim case, you should do some coordination. I don't see how that is particularly onerous. We are not saying somebody has to come from somewhere else and do the investigation.

BRIG GEN MCGUIRE: No, it says really clearly to require them, that if they are not assigned to an SVU, "will coordinate with the Senior SVU agent on all sexual assault cases".

BRIG GEN DUNN: Right.

BRIG GEN MCGUIRE: So, require them to coordinate on all sexual assault cases. What I am saying is that that investigator could already be involved, because we have the small offices here. You know, we are not talking Fort Bragg offices. We are talking also, you know, small offices where you have only got three or four investigators. And while they may have been trained to be a Special Victims Investigator, and they have got that SSI or whatever, they would be the lead on some other investigation.

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But what we are saying here is that now we have a sexual assault case and we are requiring to meet with the SVU because the SVU doesn't have a dedicated investigator.

BRIG GEN DUNN: Not meet with, but coordinate.

BRIG GEN McGUIRE: All right.

CHAIR JONES: Are you worried about changing the "meet" as opposed to "coordinate" or are you worried about putting the whole thing in like "when feasible"?

MS. FERNANDEZ: Yes, I think it is when feasible.

BRIG GEN McGUIRE: Right, when feasible, just a qualifier.

CHAIR JONES: I think the theory here is that if the Secretary of Defense is directing something and, then, you have the word "require" --

BRIG GEN McGUIRE: Yes, it is pretty directive.

CHAIR JONES: -- orders get obeyed.

BRIG GEN McGUIRE: Yes, at the expense of everything else.

REP. HOLTZMAN: Well, the other way of handling it is not only to add the word "feasible," instead of that, instead of "of all sexual assault cases," "when handling a sexual assault case". So, that would solve your problem. When they are not handling a sexual assault case, they don't have to coordinate. When they are handling a sexual court case, they have to coordinate.

I am not sure I like the "feasible" because that might allow

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commanders to say they don't have to coordinate, even though they are working on a sexual assault case. But if you would put language in saying "when they are handling sexual assault cases," I think that gets to your concern.

BRIG GEN McGUIRE: We have the Secretary of Defense directing those MCIO commanders to require investigators that aren't assigned to SVU to coordinate with the SVU? I just think that is taking away from the whole command-and-control aspects and --

REP. HOLTZMAN: Why don't I just ask, why isn't the --

BRIG GEN McGUIRE: Well, you're saying only when the SVU --

REP. HOLTZMAN: To coordinate with the Senior SVU Agent when that investigator is handling a sexual assault case.

MS. FERNANDEZ: General McGuire --

BRIG GEN McGUIRE: I guess you don't understand.

BRIG GEN McGUIRE: Maybe.

MS. FERNANDEZ: -- I will just a practical example. You are on base. Only two investigators.

BRIG GEN McGUIRE: Correct.

MS. FERNANDEZ: You have got a homicide and a sexual assault taking place at the same time.

BRIG GEN McGUIRE: Right, right.

MS. FERNANDEZ: One of your investigators is lead on the

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homicide --

BRIG GEN MCGUIRE: Right.

MS. FERNANDEZ: -- and secondary on the sexual assault.

BRIG GEN MCGUIRE: Right.

MS. FERNANDEZ: If he or she all of a sudden has to be the lead homicide person and be coordinating with outside folks on the sexual assault, you think it is going to be too onerous on that small unit?

BRIG GEN MCGUIRE: Yes, very much so.

BRIG GEN DUNN: But the investigators investigate multiple cases all the time.

MS. FERNANDEZ: They do, but we are doing here is that --

BRIG GEN DUNN: You're mandating --

MS. FERNANDEZ: --you're mandating it.

BRIG GEN DUNN: You're mandating that the resources go to the sexual assault rather than the homicide in my example.

MS. FERNANDEZ: No, you're mandating that the person who doesn't normally investigate sexual assaults and who doesn't have the training, because not everybody can be trained --

BRIG GEN DUNN: Right, right.

MS. FERNANDEZ: -- because we have small installations. But they get on the flippin' phone or get on email and go to the SVU person and say, "I

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have a sexual assault. Here's what I have done so far. What do you think of my plan? This is what I" --

BRIG GEN McGUIRE: I guess my concern is, where is this found? I mean, what is the genesis that that doesn't happen? I mean, that kind of coordination goes on, I would hope. That has been my experience.

But for the Secretary of Defense to require a commander in the field to do that, it just seems to me it is over the top, because that coordination does go on, and shame on them if they don't.

PROFESSOR HILLMAN: Absolutely. So, this is an effort to fill what was a gap that we saw in the special victim capability at small units without significant resources, to simply say there has to be some coordination. So, it is that last finding --

BRIG GEN McGUIRE: Right.

PROFESSOR HILLMAN: -- 7-3, the last sentence there, "There is no requirement for the non-SVU school-trained agent to coordinate with the SVU investigator supporting the special victim capability." That's at smaller locations, right. That is the small gap right now, which doesn't always exist, but can exist because there isn't a requirement now that that coordination take place. And we wanted to put in this requirement that just the coordination, the phone call and the contact with somebody trained in sexual assault investigation take place. That's where that comes from.

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BRIG GEN MCGUIRE: I will just go on record and disagree.

CHAIR JONES: Okay. Is there anyone else who disagrees with the recommendation as written?

(No response.)

All right. Then, 7 is accepted with the comments of General McGuire noted.

Recommendation 8. Again, General McGuire, I think you had a comment about this.

(Laughter.)

Did I say, "Again, General McGuire"?

(Laughter.)

BRIG GEN MCGUIRE: Yes, ma'am.

And again, only because having had boots on the ground in dealing with this, and the practicalities of managing recommendations such as these, I accept the recommendation if we would consider a modification that, whenever possible, utilize civilians as supervisory investigators.

CHAIR JONES: You want that taken --

BRIG GEN MCGUIRE: I just want that struck.

MR. BRYANT: I'm sorry, the "whenever possible" part or the "utilize civilians as supervisory investigators"?

BRIG GEN MCGUIRE: All of it. All of it.

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MR. BRYANT: The concern is utilizing the civilian as supervisory investigators?

BRIG GEN McGUIRE: Right. And it depends on locality. In the Army specifically, while we have a good number of civilian investigators, is a predominantly military organization. So, we may not even have the number of civilians to do that. But, then, also, who is to say they are the better-trained or more qualified to do that?

I understand that the spirit was for continuity, but that is captured in other means. You know, to ensure continuity is continued -- I mean, that there is no gap there.

Again, you say "whenever possible, utilize civilians as supervisory investigators". It just gives the impression that military investigators are not up to par.

MR. BRYANT: That was obviously not our intent when you look at our findings, General McGuire.

BRIG GEN McGUIRE: Uh-hum.

MR. BRYANT: We are not saying that we are trying to look for some continuity and that's why we also say "whenever possible".

BRIG GEN McGUIRE: Yes.

MR. BRYANT: Because we understand it is not always going to be possible; they are not always going to be available.

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But, in terms of some continuity and, then, also just for additional confidence in the system. But I think primarily what we heard and we were looking for, some consistency of supervision; the supervisor is not being rotated every two-and-a-half years or so. Is this a person who has been there, experienced, and acquire more experience at that locality with his agency on a continuing basis?

BRIG GEN DUNN: In the sexual assault area specifically.

MR. BRYANT: Yes, yes. Thank you.

BRIG GEN DUNN: In the sexual assault --

CHAIR JONES: Do I take it from Finding 8-2 that this is going on now? It says "A best practice in the military is the assignment of civilian investigators." So, the military has already recognized it helps to have a civilian investigator for continuity, is that right?

BRIG GEN DUNN: We heard testimony to that effect.

CHAIR JONES: All right.

COL COOK: Is it at all larger installations or is it at every installation? I mean, that is the challenge that --

BRIG GEN DUNN: Well, no, what we heard in testimony was that, as they establish these Special Victim Units, there is a recognition that continuity is important, and that frequently senior agents who have retired have been hired as civilians to manage that.

COL COOK: Right.

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BRIG GEN DUNN: Obviously, you can't have it across the board; thus, the "whenever possible".

CHAIR JONES: Can I just make a suggestion? I understand General McGuire's concern that this makes the military investigators like they may not be up-to-par, even though that is not anyone's intent. Maybe we can say something like "and consider the continuity which civilians provide in making supervisory investigator assignments," or something like that, something that would recognize the thought and would not make it look like they were somehow superior for any other reason except continuity. They may be, but I don't think we want to even suggest that.

CHAIR JONES: Well, is continuity the only issue? Is that the only reason that you would recommend it on No. 8?

PROFESSOR HILLMAN: No, Representative.

REP. HOLTZMAN: Well, then, if it's not, then I believe that your solution doesn't work.

PROFESSOR HILLMAN: It runs to the experience. I mean, you know, our military investigators, as the charts show and the discussion, they are very well-trained on these issues, but they don't often -- this is a rare crime in the military -- they don't often have as much experience as experienced civilian sexual assault investigators. So, that is why we recommend that.

REP. HOLTZMAN: So, maybe something that indicates that,

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whenever possible and necessary, because of the experience factor, or something like that -- that is not very elegant language -- utilize civilians, or, whenever possible, utilize civilians who have more experience as supervisory investigators.

BRIG GEN DUNN: I think the whole concept here is, if you have a civilian assigned as the supervisory of these Special Victim Units, then they build that. You know, they stay. They build the expertise.

REP. HOLTZMAN: Oh, I see.

BRIG GEN DUNN: They see the cases as they come. I mean, it is the continuity plus. It is continuity plus building the experience.

REP. HOLTZMAN: Right. I understand that. And they are not being transferred around the world and doing something else.

COL COOK: But that goes back to your "whenever possible," because that will be true. At a larger installation, when the diversity and probably the complexity of the cases is more than at a podunk installation or base that doesn't have the same criminal workload that somebody else does --

BRIG GEN DUNN: Exactly. Out of a small place, you may have, you know, two sexual assaults a year or one sexual assault every other year, and you are not going to build that base of experience. But at your larger installations --

COL COOK: Right, it would be a larger place.

CHAIR JONES: Professor?

PROFESSOR HILLMAN: Colonel McGovern has just reminded

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me that one of the issues is that at very small installations the selection of a person who is a military investigator, who may be trained in the minimum, but isn't a volunteer, isn't one of the people who would self-select into doing this sort of investigation, and that leaves us in a tough situation in those because of the limited resources there, because of bias, et cetera, those things that are mentioned in the discussion here.

So, if there are more concerns about this, Judge Jones, we do have Russell Strand here. Mr. Strand can talk to this issue as well, if there is more clarification that is needed on how this plays out, because he was, like General McGuire, experienced in investigations here.

CHAIR JONES: Did you want to add anything, Russ --

MR. STRAND: Yes, Your Honor.

CHAIR JONES: -- in terms of, actually, the wording of this recommendation.

MR. STRAND: Right.

CHAIR JONES: That is of concern, I think, to a couple of us.

MR. STRAND: Yes. We did discuss at length the "whenever possible," because we realized some of the constraints. But we did realize many years ago that we needed a force of specialized people because the military investigators are very well-qualified. Some can run circles around other civilian investigators; there is no doubt about that.

The problem is, with the military investigators, they are moved

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from assignment to assignment. One assignment they are going to work drug cases; another assignment they are going to work economic crime; another assignment they are going to work general crimes, including some specialized units.

The problem is we have offices where we don't have that expertise and we need that expertise. So, that's why all the Services are saying hire special civilian investigators to have that continuity, to have that specialized training experience, and then, to gain experience along the way.

So that, as time goes on, the military agent may have a couple of years here and there, but the civilian is going to build that 5, 10, 15, 20 years of experience. And so, that is why it is really important.

As Dean Hillman had said, we did hear testimony in the Committee that there are agents that were told to do this and they don't want to do this. And they are going to do a good job, but they are not going to maybe do the best job. So, that was why we put "whenever possible".

VADM HOUCK: But when we say to assign "whenever possible," Mr. Strand just said there are instances where military investigators will run circles around civilian investigators. So, the saying "whenever possible" mandates that, I mean if you take this literally, mandates assigning a lesser-qualified person on an investigation.

BRIG GEN MCGUIRE: Yes. Exactly.

VADM HOUCK: So, "where appropriate, assign more

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experienced"? There is got to be a different way to word this.

REP. HOLTZMAN: I just have some language which would say something. Instead of "whenever possible," "whenever necessary and feasible to ensure experience in specialized investigations in sexual assault cases, utilize civilians as supervisory investigators."

Do you want me to repeat that?

BRIG GEN MCGUIRE: Yes.

REP. HOLTZMAN: Okay. So, it would say, instead of "whenever possible," "whenever necessary and feasible to ensure experience in specialized investigations in sexual assault cases, utilize civilians as supervisory investigators."

MR. BRYANT: I'm not sure that --

CHAIR JONES: I'm sorry. As our court reporter would say, one at a time.

(Laughter.)

Mr. Bryant?

MR. BRYANT: Oh, thank you, Judge. I'm sorry.

I'm not sure that that necessarily solves the problem because -- I'm sure Russ would agree and my experience is -- just because you're an excellent investigator doesn't mean you can be a supervisor. There are homicide detectives that are fantastic, but nobody wants them supervising because that is just

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not their thing.

So, when we are looking for this continuity idea and the gathering of experience on that installation, it may be that we should continue to say "whenever possible," as opposed to "whenever necessary," to have a civilian supervisor. Because you may have a -- he can supervise some of the greatest investigators that there are.

REP. HOLTZMAN: Well, I think, then, you are trying to solve too many problems in one sentence. Okay? You are trying to solve continuity, build up civilian capability in small places because there is going to be constant shift, and then, you are also going to have situations in which you are going to need to draw on some supervisory outside expertise.

So, don't put it all in one sentence because I think it raises the problems that both Admiral Houck and Brigadier General McGuire raised.

I mean, in order to solve the problem, you have to break it into two, I think you have to break it into two components.

COL COOK: But, just as everyone has said, Mr. Bryant's point of not everyone is fit to be a supervisor, the points of not every investigator is at the same quality, and we have some military investigators -- I think including the civilians for the expertise level, for the continuity is important. It doesn't necessarily mean that they become that supervisor, but you include their expertise in part of that process and take out the requirement to make them the supervisor and let it be the most

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appropriate person to be the supervisor at that installation, governed by who is in charge.

CHAIR JONES: Can we say something like, "And whenever possible, consider utilizing civilians as supervisory investigators for continuity and expertise," something like that?

COL COOK: Take out the word "supervisory". "As investigation for the continuity and expertise," and you get that same piece there, but they are not necessarily in charge if they don't have the skill set to be the person in charge, but they have that technical expertise to be the person --

BRIG GEN MCGUIRE: And the continuity.

COL COOK: Right.

CHAIR JONES: I think the whole point of the recommendation is that you consider them to be supervisory investigators. What am I missing?

MS. FERNANDEZ: Selection and training, so investigator selection and training. So, it doesn't go to supervision. It goes to how adept is that investigator in investigating a sexual assault case.

REP. HOLTZMAN: Could I recommend that somebody try to draft this and, after lunch, we examine it?

CHAIR JONES: That's a good idea.

All right, moving along, 9, Recommendation 9. Let's see, 9(a).

And, Ms. Holtzman, I think you had a comment about this -- this

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is a recommendation that Congress appropriate centralized funds for training of sexual assault investigation personnel, and Secretary of Defense direct the Secretary of the Services to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to a sufficient number of SVU investigators.

And if I read your suggestions, it was to strike the word "centralized" in the first sentence and to strike "a sufficient number" in the last sentence.

Did you want to speak to that?

REP. HOLTZMAN: Yes. These were two just wordsmithing concerns. I don't know what "centralized funds," what that term means. So, I couldn't --

CHAIR JONES: I think we can all agree. I'm getting signals from Professor Hillman over here.

Any other objections besides take "centralized" out?

REP. HOLTZMAN: Okay. Right. And the second one is, when we say a "sufficient number," why don't we say "to provide advanced training on sexual assault investigations to SUV investigators"?

CHAIR JONES: Any problems with that?

(No response.)

All right. Then, with those modifications, 9(a) is accepted.

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I'm sorry. Colonel?

COL COOK: I'm sorry. My concern is similar. The "centralized funds" to me, what I think about is Congress appropriates funds specifically for that purpose, even now without taking "centralized," for the purpose of training just the investigators.

And my concern is I think that is too specific. I think we are making a number of recommendations in this whole process, some of them protective services, the training of the Judge Advocates, the training of the Special Victim Counsel, the training of investigators.

I would rather see, if you are going to say Congress appropriate funding, I would rather go to -- we know that fiscal times are going to continue. Appropriate funding for the Sexual Assault Program within the Department of Defense and earmark it. The Secretary of Defense, then, can allocate that to the pieces he needs to put or she needs, whoever it is at the time, to put at that given time.

But I don't think the singling out in this process -- the only part where I see appropriated funds to single somebody out is with the military investigators. And I don't know that that -- it's important; I'm not minimizing it. I just don't know that it is more important than everything else that needs to be done as part of this process.

MS. FERNANDEZ: We did have a Special Counsel, too.

COL COOK: It said to make sure there were funds, but it

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doesn't say that Congress is going to appropriate those funds. And I may be mistaken, but I thought this was the only place we are saying where it is appropriate funds.

And I don't know that you are going to get special earmarked funds for each of the pieces on any given year. So, that is my concern, that I don't know that you put the military investigators above everything else that we are trying to do. I would rather strike out the words -- "Congress appropriate funds for the training of sexual assault personnel". Take out the word "investigators". But you are trying to reach investigators with this point.

And then, "the Service Secretary's program of budget funding to provide advanced training on sexual assault investigations," period.

PROFESSOR HILLMAN: Judge Jones?

CHAIR JONES: Yes?

PROFESSOR HILLMAN: I think that we did make a judgment that the investigators were the specialized support in this specific way that isn't in other parts, because they are the gateway to the entire system, because the failures there -- no one else ever gets a chance when a victim encounters an investigator who is actually not equipped to deal with the challenges of that situation. And so, we did prioritize in the way that Admiral Houck identifies. That's correct.

COL COOK: And I think you could prioritize the same thing. The gateway could also be the first person to whom the victim reports. And if that

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person is not properly trained to take that restricted or unrestricted report, then that also -- I mean, it may not fail the system as much; it is going to fail the individual. And that is what my concern with putting one over the other is.

CHAIR JONES: Ms. Holtzman?

REP. HOLTZMAN: Thank you, Your Honor.

I think you made a good point. My view is that Congress is "all wise," as we know.

(Laughter.)

Sometimes they might not have focused on this issue of investigators because it is not as kind of sexy as some of the other issues that they have been focusing on. So, that is why I don't think it is a bad idea to have this brought to their attention specifically.

On the other hand, you make a very good point that maybe we need to look at some of the other programs, and maybe this not the right time, but maybe when we are looking at the general report, we should look and make sure that we have made appropriate recommendations for appropriations.

I mean, I agree with what Professor Hillman said, which is this is so bread and butter, people might say, "Oh, well, you know, they've got the funds. They know how to do it. We haven't heard any problems." That is why I think it is important to point that out.

But I agree with your point that we don't want to in any way

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slight any other areas that may need some attention, and that should be something that we might want to look at, at a later point before the 16th.

COL COOK: And I agree completely with your discussion. It is in here that this is where we make that decision that is the investigators. In our general report, I would just go on record as saying there are a lot of important pieces, and I would agree with that completely, that we, as a panel, make an overall comment in terms of that funding the resource. And it is going to be important across the board.

If in this one we are going to say it is the investigators, I can accept that, as long as overall our panel says that there is going to be some hard decisions made in the future if there is not enough dollars. I don't know that the investigators will always be right up with that funding.

CHAIR JONES: I think that is a great idea.

Did you want to add to that, Ms. Fernandez?

MS. FERNANDEZ: No, that is exactly my idea.

CHAIR JONES: Okay. Then, we accept 9(a) with the word changes proposed by Ms. Holtzman.

Recommendation 9(b), I don't believe I received any comments on that, but is there anyone who wants to comment or discuss 9(b)?

This provides that the Secretary of Defense direct commanders and directors of the MCIOs to continue training of all levels of law enforcement

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personnel on potential biases and inaccurate perceptions of victim behavior.

The SECDEF direct the MCIOs to also train investigators against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

I mean, I support this recommendation. We heard testimony on how important it is for this type of training.

Any objections?

(No response.)

All right. Then, 9(b) is accepted.

And we'll move to 10(a). All right. This particular set of recommendations, (a), (b), and (c), overlap to some extent with Victim Services' 18. So, if you have that in front of you already, I think we can go ahead. You need Victim Services' Recommendation 18

PROFESSOR HILLMAN: Judge Jones, Victim Services' 18, if I could, it says it directs. It says "The SECDEF direct a study of what constitutes low-level collateral misconduct and assess whether to implement a policy in which commanders will not prosecute low-level collateral misconduct."

So, the CSS recommendations specify a means of doing that.

CHAIR JONES: Right. And I think that that, that VSS 18, is specifically relevant to 10(b), which talks about promulgating -- 10(b) of Comparative Systems -- which talks about promulgating "a list of qualifying offenses for which

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victims of sexual assault can receive immunity". And then, 10(c), which talks about Congress and the Secretary of Defense examining whether Congress should amend Article 31(b) to add an exemption to the requirement for rights advisement to a Service member.

Article 31(b) also is the subject of Recommendation 10(a). So, part of (c) and 10(a) are about 31(b). The entire set of recommendations actually speak to the issue of what can be done about collateral misconduct and the problems that arise from it for a victim who may be prosecuted for collateral misconduct, but who is still in the process of trying to report his or her victimization for sexual assault.

I, speaking just from my own vantage point, believe that the Victim Services recommendation, which for some reason is cut off on here -- thanks -- that says, "The Secretary of Defense direct a study of what constitutes low-level collateral misconduct in sexual assault cases and assess whether to implement a policy in which commanders will not prosecute low-level collateral misconduct."

This is an area where I don't personally feel that I know enough about what the commanders' experience, or the victims, for that matter, but primarily what the commanders think about having a blanket immunity provision for collateral misconduct.

And I think it makes a great deal of sense to highlight this as an issue and to ask the Secretary of Defense to do a study to consider what are the

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categories of low-level collateral misconduct and ask the question and decide whether to implement a policy, which essentially would be an immunity policy in which commanders will not prosecute low-level collateral misconduct.

I think the recommendations from Comparative Systems are much more assertive here. They direct the Secretary, they have the Secretary of Defense direct the standardization of policy. Well, I'm sorry, that's (a). We should come back to that.

Recommendation (b) basically has the Secretary of Defense promulgating a list of qualifying offenses for which the victims of sexual assault can receive immunity from military prosecution. So, that one assumes that there will be some process for immunity, or at least that is how I read it.

And then, 10(c), Congress and the Secretary of Defense examine whether -- and I would go to (b) again -- a definition or procedure for granting limited immunity should be implemented in the future or other legislation or policies should be adopted to address the issue of collateral misconduct by military victims of sexual assault.

I think it makes sense to talk about 31(b) separately, but correct me if I'm wrong, Professor. I think that it is sort of intertwined here with the basic issue of what do we want to recommend with respect to what we want people to do about looking at the issue of collateral misconduct and the issue of granting immunity.

Mai?

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MS. FERNANDEZ: Is there a way that we could take Recommendation 19 and, then, specify that the study should include what is included in 10(b) and 10(c)? That still is you are not promulgating a list, but you are being much more directive about what the study should look at.

I don't know if that is sufficient in what the Comparative Systems Subcommittee thought about that. In some ways, your recommendation got much more specified than ours did. Ours was just a broad-brush look. Yours is saying we see these exact problems. And I like that about your recommendation.

CHAIR JONES: Admiral?

VADM HOUCK: I mean, I think the centerpiece of it has to be the Victim Services Subcommittee's recommendation to do a study. I am not sure that I would object to including some recommended elements of the study, is my suggestion. But the notion that the Secretary of Defense will promulgate now or that we direct 10(a) and 10(b), I do not concur with. So, a modification of 18 to include elements, I could.

PROFESSOR HILLMAN: Judge Jones?

CHAIR JONES: Yes?

PROFESSOR HILLMAN: The Recommendation 10s, all these at least three are a compromise position that actually the Subcommittee reached that lessened the stronger version which was closer to the dissent from the Victim Services Subcommittee that suggested we go further in this regard now.

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So, you are right, there are two issues, the 31(b) issue, which we found 31(b) is being violated right now regularly. It is actually a policy that it be violated. And we find that problematic in terms of protecting investigators from making errors, protecting victims from making disclosures for which they may not actually have immunity down the road, because it is not actually within the authority of an investigator to grant immunity in the way that they are, essentially --

CHAIR JONES: Well, they are giving use immunity, essentially, right? I mean, when they don't advise the person, then they can't use their statements against them. It is not transactional? In other words, they don't have complete immunity, right? I just wanted to make sure.

PROFESSOR HILLMAN: In practice --

CHAIR JONES: Maybe we don't know.

PROFESSOR HILLMAN: I can't say that I know, Your Honor.

CHAIR JONES: Okay.

PROFESSOR HILLMAN: But we do know that it is not consistent across the Services. So, (a), you're right, is about 31(b). We think it should be clear to protect the legitimacy of the investigative process and victims. (b) actually doesn't change very much, what's happening right now, but it creates a signaling mechanism whereby victims would know that there is a list of offenses, not for which they will receive immunity, but we lessen, lighten the language there to say they can receive immunity.

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That is true right now. They already can get, they can not be prosecuted. In fact, as we point out in the discussion, commanders are deferring this decision until the end of the investigative process, but it remains a potential sanction for a victim, and it certainly remains a potential sanction before they decide to report.

So, this was an effort to address the barriers to reporting that we think are a big part of the problem within and without the military with sexual assault.

And then, the last recommendation is really just, as Ms. Fernandez pointed out, putting points on the study. So, that is saying that we should study these things.

First, let's look at 31(b) and see if we need to change that, so that we can give fair advisement to our investigators and standardize process.

The next one is about what kind of limited immunity use, transactional -- as you point out, we said limited immunity to leave room for that.

And then, finally, other legislation or policy that should be adopted to clarify that. It is not a recommendation that actually changes anything that is within the authority of a convening authority right now, but it does recommend the Secretary put out a list. That is the proactive part of this recommendation, which just says publish a list.

And actually, the list is really easy to define. It is in the Victim Services Subcommittee report, too. Alcohol offenses generally are the huge issue there.

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Just putting out there that one thing would make a difference, we think, a potential difference in reporting.

CHAIR JONES: Any other comments?

COL COOK: I would echo Admiral Houck's concern. And I'm so sorry, we had a witness who came and had provided information to us. Her first name was Joye, I think. Joye Frost.

Just to clarify for people who are in the room that may not realize it, Miranda is a custodial interrogation. When you are under arrest, you basically get read your rights. In the military, if you are suspected of a crime -- so, as you say, underage drinking, misdemeanors, General Order 1 violations where you might go into the room of somebody of the opposite sex or the same sex, and you don't belong there.

The challenge in the military is that piece, and I am very sympathetic to a victim and to investigators who don't want to stop and read somebody their rights. I am sympathetic to that. I have got concerns with automatic immunity or saying there is still, according to what Joye Frost had said, 3 to 5 percent or 3 to 8 percent of false reports that are out there, and I am not trying to protect that, but you are trying to balance everything.

So that automatic immunity and giving something out there, I have a concern about. I like the Victim Services Recommendation No. 18 that says let's look at it; let's look at more of the information that is out there and get a better assessment of what is appropriate on whether or not we are going to prosecute

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low-level collateral misconduct and come up with a policy that all the Services can do.

Because you're right, there is at least one Service that, as a matter of course, just does not choose to read the rights. That just means they are violating Article 31(b) because they don't have that discretion. It says, if you are suspected of a crime, it is the victim's right, not the investigator's right to change it.

I would not go as far as the recommendations dealing with Article 31(b) and the terms of automatic type of immunity.

PROFESSOR HILLMAN: There's nothing in the recommendation about automatic immunity.

COL COOK: Right.

MR. BRYANT: And this is not a new concept, either. Obviously, in one of our violence reports out for the last 10 years, DoD has identified what are the most common collateral misconduct issues in sexual assault cases as underage drinking or other related alcohol offenses, adultery, fraternization, or the violations of certain regulations or orders.

So, you know, to say let's just kick this can down the road, I think we ought to be a little more, I am hoping we will be a little more specific with these things.

CHAIR JONES: Mai?

MS. FERNANDEZ: Judge, I think Victim Services struggled with the same issues that Dean Hillman has brought up.

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In some ways, what we are all worried about, that if we just ask for a study, that is equivalent to a punt. And we are asking Congress to just study something again.

And I get the need for a study and not moving too fast, but I also think that Dean Hillman's recommendation here of just promulgating a list where they can receive immunity might actually incentivize people to come forward. At least they know that they could possibly get immunity for a drinking violation. It doesn't mean that they are going to, but they possibly could.

I think that is an ongoing fear in all of us, that if we don't at least do something about this other than create a study, we are going to have lots of people still not coming forward. And then, somebody is going to do a study and, then, we are going to look at the study and maybe or maybe not something will go forward.

As much as Victims Services said let's study it, I think that this might actually be a little bit stronger without going too far.

CHAIR JONES: Can I ask a question because I don't remember testimony on this? Is there now any process for immunity? Is it just agreements from the convening authority, I mean which is not so different from immunity in the civilian world, but what is the process, the basic process?

PROFESSOR HILLMAN: There is a process out there. So, Colonel McGovern, do you want to speak to that, what we saw in the different Services? I mean, it gets to the convening authority. Or, General Dunn, do you

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want to talk about how that works?

I mean, the victim can get -- I mean, it is not always, it is certainly not always prosecuted. And the recommendation has been that it is deferred, the decision is deferred until the end of the prosecution of the more serious crime.

CHAIR JONES: Deferred, but not immunized.

PROFESSOR HILLMAN: Correct. That's correct.

CHAIR JONES: And then, what happens if there is a decision to grant immunity? Is it a simple agreement?

BRIG GEN DUNN: Yes, yes, it is a simple agreement between the victim and her counsel.

CHAIR JONES: The victim's counsel and the convening authority?

BRIG GEN DUNN: Yes, yes.

CHAIR JONES: Right. All right.

Liz?

REP. HOLTZMAN: I just wanted to make a point. You know, we struggled, as Ms. Fernandez said, in the Victim Services Subcommittee about this. And it is a very distressing issue, particularly if it results in the refusal of people to come forward because they don't know what they are in for if they report.

However, we have a new phenomenon that has come into effect, which is Special Victim's Counsel. And nobody really knows how these two things

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are going to intersect, and whether, in fact, this issue that we are worried about is going to be somehow solved because you are going to have Special Victim's Counsel right there arguing for this right away.

That doesn't, in my judgment, minimize at all the need for an understanding of how better to address it, but I just think that maybe some of the concerns that we have been worried about may be ameliorated by the Special Victim's Counsel. I don't know that. It may not be. But it is a new factor that we just need to think about in terms of how the whole thing is going to work out.

MS. FERNANDEZ: Representative Holtzman, play it out. Let's say that a rape took place during a situation where somebody was drinking under age. A Special Victim Counsel would say, "You know what? If you are worried about the drinking under age, that could be something that down the line we can get immunity for." But Special Victim's Counsel can't guarantee it still, correct?

BRIG GEN DUNN: But Special Victim's Counsel could insert themselves in the process at the beginning, though, and say, "My client's not talking to you until you" --

MS. FERNANDEZ: Right, you've got an additional --

BRIG GEN DUNN: -- "grant her immunity on this particular issue."

MS. FERNANDEZ: So, I find that this recommendation is really just further education on what is taking place currently. I don't necessarily see that it

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is really deviating from what is currently taking place.

So, we are still essentially punting because we are not making a total decision. We are saying they can do this.

VADM HOUCK: I don't think this group is qualified to make a decision. And I may be an army of one, but I don't believe that if we recommend a study that it is going to be punted.

I think the Secretary of Defense will look at the recommendation and will take it very seriously. This has to come from the ground-up within the Services. And I know that there are people who distrust the Services. But if it doesn't come organically, it is not going to work.

And I think the recommendation of a study will be taken very seriously, and I think a lot can be learned from it. I think all the Services and everybody recognizes that collateral misconduct is a really important issue right now, and that the Services probably aren't there yet in terms of the right way to handle this.

But the military society is different, and to preserve that there are right answers to this at this point I think is wrong.

CHAIR JONES: Yes, General McGuire?

BRIG GEN MCGUIRE: Your Honor, I have one more additive comment, again in support of the Victim Services Recommendation 18. It is that, while we are looking at these, there are so many other variables that we need to take into consideration, and my concern is the erosion of good order and discipline, and the

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reason why we have rules and regulations.

If, in fact, we are going to consider immunity, then we also have to look into what is the impact of, then, these rules and regulations; in particular, for example, General Order No. 1. Let me give you a scenario.

This is how it is imparted to lieutenants that look at their 30 people in their platoon, and they look at each one of them and it says drinking in a combat environment is a no-go. This is what will happen. And they tell them about you will get in trouble. It leads to this kind of behavior. You could become victimized. When, then, something happens, and each person has been told that, that was a willing disobey of an order, a direct order.

So, I think that by going and doing a study, what impact is that going to have not only on collateral misconduct, but other misconduct as a result of this recommendation here?

COL COOK: And the reason I like the No. 18 from the Victim Services is also because it goes beyond the study. The second part of it says, make a decision. Should there be a Service-wide policy on this point, so we don't have one Service doing it one -- I mean, Article 31(b) is long. That is going to have to be a congressional change. But if there is going to be a policy across the Services of whether you are going to do this, this is just saying, "Hey, SECDEF, make a decision on whether there should be a policy after finding out what the current practices are, what the current impacts of those are. Are victims coming forward or not?" So, it does

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have an "and" there.

MS. FERNANDEZ: What's the negative about promulgating a list? I am just curious as to why there is a pushback to that.

COL COOK: My concern is, if you are a victim and you walk in and it says you can get immunity -- okay, "can" -- when? I mean, you can get immunity now. You can promulgate a list and say you can get immunity for all these things, but it goes through the convening authority.

If they are misreading that and they are going in and they are speaking to an investigator, thinking this person can give them immunity, have you now created an even bigger problem?

As Representative Holtzman pointed out, the Special Victim's Counsel is now in the process and they are very concerned about they are a victim. They can draft up. It is a memo. They can draft up that memo, give it to the trial counsel, give to the convening authority themselves and say, "Look, there's been a crime in your command. You need to know what's going on. My victim will go talk to the investigators if you give them immunity." And then, it is a command decision. This is usually somebody who is very close. They can fix it. They can do whatever. A decision can be made quickly.

But I think that if you promulgate a list, and you say you can get immunity, that is no different than the reality right now. You can; it is just a question of at what point.

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So, unless you are saying this is going to the investigators to do, which I know is what the intent is, I think you may actually mislead some victims in understanding the wording of the way this is, at least for me.

CHAIR JONES: Anything further?

PROFESSOR HILLMAN: I just want to get victims to the Special Victim's Counsel. And I fear, without more knowledge about what they could get immunity for, then they are not ever going to get there.

Once they get the Special Victim's Counsel, I am not so concerned. I believe they will be effective with respect to getting them taken care of through the process, including potential immunity. But having information out there would increase the likelihood in our judgment that they would actually get there, that they would initiate the process.

MR. BRYANT: And we want to be careful, too, that we are not holding up the investigation while we have this meeting between Special Victim's Counsel and what are your rights and can I get immunity. Because one of the complaints that we heard in our field visit on the Service that is not even advising of these rights was their complaint that they are hearing from victims on average 72 hours after the event, which is -- and Russ Strand's shaking his head -- which is, you know, an investigator's bad dream. They want to hear this as soon as they can, so they can get started while there is still perhaps physical evidence available and forensic tests to be done on that evidence, and so on.

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So, I understand that we want them to get with the Special Victim's Counsel, but to say we are going to have to delay this whole immunity thing until all that happens, rather than just having, "Now there's a list. If this is what you did, then there is going to be the ability to go on with the investigation without you fearing that, because you were drinking at age 17, you're going to be at some point prosecuted for that."

MS. FERNANDEZ: Publishing this list doesn't make it automatic that they are going to get immunity.

MR. BRYANT: Yes.

MS. FERNANDEZ: We are not saying that at all. We are sort of just clarifying what you could possibly already get. We are not adding what you could already get.

I mean, this recommendation says these are the possible things you could possibly get immunity for, not that you will.

MR. BRYANT: Okay. Yes.

CHAIR JONES: And I think we need to study the whole thing at once. What are the offenses you may get immunity for and how are we doing it?

To me, it is a whole, not just having a list promulgated that I don't know whether reading it, what it might mean to a victim at that point or an investigator or anybody else. In a vacuum, I would not go for that recommendation.

MR. BRYANT: So, how would we find out the results of that

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study? Would we do a survey?

CHAIR JONES: Oh, it would make me happy.

MR. BRYANT: If you knew that you were going to get immunity, would you be more likely to come forward, or if you knew that you were going to be prosecuted for this, would you be less likely to come forward, which is what we heard, at least in the Comparative Systems group, from every victim and victims' rights organization and those in the field, on the ground, right now.

As Admiral Houck said, we know this is a problem. It is not a new problem. It is a problem that hasn't been addressed.

CHAIR JONES: Yes, I just don't think having a list out there for somebody to read solves the problem. I think they are going to either understand it and say they don't have any immunity yet or they are going to think they might. So, I just don't see 10(b) as a standalone.

MR. BRYANT: Maybe we could have a pilot program where somewhere we could propose a list and see how that works. Then, we will have some, quote, "evidence".

COL COOK: One of the concerns I would also have is, do you create a new problem if it is an automatic immunity? In an organization that is so based on good order and disciplines, especially in a deployed environment, if you are under the influence of alcohol when everyone is armed with a weapon, and you violate it, do you create an environment where we probably have a very low incidence of false

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reports now. But if you have got somebody who is now scared, who -- I don't know. I just don't know what that impact is, and I don't think we have enough information to go beyond what is in the Victim Services recommendation of No. 18.

So, I wouldn't want to inadvertently create a new problem by going forward with promulgating a list and having somebody misunderstand it.

CHAIR JONES: Can I take us back to 31(b) for a minute? Is there any objection to 10(a)? Because I think we have all heard the testimony that 31(b) in practice is not honored. Is that what we believe? Or the Services all deal with it differently?

BRIG GEN DUNN: Which (b) are you talking to?

CHAIR JONES: I'm talking about Recommendation 10(a) which deals with -- I'm sorry -- obviously 31(b).

BRIG GEN DUNN: If you look at Sub-finding 10-4 --

CHAIR JONES: Yes.

BRIG GEN DUNN: -- you know, NCIS investigators do not read victims reporting sexual assault their rights --

CHAIR JONES: Right.

BRIG GEN DUNN: -- for minor collateral misconduct because NCIS only investigates felony-level crimes. So, NCIS does not do it. The other MCIOs do do it. And it is not a precedent at all; it is the law. It is the law.

CHAIR JONES: So, there is no objection, then, to having the

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SECDEF direct the standardization of the policy regarding 31(b), or is there?

COL COOK: It is not a question of -- what is interesting to me is the Navy's -- if the practice is not to read writes to somebody suspected of a crime, they are violating the law. So, what you're saying is, SECDEF, come up with a policy that says they should follow the law or stop breaking it, right. I mean, it is not a standardization of process. It is for the Services to follow the law.

CHAIR JONES: I think we should hear from Admiral Houck on this on behalf of the Navy.

VADM HOUCK: Retired.

(Laughter.)

No, I don't have anything to add to it.

CHAIR JONES: I'm sorry.

VADM HOUCK: Article 31(b) is what it is.

CHAIR JONES: Yes.

VADM HOUCK: So, if they are not following 31(b), they ought to be.

CHAIR JONES: So, what do we want to say here, if anything?

COL COOK: Why don't we just say enforcement of the law? They should determine whether there should be a policy of what is here, but they should enforce the law.

CHAIR JONES: Professor Hillman?

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PROFESSOR HILLMAN: I have concerns if we take this out. The thing is, I don't want to make it harder for NCIS to investigate these crimes. And actually, not doing the rights advisement makes it easier for them. They're more effective.

So, to me, to not address the collateral misconduct issue at the same time that we do address the 31(b) carveout that the NCIS investigators are exploiting right now, to me, is actually a step in the wrong direction.

BRIG GEN McGUIRE: I think that needs to be added to our study in Recommendation No. 18. So, we are looking the good order of discipline issue. We are looking at --

PROFESSOR HILLMAN: I'm struggling with what else we need to know to make this recommendation -- really, commanders rarely impose punishment on these victims already. It is quite rare because they recognize the severity of the sexual assault crime is the thing that they need, but it scares victims.

In the Workplace and Gender Relation Survey, the non-reports, 22 percent of the people who did not report said they did not report because, quote, they "feared" that they themselves or others would be punished as a result.

So, we know a fifth of those lack of reports are collateral misconduct fears. That is a much easier piece for us to get at than all these other pieces. The other fears about reporting go to I didn't want anyone to know. That's very tough for us to make a policy recommendation on. But to make a policy

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recommendation on collateral misconduct seems pretty straightforward, and we know what the offenses are because we actually have lists. We know what the most likely types are, and it is not actually difficult.

So, to make it tougher for NCIS investigators at the same time that we make it no easier for victims to counter the impression that their assailants sometimes give them that they will be prosecuted if they come forward seems to me a mistake.

MR. BRYANT: And if we will flip this coin over on the other side, we will also find -- and the Navy is the second largest Service; we have over 300,000 men and women in uniform. We have not heard from commanders that good order and discipline is down the toilet in the Navy because NCIS is not advising these victims of their rights; that we are having a tremendous problem with good order and discipline; underage drinking is rampant because NCIS is not advising of their rights. We heard nothing, not from NCIS, not from the prosecutors, not from any of the commanders that we heard from even, just as an example.

But we talk is, is there evidence? We often try to prove negatives on this panel, but there is some hard evidence because we haven't heard that the Navy is complaining itself that NCIS is not doing this.

REP. HOLTZMAN: Well, I don't understand the relevance of that at all. I mean, if people aren't being read their rights, and they are entitled to be read their rights, that is a problem, whether it affects the ability to have improved law

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enforcement or not. I mean, that is part of the process.

So, I don't understand the relevance of law enforcement. I mean, the question that I would have is, well, I'm not about to say, even if it showed, even if we had statistics showing that the Navy had a better prosecution rate than any of the other Services, I'm not sure that I would still agree with their violation of the right. But we don't have that information. So, we don't even know what impact the Navy's apparent violation of the law has had. So, I don't see the relevance of that.

I agree with Admiral Houck's concern here. It is true that in most cases convening authorities are not going to prosecute for collateral misconduct. But what about the cases in which they are? We don't know they are going forward in those cases. We don't know what impact that will have. I personally don't feel that I know enough about it. I mean, maybe you have heard from commanders who say, "Well, we don't really care. Yes, sure, take this decision away from us. It's not a big problem." But we don't have that information and we don't know the impact.

So, I would be concerned about, even though we know it is a big problem, making a recommendation for a solution when we have not heard from everybody involved in that solution, particularly commanders and to get some sense of what the impact would be on this issue of good order and discipline. It may have no impact, and you may 100 percent right, the members of this Committee, that we

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should just junk any prosecution for collateral and misconduct. You may be right, but I don't know that you are. That's the difference.

We should urge -- and I think that your suggestion, Ms. Fernandez, about asking for a quick report, asking the Secretary to give priority to such a study because of the number of people who say that this is problem, I would definitely agree with that. But I don't feel that we have enough information at this point. I don't feel comfortable for myself at least supporting a recommendation that we just abandon the idea of letting commanders deal with immunity.

CHAIR JONES: No one is opposed to Recommendation 18. Many or some are opposed to it not going far enough. And leaving aside the desire to put more in from 10(a), 10(b), and 10(c), is everyone in agreement that we might wish to add that the Secretary of Defense direct an expedited study to highlight this in 18?

PROFESSOR HILLMAN: Your Honor, I will just point out, they are going to have trouble because the Army, the Air Force, the Navy, and the Marine Corps have not tracked prosecutions of sexual assault. The Victim Services Subcommittee actually submitted a request for information on this, and we couldn't get any more information on it because they haven't tracked it. All we had was from the Coast Guard for five years and, then, from the Army for one year; that's it for what we got.

CHAIR JONES: Are you saying we won't be able to tell the

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Secretary of Defense what they consider to be low-level collateral misconduct?

PROFESSOR HILLMAN: I don't know what kind of data they are going to get. We put in these RFIs and we didn't get anything. I mean, that happened to us in a lot of different circumstances.

But I don't think that Victim Services failed to investigate this, nor did Comparative Systems. We actually tried. I don't know what -- the Secretary may get a better response than we did to the RFI; I don't know. But, actually, they didn't; they just didn't. So, we haven't tracked this information, so we can't tell you anything else.

So, I don't see how an expedited study gets us very far. But I don't object. Just to be clear, I don't object to an expedited study.

(Laughter.)

LTC McGOVERN: Judge Jones, we do have the RFI response from the Services as to their position on immunity, and they do not support a blanket immunity for these cases of collateral misconduct.

PROFESSOR HILLMAN: Not for reasons of commanders' discretion, however, but for reasons of the credibility of their witnesses going forward in the trial. They said they don't want defense counsel to be able to bring this forward. So, it was about the effectiveness of the prosecution and adjudication, as opposed to the discretion of the convening authorities to maintain good order and discipline.

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VADM HOUCK: At the risk of prolonging this -- (laughter) -- there is the rule of unintended consequences. As we go down this road without a thorough understanding of it -- and this is not a recommendation to punt -- but as we go down this road, then we do not know what other ways the cloth is going to be altered by pulling this string.

The Department of Defense controls, among many other important things, nuclear weapons, for example, and civilian society does not. And so, when witnesses come to the panel and they say, "This is preposterous. We can't understand why you guys are concerned about underage drinking and things like this," they are different systems.

And I think our discussion of Recommendation 10(a) is kind of extraordinary. We have one Service who is not following, apparently, not implementing Article 31(b). I don't know this for a fact, but I take it from what people have said. We have three Services that are, and then, we have a comment that actually it is good to not follow Article 31(b) because that will help us get farther.

I mean, this needs further analysis, in my opinion. And Victim Services Recommendation 18 has recommended for modification by Judge Jones. I believe this is the way to do it.

CHAIR JONES: What about, also, including -- or am I extending this too far -- something about studying 31(b), just to take a look at that as well?

MS. FERNANDEZ: Well, is there a way to do a study and rules

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and regulations are promulgated after the study? Because I think that is the problem of why you say a study is a punt, because you study it, and then what? You are not going to say that anything else is going to happen after that.

BRIG GEN DUNN: There has to be an outcome for the study.

MS. FERNANDEZ: There has to be an outcome. And I think you have got to promulgate some rules and regulations --

BRIG GEN DUNN: As a result of the study?

MS. FERNANDEZ: -- as a result of the study.

CHAIR JONES: Well, we are saying the Secretary of Defense is directing a study which is going to result in two things: what constitutes low-level collateral and misconduct in sexual assault cases? And it is also supposed to assess whether to implement a policy in which commanders will not prosecute low-level collateral and misconduct.

What would you propose we add to that?

BRIG GEN DUNN: I think that, with regard to 31(b), that we should just recommend that the Secretary of Defense resolve the issue of why one Service does not think -- you know, just resolve the disparity between the Services on that in just a one-liner.

COL COOK: If you continue to include CSS Recommendation 10(a), which you can do that, the only result that is possible, as it says, the Secretary come up with standardization of policy that complies with the law. Without a

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change in Article 31(b), without the establishment of a policy, the only thing the Secretary of Defense can do is, if the Navy is not following the law now, is to tell them, "Get in line."

And I don't know that that is what you want, but, essentially, that is all that one says. So, I have got no objection with the wordings that is there. I just find it interesting that we are essentially saying to the Secretary of the Navy (sic), "Tell the Services to follow the law as it is written." Because it is not discretionary; it is a victim's right. And I understand it is destructive to the investigation, which can also hurt a victim. It is a difficult one to resolve.

CHAIR JONES: All right.

(Laughter.)

Well, I think we should --

BRIG GEN DUNN: Let's ask the Secretary of Defense resolve the discrepancy in the application of Article 31(b).

COL COOK: Or resolve any discrepancies, so that we don't --

LTC McGOVERN: Is it the policy of NCIS only handling felony cases? In sexual assaults they should also investigate collateral misconduct as a matter of policy?

COL COOK: No, I think it is just a question of Article 31(b) says, if you suspect somebody of a crime, you have to advise them of their rights. If they are not complying with that in any case, whether it is sexual assault, felony cases,

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it doesn't really matter; it is not their discretion to change.

So, General Dunn's comment of the Secretary of Defense resolve any disparity in the procedures used by criminal investigations, pursuant to Article 31(b) -- whatever the language is, but it just goes more generic. It doesn't presume that it is happening across the board. It might be in isolation, but I don't doubt that it is not happening.

MR. BRYANT: And by the way, in our field visit, NCIS representatives did not express that it was because they only did felony investigations and prosecutions. What they said was it was unwritten, but an official agencywide policy.

We heard that came from somewhere else, but I am just saying in our field visit at a major facility, they didn't express that was their reason. They just said it was official agencywide policy.

LTC McGOVERN: And our response said it is because they handle felony cases. So, they refer it to the commander for action on collateral misconduct.

MR. BRYANT: And I think that information is getting to the prosecutors because they told us at that field visit that they rarely pursue those things.

CHAIR JONES: All right. We are going to take a 10-minute break. We'll come back with a great idea.

(Whereupon, the foregoing matter went off the record at 10:28

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a.m. and went back on the record at 10:50 a.m.)

CHAIR JONES: All right, we will resume our discussion and deliberations now.

Professor Hillman, did you want to propose your own recommendations with respect to 10(a) through (c)?

PROFESSOR HILLMAN: Yes, please. I think that there are two issues. There is the 31(b) issue of compliance with the law and standardization, and then, there is the question of reporting and the concern with Victim Services and Comparative Systems about making a change to encourage more victims, despite their collateral misconduct activities, to come forward.

So, if we address that bigger issue, the reporting issue, upfront actually with Victim Services Subcommittee Recommendation 18, with just some increased specificity, that is, the study that we are recommending --

CHAIR JONES: Right, expedited study.

PROFESSOR HILLMAN: Expedited study, should look at what constitutes low-level collateral misconduct, should look at whether an immunity policy ought to be implemented, and should address 31(b), should suggest to Congress an exception to 31(b) to permit investigations to actually have the discretion to grant immunity.

We don't want to be specific there, but basically look at the 31(b) exception issue. So, that is what the study would do.

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CHAIR JONES: I think your first two are fine. I think, in my own personal view, with 31(b), we should be -- I don't think I would ever recommend telling investigators to give immunity. But we could say, "and consider," or however you want to put it, "whether to recommend to Congress any changes to Article 31(b)". Or how more specific do you want to be?

PROFESSOR HILLMAN: That's fine, Your Honor. You know, 10(c) was our effort to do that before, that is, to look at whether other legislation or policy should be adopted to address the issue of collateral misconduct. We could say "including 31(b)" there. So, that is the study.

And then, the other point that was in 10(a) about standardizing, let's put that in the training part of the report, about investigators and training.

CHAIR JONES: So, we will come to that recommendation where we are going to put it in or --

PROFESSOR HILLMAN: I think we should put it in the final report of the panel, that our staff --

CHAIR JONES: Just as narrative, you're saying?

PROFESSOR HILLMAN: -- is working on structuring this. It should go in the process discussion rather than the discussion of reporting of victims. So, let's separate that piece out, because it actually runs to the investigative process, not to the victim reporting piece, which is really what we are talking about with the Victim Services Recommendation 18 and most of the 10 series of recommendations from the

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CSS.

CHAIR JONES: All right. So, would I be right if I said that Recommendation 10(a) is withdrawn at this point?

PROFESSOR HILLMAN: Yes. It's incorporated.

CHAIR JONES: It's incorporated. It is incorporated into one recommendation that we are going to put together that basically follows the Victim Services Recommendation 18 with the additions we have discussed? Is that --

PROFESSOR HILLMAN: Well, we are still going to make a recommendation about --

CHAIR JONES: But not here, right?

PROFESSOR HILLMAN: In the structure of the report, this will go in the process section of the report, which will separate it from the rest of it. In other words, I think that in the crafting of the final report we can distinguish these two issues, the investigative process and making sure that continues to be effective, in fact, becomes more effective, and is in compliance with the law. But, also, recommending a study that will correct the problem in the law that is leading to the non-compliance issue as well as look at these issues of immunity and the list of offenses that would qualify.

Colonel McGovern, is that close to what you were suggesting?

LTC McGOVERN: Yes.

COL COOK: Are we talking about the CSS report? When

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you were talking about "in the report," were you talking about --

PROFESSOR HILLMAN: The CSS report is done and out the door.

COL COOK: So, you are talking about the panel's report later?

CHAIR JONES: Except for the fact that there may be some wordsmithing, are we talking about saying the Secretary of Defense direct an expedited study of certainly what are these low-level collateral offenses, what constitutes low-level collateral misconduct in sexual assault cases, one? Two, assess whether to implement a policy in which commanders may grant immunity or would grant immunity?

PROFESSOR HILLMAN: Just say "in which immunity would be granted". Let's leave it open as to who would do it.

CHAIR JONES: Yes, whether to implement a policy, you want to leave it open as -- okay.

COL COOK: I would object to that because that presumes it will be done. And which immunity would be granted as opposed to whether to grant immunity are two different issues, from my perspective.

CHAIR JONES: Well, I'm leaving it as "whether". I mean, this is a study, whether to implement a policy. I don't think we --

PROFESSOR HILLMAN: That is correct.

CHAIR JONES: That was fine. And what's the issue over

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commanders? They are the ones who grant now. We are going to leave that out?

Who is recommending leaving that out?

PROFESSOR HILLMAN: Well, our Subcommittee saw investigators as in the civilian -- the best practice from civilian jurisdictions is that investigators are making that decision, actually.

CHAIR JONES: It is actually, in my view, not a best practice. It may be "the practice," but I think prosecutors are supposed to be making these. And, of course, they are not convening authorities, but --

PROFESSOR HILLMAN: I think that our objectives are in tension with each other, to ease the investigative process for victims of sexual assault and get to the end faster, but, also, to preserve what are the proper rights advisements under 31(b), but, also, preserve the discretion in the appropriate legal authority where it ought to reside, the prosecutor and the civilian sector, the convening authority of the military.

I would just simply say whether there should be a policy to grant immunity. The way that we drafted this in 10(c) was "a definition or procedure for granting limited immunity". So, here is what the question would be: examine whether a definition or procedure for granting limited immunity should be implemented in the future. That doesn't say there will be; it says whether a limited immunity process should be implemented in the future.

Your Honor, I would recommend that we let our staff try to draft

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this.

CHAIR JONES: That's fine. That's fine.

And what about, did you want to add 31(b) issue to the study or not?

PROFESSOR HILLMAN: I do, because I think that is also a recommendation for a legislative change, a potential legislative change that should be part of the study. Because what gets recommended with respect to immunity will intersect with the 31(b) process that currently exists. So, I think that should be a part of the expedited study.

CHAIR JONES: All right. So, that would be in lieu of 10(a), (b), and (c), correct? We would two more segments. Well, no, we would have the same two issues that are already in 18, the similar changes, and we would add consideration with respect to recommending to Congress changes to Article 31(b). And we are going to have the staff try to work on this, on the exact wording?

PROFESSOR HILLMAN: And then, the lack of compliance with 31(b) that is out there right now we would address in the investigative section in terms of process.

CHAIR JONES: Okay, but it is not in -- I hate to be this way, but I have to keep moving -- it is not going to be in 10, Recommendations 10(a), (b), or (c)? It is another section? You are going to bring it up in another section?

PROFESSOR HILLMAN: Yes.

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CHAIR JONES: Okay. All right. With the proviso that we still have to get some of the wording fixed, is that agreeable with everybody?

All right. So, Victim Services Recommendation 18 is accepted with modifications, and we have to see those, obviously, and finally approval them. Recommendation 10(a), (b), and (c) are not accepted in the Comparative Systems recommendations.

All right. Recommendation 11, I think both Representative Holtzman and General McGuire had comments with respect to this.

This, basically, is a recommendation that the Secretary of Defense direct the Sexual Assault Prevention and Response Office to develop policy and procedures for Sexual Assault Response Coordinators to input information into the Defense Sexual Assault Incident Database.

And the key here is that this information would be on alleged sexual assault offenders identified by those victims who opt to make restricted reports. So, these are victims are making restricted reports and do not want themselves identified, and do not want, many times do not want any followup investigation.

And then, it goes, "These policies should include procedures on whether to reveal the alleged offender's personally-identifying information to the military investigators when there is credible information the offender is identified or suspected in another sexual assault."

I think you had a point of clarification or a question, Liz, am I

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right?

REP. HOLTZMAN: Yes, I support this recommendation, but my only question was there may be information aside from offender, the identifying information about the offender, that might be useful to have in these reports.

CHAIR JONES: In the database?

REP. HOLTZMAN: In a database. I mean, for example this is the 12th rape that has taken place in this wooded area near the base. I mean, then you might want to address that. That's all I am saying.

COL COOK: Or alcohol involvement --

REP. HOLTZMAN: Yes, or something.

COL COOK: It could be any data. I would agree with that.

CHAIR JONES: I need more a little more background on this. Do we know, what types of information goes into the Sexual Assault Incident Database now? Is it very broad information? Time, place?

Russ?

MR. STRAND: Yes, ma'am.

So, the database basically has a lot of fields in it, victim data, suspect data, location, times, and dates. And the victim advocates basically fill in the information that they have. Victim advocates sometimes are trained not to collect a lot of information or not to write a lot of information down. So, that database may not be populated with a lot of that information.

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CHAIR JONES: Is there a reason that this recommendation is narrowed to just adding data on the offender?

LTC McGOVERN: Yes, ma'am. On page 87 of the report it explains that FY14 NDAA asked the RSP to explore or assess whether there can be a database to collect information from restricted reports, basically, to see repeat offenders.

So, CSS explored the databases currently in existence and that these SARCs or VAs were trained to specifically ask these questions. That information could be available through the current database.

CHAIR JONES: Through the current database?

LTC McGOVERN: Yes, ma'am.

CHAIR JONES: The DSAID?

LTC McGOVERN: Yes, ma'am.

CHAIR JONES: Okay. So, you were really just responding to that question about should we and can we, if we decide to do it, collect data on sexual offenders when it is a restricted report?

LTC McGOVERN: Yes, ma'am.

CHAIR JONES: And we say this is how you should do it?

LTC McGOVERN: Yes, ma'am.

CHAIR JONES: All right.

PROFESSOR HILLMAN: But our intent would not be violated

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by broadening the information that would be made available.

CHAIR JONES: Right.

PROFESSOR HILLMAN: So, I have no objection to changing that language.

COL COOK: So, that doesn't affect the fact that it is a restricted -- I mean, I just don't know how the database is used. It won't affect the restricted report that a victim was trying to make an anonymous -- but now that it is in a system, can a commander --

PROFESSOR HILLMAN: Commanders don't have access to the system. Investigators have access to the system.

And the problem that the NDAA asked us to address is the lack of a record of restricted reports, and there is some information that would be useful going forward. So, if we can collect that and we can use an existing database and maintain the restricted report, that is, nothing goes forward with that victim who made that report, then that is what we are --

CHAIR JONES: Well, yes, General McGuire?

BRIG GEN MCGUIRE: I initially rejected this, only because I think I need a bit of an education. Because I see this recommendation is a byproduct of restricted reports, and I feel that we are on a civil liberties/civil rights slippery slope when we are collecting data on alleged offenders without having the opportunity to deal with accusers. And so, we are collecting data on potentially innocent people

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when the accusations are not made public.

BRIG GEN DUNN: The way it was explained to us -- and, Mr. Strand, if you will listen or interject -- the way it was explained to us is that this DSAID database is a criminal intel database.

MR. STRAND: No.

BRIG GEN DUNN: No? No?

MR. STRAND: No, ma'am, no. This is a victim advocates' database.

BRIG GEN DUNN: Oh, this is victim advocates?

MR. STRAND: Right, and it is maintained by the SARCs on the installation. It actually goes with the Service SARCs, and they maintain that database through the Department of Defense.

I think the reason the question came up is we currently don't use that database. But if we have identified a serial offender, say a drill sergeant or another person, it is helpful for us in that investigative process to look into that or go through the Service SARC or go through the proper authority to see if there are other restricted reports listing that person, which would be very beneficial to our investigation. That data generally doesn't exist now.

We are currently working a case now where we have identified a person to have multiple victims. We have contacted the Service SARC, and they don't have any offender data. If they had the offender data and if they had data on

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this particular offender, it would be very helpful to the investigation.

BRIG GEN DUNN: But it circles back then. I was under the impression that this database, that people couldn't -- that there was very limited access to this database and that you couldn't have Freedom of Information Act requests, et cetera, that might pertain to it.

LTC McGOVERN: General Dunn, I think you are referring to the separate discussion we had that there are other databases out there for criminal intelligence --

MR. STRAND: Criminal investigations.

BRIG GEN DUNN: Right.

LTC McGOVERN: -- that are already collected on people for other types of crimes.

BRIG GEN DUNN: But the military ones have very specific, limited access, can never be looked at except by investigators for specific purposes.

MR. STRAND: Correct.

BRIG GEN DUNN: You know, corrections boards aren't looking at it. You know, general officer boards aren't looking at it. And I think that's the issue that General McGuire has raised.

MR. STRAND: Right. Our criminal investigator databases are very --

BRIG GEN DUNN: Right, so who can get into this DSAID?

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PROFESSOR HILLMAN: Point of information. Just this database we are talking about right now, the victim advocacy database, DSAID, contains information input by the SARCs about both restricted and unrestricted reports right now, but DoD policy prohibits inputting personally-identifying information --

BRIG GEN DUNN: Right.

PROFESSOR HILLMAN: -- of the alleged offender in a restricted report. And that is what we are recommending a change to, that there would be personally-identifying information input and it would, then, be available.

BRIG GEN DUNN: Maybe we should add language about appropriate safeguards or something.

BRIG GEN McGUIRE: Yes. Only because it just sounds insidious. I'm sorry. And I think this is a byproduct of restricted reporting, that if we really want to go after the bad people, then it has got to be reported. It just seems like a circuitous way to -- I don't know. My personal opinion.

CHAIR JONES: Liz?

REP. HOLTZMAN: You Honor, I would like to ask a question of Russ. You kept saying this is helpful; it would be very helpful. Could you explain? I mean, I think I have an idea, but I would like to hear it from you.

MR. STRAND: So, hypothetically, we are working a case with a sex offender who has multiple victims. We contact the Service SARC who, then, may now have information, offender data, in this database.

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REP. HOLTZMAN: Right.

MR. STRAND: They query the database, and they say, "Yes, there's two other victims out there that reported restricted assault, sexual assault.

What we would, then, as the SARC to do, whatever installation they are at, is to contact the victim, let them know they are investigating this particular person, and there's multiple victims. Would they now be willing to come forward and make an unrestricted report? And that would be very helpful.

It is generally the practice now where SARCs, if they identify a pattern, they can override; that is an exception to restricted reporting if there is a pattern like that. But, if they are not collecting offender data, they are not going to see that pattern.

REP. HOLTZMAN: Okay. So, that is the only circumstance that you are thinking this would be useful?

MR. STRAND: Yes, ma'am.

REP. HOLTZMAN: Well, maybe if we could spell that out, then General McGuire's concerns would be alleviated. Is that correct?

BRIG GEN MCGUIRE: Right. And having lived my life in law enforcement, I would exactly want to do that. But I am also aware that we do have rights that are reported also to the accused or the alleged offender. And so, I guess I just want to make sure that we are not going in a direction that we shouldn't.

COL COOK: There is another question, too. Knowing that

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there is an accused out there as well --

BRIG GEN MCGUIRE: Yes.

COL COOK: -- if this is going to be used to determine have there been other allegations against the potential offender, can -- I am not saying should it be dubbed true, but would an accused be allowed to go back and say, "Hey, wait a second. You can get the information about whether there is anything else against me. Are there any other reports by this alleged victim who is against me? Has this person ever made an allegation against somebody else?"

You go into a database for one purpose. I can see how somebody might want to go into it for the opposite purpose. And I am not sure if the information is in there for that as well. I am not sure that safeguarding it from one side versus the other -- it is just a question of you set up this database. You make the information and the details, put in more information. Who gets access and how can it be used? It could be used on both sides.

But you want to collect the offender data in this database. The victim data is already in there?

MR. STRAND: Right.

CHAIR JONES: It sounds like all the other data is already in there.

COL COOK: Right. It is just the offender that is not, which I agree with the recommendation. The concern I had is, how will it be used later?

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LTC McGOVERN: And again, I believe that the NDAA was in response to some resistance on the Hill to restricted reporting because they think everything should be unrestricted in the first place. So, if you are going to have restricted reporting, what measures can you take to identify possible repeat offenders?

COL COOK: Which is where my question comes in, because now you are identifying the offender. Have you taken away that -- if the offender now says something about the definition -- have you taken away the protection from restricted reporting by doing something like this? I don't know.

MS. FERNANDEZ: Well, let's look at the situation of an unrestricted report. I say my offender is John Doe. John Doe has gone AWOL. Now this is information that is available to everyone. What is the difference? I don't think there's any civil rights that are violated there. I don't see why the offender's civil rights would be violated in a restricted report.

When you report, you give the name of someone, and it is kept in a file or in a database or in something. So, you are not violating anything that you wouldn't also violate in an unrestricted report, is my comment.

COL COOK: My concern is not the civil right piece, based on the opposite; it is on the accused. So, I have a constitutional right to defend myself, too. I get that access to that information, which is now protected under a restricted report process because it doesn't exist. If you collect it, can you deny an accused access to information that they think it potentially exculpatory to them? And it may

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not be. They can go on a fishing expedition, essentially.

BRIG GEN DUNN: Yes. So, how many reports has my accuser made?

COL COOK: Right.

MS. FERNANDEZ: It sounds like writing material.

CHAIR JONES: Yes, and that would end up being, presumably, you know, a lawyer is going to make that request and a judge is going to have to decide it. That is not going to change.

COL COOK: No, but what does change is, if it is a restricted report right now, I don't think that can be accessed right now by a victim who has made a restricted report.

BRIG GEN DUNN: There is no offender data in there.

COL COOK: I'm concerned about creating something that may change the concept of restricted reporting within the Department of Defense. And I'm not saying yes or no. I am just saying, do we understand that is what --

PROFESSOR HILLMAN: The victim's name, though, is not recorded in the restricted report.

COL COOK: I think you just said that you can go back to that victim and say, "Now there has been another allegation against that offender. Do you want to come out and make your report unrestricted?" If it can be traced is the concern I have.

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PROFESSOR HILLMAN: I agree. You know, restricted reporting is relatively novel. We have done it now for some time. We are also trying to convert as many as possible. And it actually pushes beyond restricted reporting in the civil sector to anonymous reporting, which is more than restricted. I mean, that is anonymous, right, to simply get a sense of what the problem is?

And I agree, there are privacy issues that sort of govern this going forward. But this recommendation now did not seem to us as going much beyond what is already happening in many instances by adding that individual's personal in-depth findings in there. But there are concerns about how to manage this information going forward, I agree, and we are attempting to resolve all those issues, just to collect the data that we do have on those restricted reports.

MS. FERNANDEZ: I think we should. I think we should see the validity in the recommendation, and then, there may be litigation around this. And we can't prevent, we can't really prevent that. There may be litigation around a lot of the things that we are going to do.

BRIG GEN DUNN: I think Colonel Cook's perspective that -- is this going to be an unintended consequence that is going to haunt victims? That was her question.

COL COOK: Right.

BRIG GEN DUNN: Because it now allows an accused --

COL COOK: Constitutional access in some ways.

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BRIG GEN DUNN: Right, right.

COL COOK: And I'm not saying I disagree with the recommendation or that, but I do think that you put restricted reporting at risk if we -- and that may be fine, but --

PROFESSOR HILLMAN: It is already at risk, though.

COL COOK: Yes.

PROFESSOR HILLMAN: I mean, your point actually runs to it right now. It doesn't go only to the database as newly-constructed should we adopt this recommendation and someone's use to follow it. It goes to the database as constructed today.

COL COOK: And if we recognize that is a risk, then perhaps the recommendation that that is fine. We just know that that is a potential consequence. If I were on the defense bar, I would be raising it.

CHAIR JONES: So, right now, if an investigator called up and asked you to do a query with respect to a particular individual, that would be the purpose of having the offender identified in the restricted report?

MR. STRAND: I'm not sure that was the intended NDAA aim, but that would certainly be a new step we would have. I think the intent of the NDAA is that we don't know, of course, who the offenders are --

CHAIR JONES: Yes.

MR. STRAND: -- in the restricted report. But we, as a

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community, as the military, even as Congress, want to know how many reports may actually be serial offenders.

LTC McGOVERN: I think that the language does contemplate your concern when it says, "that the identifying information of an alleged offender that is collected as part of a restricted report of sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators."

So, it seems like they were trying to couch language to limit that somewhat.

CHAIR JONES: Well, that's what I thought the purpose of this is, although we don't have that language in here.

COL COOK: I believe that's the purpose. I'm just saying, if I'm an accused and I'm saying I've got a constitutional right to defend myself, I'm going after it as potential but it might be a fishing expedition. But I agree with the recommendation.

CHAIR JONES: Yes, I agree with it, too.

Any other objections or any objections?

(No response.)

All right, 11 is accepted.

Twelve. This recommendation would allow a victim who has made a restricted report to provide information to an investigator with a victim advocate and/or a Special Victim Counsel present without the report automatically

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becoming unrestricted and triggering a law enforcement investigation.

And I think, Congresswoman Holtzman, you had a question with respect to this?

REP. HOLTZMAN: Yes. My question was, why require the victim advocate or Special Victim Counsel to be present when this happens?

PROFESSOR HILLMAN: Your Honor, that is an excellent question. In an ideal world, we would just as soon not have that restriction in there. The reason it is in there is to protect the restricted nature of the report, to make sure that the victim can actually be assured that the information won't turn into an unrestricted report. So, having that support in an advocate and/or -- we put that -- and/or Special Victim Counsel present, that would protect the restricted nature of the report. That is the reason.

CHAIR JONES: I think that makes sense because that person would be a witness, too, and there wouldn't be any litigation later about what was said, or at least there would be much less litigation if they have a third party there as well.

Does that make sense?

REP. HOLTZMAN: Well, I'm just concerned. You know, sometimes speed is of the essence. And I just want to make sure that this doesn't interfere with very prompt investigation.

PROFESSOR HILLMAN: We are trying to knock down barriers, not put them up. But Russ is better at --

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MR. STRAND: Yes, ma'am. If I could, we are already trained and we are generally not going to interview a victim until we know whether they have had an opportunity to see a victim advocate or Special Victim Counsel, of course. So, I don't think that will slow us down.

REP. HOLTZMAN: Suppose they have had that opportunity and they don't want one? How about that?

MR. STRAND: When we discussed this, this was more of a check-and-balance, so that later on the MCIOs aren't accused of forcing victims to make a report. It does go to check-and-balance in that.

REP. HOLTZMAN: Well, I understand, but what happens if the victim doesn't want a victim advocate or a special counsel at that moment? Can they still make an informed -- can they still report to the -- can they still have a conversation with the MCIO or not under this recommendation?

MR. STRAND: They could, ma'am, but they wouldn't have restricted reporting because the only way you can get restricted reporting is to go through an advocate.

PROFESSOR HILLMAN: If you went to an investigator now as a victim --

REP. HOLTZMAN: Oh, I see what you're saying. I see what you're saying. Oh, okay, I'm sorry. I'm sorry. Yes, yes, yes. Sorry. Sorry. I withdraw my comment. Sorry.

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COL COOK: And I will put mine out there. I'm sorry, once you get to the investigator, you have got avenues where you can make a restricted report. We are now putting a -- I don't have an objection to, when you go to the investigator, the investigator saying, "Look, you have the right to speak to a Special Victim Counsel." If at that point the person wants to talk to you, once it gets to the investigator, I don't think you can unring that bell. Their job is supposed to be a neutral investigation of the allegations that are there.

And once the information is presented to them, and to make it restricted versus unrestricted, how far a victim would go at that point -- what if they mention one thing that later on somebody wants access to, do we have competing statements? They go from restricted to unrestricted, but they don't say the same thing.

If you have questions about the process, we are now injecting a Special Victim Counsel into that who should be able to answer all of the victim's questions. If a victim wants to go to an investigator, the investigator investigates. I just think that is too late.

BRIG GEN DUNN: This came from testimony that we heard --

COL COOK: Uh-hum.

BRIG GEN DUNN: -- from the civilian policy agencies, that victims, once they have some interaction with an investigator, frequently decide to make a report, and it is available. You know, they realize that they are speaking to

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someone who is professional, who is compassionate, who is not blaming them, who is explaining how the system works to them.

COL COOK: But what are they discussing with them at that point? Are they discussing the details of the event or are they just getting to know the person in some preliminary -- I mean, as long as they are not getting into the details, I don't have a problem with that. If they are starting to get into the details of what happened to them, and the investigator knows this may be a potential victim and doesn't know anything else, that would be fine. But, once you get into the allegations of the who, what, where, when, and why, the investigator's job is supposed to be an impartial investigation.

BRIG GEN DUNN: Yes, but there is nothing that requires -- you know, if you have got this Special Victim Counsel and/or a victim advocate present, and the victim is just having that interaction, telling the story or asking questions about the process, we just thought that, based on the evidence we heard, that it would lead to more unrestricted reporting, which is where we are headed.

CHAIR JONES: Yes, Mai?

MS. FERNANDEZ: Doesn't 12, essentially, just build on 11? You are giving additional information to the investigators. And then, they can go and investigate, in case there are other allegations about this particular individual. No?

PROFESSOR HILLMAN: Twelve gives the investigator the chance just to talk to a victim, which right now if there is a restricted report, the

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investigator can't talk with them.

MS. FERNANDEZ: Right.

PROFESSOR HILLMAN: It is immediately an unrestricted report if that happens, and we wanted to create an avenue where we could make that possible.

CHAIR JONES: It does contemplate, though, as you say, to provide information to the investigator. And your concern is that, if they have information, they have to act on it?

PROFESSOR HILLMAN: Yes.

CHAIR JONES: Is that okay under this scenario?

PROFESSOR HILLMAN: No, it says this prohibits MCIOs from using the information to initiate an investigation or title an alleged offender unless the victim converts to an unrestricted report.

CHAIR JONES: So, they can't use it?

MS. FERNANDEZ: But, then, I go back to 11. If you are saying, "Sam Smith raped me last night," and they know that they have had allegations from two other people saying that "Sam Smith raped me last night," --

PROFESSOR HILLMAN: The investigator can use that information, can talk to the victim about that. The victim could decide to go unrestricted. And at that point the investigation would be initiated.

LTC McGOVERN: If I could clarify, I think on 11 the

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investigator would go back to the victim advocate or SARC, who would be contacting the victims. The investigator doesn't contact the victim on the restricted report.

Whereas, Recommendation No. 12 is creating a semi-restricted report where, to address Colonel Cook, you would almost have a whole separate form, where they are filling out the information to clarify what is restricted versus unrestricted. That was part of the conversations in the CSS.

COL COOK: Okay. So, they go and they make this statement to -- it is still restricted -- they go and they make a statement to an investigator. They can't initiate an investigation. They can't title. What does the investigator do with it? Do they do a memorandum for the record that documents what has now been said to them? And in the event it becomes an unrestricted report, they have a record that they have done of the first conversation with the second conversation, all of which becomes discoverable from a defense perspective later, or they do an MFR that never goes anyplace because they can't put it into the criminal database. Because if they put it into the criminal database, if somebody is accused of rape with titling them in some way -- I don't understand how the investigator would use this.

MS. FERNANDEZ: This was also paired with the Victims Subcommittee 2(a), and I think our intentions were very different. With Recommendation 2(a), we were looking at the unintended consequence, that for some reason an investigator goes to a victim. The victim hasn't really made a choice yet

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whether to go restricted or unrestricted. It is almost a declaration by the investigator saying, "You have the ability to go restricted or unrestricted" before they go into any of the fact-finding.

So, that is very different.

COL COOK: Right.

MS. FERNANDEZ: For some reason, the investigator got there before Special Victims Counsel, before a victim assistance person, or anybody got to them. And all of a sudden, the victim starts to talk, and they really want to go restricted. They don't want to go unrestricted.

So, despite the fact that they seem the same, the intentions are very different.

BRIG GEN DUNN: Right. Our perspective on this in the Committee was that this is intentional decision on the part of the victim with her victim counsel or a victim advocate. You know, it is just an opportunity to interact with an investigator and see how they feel, see what they think, see if that interaction might give them a level of confidence to make an unrestricted report.

Or maybe they go in there and they just after five minutes say, "I don't want to do this. I don't want to do this. I want to leave it restricted. I don't want it to go anywhere. This does not allay my fears about this problem."

CHAIR JONES: Okay. I'm still concerned. I mean, I don't care if they want to get together and the victim wants to hear about the process from

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the investigator, or something along those lines, ask a question.

But the notion that they would come and start talking about the offense and giving information to an investigator, who is supposed to under ordinary circumstances follow up --

MS. FERNANDEZ: Judge Jones, can we ask Russ about that?

CHAIR JONES: Oh, sure. Sure, Russ.

MR. STRAND: This is a change in culture thing. What we hear from asking the police department, this has been wildly successful for victims to come forward. And it is one thing to talk to a police officer detective about life and about investigations in general.

But once they start sharing the information and seeing how that detective is interacting with that specific information -- first of all, if the victim advocate or Special Victims Counsel bring the victim to us, we are already going to suspect they are a victim of sexual assault. We already know that there was probably a crime.

Also, we already have a policy in the Department of Defense that, if I am sitting on a Sexual Assault Review Board and I am, as an agent, putting two and two together on a restricted report or the discussion restricted report, and I identify who that person is, I am already prohibited from doing anything with that information. I do not follow up. I do not have a requirement to follow up.

With this particular recommendation, our agents will not have a requirement to follow up. In fact, we will be prohibited from following up as long as

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that victim still wants a restricted report.

What this does, it allows the victim to make a more informed decision after disclosing the information as to whether to go forward with an investigation or not. If they choose not to go forward with the investigation, we cannot initiate an investigation based on that report.

Now what that does, though, is it does kind of go along with 11, where we do have that information. We are going to put it into our criminal intelligence database. And we are going to actually explore that criminal --

CHAIR JONES: In the one you were talking about, the DSAID?

MR. STRAND: No, no, our own criminal databases.

So, when we are talking to that victim, we might have one of our agents check our own criminal intel when they come in, and we might find other reports as well. And we might be able to tell the victim at that time.

But if that victim still doesn't want to report, and they want to make an unrestricted report, we still have that information. So, if the next victim comes in, we are going to have that information, and then, again, we are going to use the same process, go back to the victim advocate/Special Victims Counsel and say, "We've got another victim that came in by our database," when you came in and talked to us, because it might be a different agent at a different time. You know, we have another victim coming forward, and use it for the same purpose.

But it would prohibit our agents from conducting or initiating an

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investigation based on that report, but it will allow the victim to make a far more informed decision. Right now, victims are being told, "Well, you don't have to talk to law enforcement," which could be a negative from the start. And if they are not allowed to talk about the specifics of the events, they may not get the confidence that they need in just a social chat.

CHAIR JONES: This goes back to another question. So, a victim comes in with their advocate or their special counsel and gives information about what happened. That goes into the criminal database?

MR. STRAND: No, it doesn't go into the same reporting database that our reports go into. It is a special protected criminal -- it is like little bits of information. If somebody calls up the police and says, "Russ Strand is selling dope" --

CHAIR JONES: Right.

MR. STRAND: -- where there is nothing to confirm that, it is going to go into a database where, if they do an inquiry, Russ Strand is going to come up for selling dope, even though it was never a credible --

CHAIR JONES: So, it is showing an identified offender even though it still is a restricted report? The information about that individual will go into a criminal database already, if the information is given over in this fashion? Is that right?

Whereas, if it is given in a restricted report without MCIO

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involvement, it goes into the DSAID database?

MR. STRAND: Yes, ma'am.

COL COOK: And my question is, besides the offender information going into the criminal database, does anyone do -- you know, if somebody comes in and they get into the details, is someone doing -- because now I am thinking, what is the probe? They make it an unrestricted report. What if there is contradictory -- I just want to know, is there a record kept about what the victim is saying? Because now you have got a statement by a potential witness that can't be used right now, I understand that. But if later on it turns into a case that they want to pursue, which is fine, and the investigators can pursue it as well, can the defense access the prior statement as the current statement to ensure there are no inconsistencies?

MR. STRAND: Yes. Well, there is not going to be a statement.

COL COOK: Not a statement by the victim, but some kind of memorandum of record documenting by the investigator to whom comments and statements were made?

MR. STRAND: Right. It is going to be very limited data that so-and-so came in on this day, reported a rape. This is the person who did it. This is where it happened. And that is pretty much going to be it. It is not going to be a lot of detail in it.

COL COOK: And if the victim provides more detail, you are

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going to choose not to capture all of it from the initial statement?

MR. STRAND: Right, because we are not going to document it within a statement.

COL COOK: Yes. Right.

MR. STRAND: So, it is just going to be bits of criminal information. Like a field identification card, if a police officer got it on the street and they get some information, they put it into the same kind of a system. And it can be accessed, but, again, it doesn't have to go through the judicial process and through the legal process to get that information.

COL COOK: Well, you can always call the investigator and ask him what else was said. So, I mean, that's --

MR. STRAND: That's right.

COL COOK: It is discoverable.

CHAIR JONES: And then, it is based on their recollection of what happened in other cases that are out there?

COL COOK: Right, right.

CHAIR JONES: Any other comments on this or questions?

COL COOK: I'm not comfortable. As far as this recommendation, I don't have a problem with the victim coming in, getting comfortable with an investigator, and allowing it to continue to be restricted as long as the amount of information that is provided to that investigator -- and I don't mind it

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being put into a database, limiting the investigation, all of that. But it is just the comments, to provide information MCI agent with no limits on what can be said. I would just say some limited initial data or a conversation to see if they are comfortable, fine.

But when you get into the merits of the case, even if it not a victim making an official statement, I think there just is something that is recorded, because if it goes further later, you are protecting the interest on both sides.

CHAIR JONES: Any other?

MR. BRYANT: This is a double-edged sword, though, because if there is limited information in the first report, that is almost just as bad. Because when they do the full interview, the questions are going to be on cross-examination --

COL COOK: "Why didn't you bring it up the first time?" Yes.

MR. BRYANT: -- "You didn't tell the investigator that when you went in the first time, did you? You told that after you talked to your victims counsel, and blah, blah, blah.

So, it is going to cut both ways.

COL COOK: It is a double-edged sword.

MR. BRYANT: Yes. It is going to cut both ways. If they don't take enough information, then the investigator gets questioned. "Why didn't you ask her this? Why didn't you ask her that? You didn't want to know that, did you?"

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CHAIR JONES: Yes, and I think what you are talking about is correct. It will all end up playing out if and when there is an investigation and a charge, a trial, and the courts will decide.

MR. BRYANT: Right.

CHAIR JONES: If everyone is comfortable with the notion of keeping the report restricted after divulging some amount of information to an MCIO agent, that is fine with me. I don't actually have a problem with that.

I was more concerned with the notion that the investigators would feel obligated to go do something. And apparently, they are required not to under this circumstance. So, whatever objection I had is now gone.

Is there anyone who objects to accepting 12 at this point, after the discussion we have had?

COL COOK: For all the prosecutors that are here, when it says, "Some police agencies allow the investigator or detective to contact..." is this a best practice or it is not?

CHAIR JONES: I'm sorry, where are you now?

COL COOK: I am looking at the finding underneath of it saying why we are looking at this, because some police agency is saying it is a good practice.

CHAIR JONES: Well, I think we have more behind it than that. The Comparative Systems had some re-endorsements about this practice in terms of helping victims to decide to go unrestricted.

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MR. BRYANT: I think the reason that we used "some" there in our deliberations -- and my fellow Subcommittee members will help me -- is because we did not survey the full universe of civilian investigative agencies. Those who were involved said that is what the practice was in their jurisdictions.

COL COOK: But do they have restricted reporting and unrestricted reporting in their jurisdictions as well?

MR. BRYANT: I don't know about policy, that they have restricted/unrestricted or that they call it that.

COL COOK: Okay.

MR. BRYANT: That is going to be a judgment call on the part of the investigator and the prosecutor as to whether or not, when a victim says, "Here's what happened to me, but I don't want to go to court on this," that is probably what is going to happen.

Now somebody may try to talk he or she out of not going to court, but --

COL COOK: And I just don't know. I look at this and I think you're in a military community. You have gone to the investigators. They are out there to protect the environment, and you now know something, even the details of which you cannot act on.

BRIG GEN DUNN: I think the point was in the civilian communities that those victims actually have control of whether those cases go

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forward. A victim can go in and say, "This happened to me. This guy did it. I do not want to prosecute." And that is their decision. Whereas, in the military that is not their decision.

COL COOK: And I am not sure that it should be their decision in terms of you have got good order and discipline --

BRIG GEN DUNN: That's right.

COL COOK: -- and now, you have got the investigators.

BRIG GEN DUNN: But we have the whole restrictive reporting process which does make it their decision. It takes out any -- the whole purpose of this, the whole purpose of this is to encourage victims to convert to unrestricted reporting by allowing them to have that interaction with the investigator that they can get in the civilian world, but that they can't get in the military. That was the whole point.

And the civilian police departments that I have heard testify said, "Yes, if they come in, we keep something for" -- they had a time limit, right? One year they kept it or six months they kept it, and then, if the victim did not return and say, "I want to go forward," then they just dumped the whole thing.

CHAIR JONES: Right. And I assume that if information was given which was so of specific that an investigator knew that there was a serial rapist who was likely to be dangerous and carried a weapon, and hung out at "X" place, they would act on that in terms of surveillance --

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BRIG GEN DUNN: Yes, yes.

CHAIR JONES: -- in order to protect the public, but would not arrest, based on the information in the unrestricted -- in the restricted report. That would be the scenario.

BRIG GEN DUNN: Okay.

CHAIR JONES: Okay. So, Recommendation 12 is accepted.

Now we ought to deal with 2(a), Mai, which you brought up, which is the Victims Services, while we have it, because it is related.

MS. FERNANDEZ: It is related and not related.

CHAIR JONES: Yes.

MS. FERNANDEZ: It is very different.

We had victims come to us and say, "Accidentally, this information got to an investigator. And so, all of a sudden, what I wanted to be restricted became unrestricted."

And so, what we said was, basically, the investigator, before they start the investigation, had to say, "You have the right to go restricted or unrestricted. Do you understand this?"

And then, they get to make the choice again. If they say, "I want to go unrestricted," then they go on with their questioning. If they say, "Restricted," they stop there, unless they wanted to, I guess, though, now, do this in-between thing.

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(Laughter.)

CHAIR JONES: But they can't do the in-between thing without having a third party there to be the witness.

MS. FERNANDEZ: Yes, that's right. Yes.

CHAIR JONES: Right.

Comments on this?

(No response.)

All right. Is everybody for it? No objections? All right, 2(a) is accepted. That would be Victim Services 2(a).

Okay. Going on to Recommendation No. 13, this would permit trial counsel and investigators to "unfound" a report under the Uniform Crime Reporting Standard of false or baseless. And I think both Admiral Houck and Representative Holtzman had comments with respect to this.

Let me just take one quick look here.

Well, to go to the merits, I think is an interesting issue. It would take away from the convening authority the right to makes this call. And as I understand it, it is not done in every Service. But this sort of came up at one of our presentations.

It appears to be the policy in the Army to "unfound" allegations. The trial counsel and the MCIO or I guess whoever their investigative officers are provide the information. Well, it says they provide it to the initial deposition

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authority. So, maybe I'm wrong.

PROFESSOR HILLMAN: Your Honor?

CHAIR JONES: Yes?

PROFESSOR HILLMAN: Our staff worked really hard to try to parse this out. These are critical steps towards having data we could actually compare across the Services.

CHAIR JONES: Right.

PROFESSOR HILLMAN: On page 93 of the Comparative Systems Subcommittee report --

CHAIR JONES: Right.

PROFESSOR HILLMAN: -- there is a chart that describes the unfounded determinations.

And then, on page 95 is a chart that integrates the unfounded decision into the disposition, the decisions that get made from titling referral, the preliminary hearing, and probable cause.

CHAIR JONES: No, I should have started by saying that I think the recommendation that the Secretary of Defense direct the Service Secretaries to standardize the process for determining a case is unfounded, I completely 100 percent agree with.

Then, when we get into exactly what each of the Services is where -- and, also, whether or not to, as the recommendation suggests, shift from the

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commander to the investigators and the trial counsel the decision about unfounding a case, is the substantive part of it that I was more concerned about.

Admiral Houck?

VADM HOUCK: That would be my sense of it exactly. I don't object to standardization. I think that is probably a good idea. But I do object to that vesting a convening authority, the recommendation that vests the convening authority. Three Services apparently do it that way.

CHAIR JONES: Well, yes, and you can help me here. I am under the impression that the Army makes a decision, whether it is under the UCR definitions or includes other standards, like probable cause.

And then, it is sort of presented to the initial disposition authority who signs off on it. Whereas, there is a little bit more full activity or action or consideration on the part of commanders' initial disposition authorities in the other three Services. That is the impression I am under from the testimony we heard.

PROFESSOR HILLMAN: There is murkiness as you move up that chart that is on page 95 and the different Services, from the titling decision referral through the probable cause or preliminary hearing determination.

And it is true an allegation can be unfounded at any point throughout that, but there is not the same standard. So, we are accepting that standardization is important; the authority that makes the decision is important, too. I mean, what we are recommending is that the MCIO, in coordination with the trial

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counsel, make that decision, applying the UCR standard which is false or baseless, and only false or baseless.

We are getting rid of this substantiated category, which has caused great confusion, for instance. So, that is what this is intended to do.

You know, 14 is related. It is another step in the process.

LTC McGOVERN: That is based on the best practice in the civilian world as well, where the detectives do the unfounding, and then, there are audits of their unfounded cases.

REP. HOLTZMAN: Where does probable cause fit into this? I see that it deals with the Army making a decision about probable cause, but I thought commanders made that decision. Or it is not clear to me. What's going to happen? Is probable cause part of this decisionmaking in 13?

PROFESSOR HILLMAN: No, probable cause is not part of 13. Probable cause will be, as of December, when the Article 32 changes, will be a determination made at the Article 32, the probable cause determination.

REP. HOLTZMAN: Okay.

PROFESSOR HILLMAN: And who will make that? As in the new Article 32 procedures, it will be made by a convening authority with the recommendation that comes from the investigating officer from the Article 32.

And can we get Mr. Strand on this?

CHAIR JONES: Oh, sure. Russ?

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MR. STRAND: What we're talking about here is police reports. This is a police report. Every single law enforcement agency in the United States has the same standard, Uniform Crime Report, to look at the definitions for whether false or baseless or whatever.

Only the military, two Services in the military have a difference of opinion where they make a commander the authority, that the commanders make the determination on a police report. And that is what separates us from a lot of our civilian counterparts.

When we went across and did our Comparative Systems Subcommittee's work, every single police department, they don't go to anybody else. It is a police report, just like if they are working a robbery case or a murder case or an auto theft. They make the determination on how that report should be categorized at the end.

And so, we feel that the military should at least follow the same standard, that this is the best practice of the United States, and take out some of the murkiness of whether somebody -- we have heard along the way, both on the Response Systems Panel and on our Subcommittee, you know, commanders should or should not make certain decisions. I don't think commanders should make decisions on police reports.

And again, the best practice in the civilian world is that police make that decision, oftentimes with prosecutors, to determine. It doesn't, in my

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opinion, take away anything from commanders because, even if we unreport or say it is false or baseless, that doesn't stop a commander from taking anything forward. It doesn't stop a commander. It doesn't take away anything from a commander. We have had commanders, and still have commanders, that take our reports and we say there's nothing there, and they can prefer charges. They have their still full realm of any possibility that they have. It doesn't take away anything from any of the commanders. What it does is it --

CHAIR JONES: So, you're saying that this is a determination, and in this case it is not just by the investigator; it is also in conjunction with the trial counsel in the military?

MR. STRAND: Yes, ma'am.

CHAIR JONES: Which is also in civilian practice some places, but not on founding or un-founding probably.

So, this is a label that means, in the opinion of the trial counsel and the investigator, having done an investigation, this allegation is false or baseless, but it doesn't prevent the commander from telling them to do more investigation or deciding differently with respect to the question of whether to go forward. Is that what you are saying?

MR. STRAND: Yes, ma'am.

CHAIR JONES: Okay.

VADM HOUCK: You mentioned there is a difference between

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two Services, but the finding says Navy, Coast Guard, and Air Force do it in a particular way. What did they say and what is their opinion on this issue? Are they agreeable to the change that you are recommending?

MR. STRAND: They are not agreeable.

VADM HOUCK: Why?

MR. STRAND: Because they make the decision. If they make a timely decision, which right now the DoD IG or the DoD instruction says the titling decision currently is an operational, not a legal, decision.

CHAIR JONES: Titling? What does that mean?

MR. STRAND: Titling is like if we determine that a suspect did something, they are a suspect.

PROFESSOR HILLMAN: The standard is credible evidence that the suspect committed the offense.

MR. STRAND: Right.

CHAIR JONES: At the time the decision was made?

MR. STRAND: So, right now, it is an operational decision. We could actually change it and add more to it to make it an operational and a legal decision.

The Services on their RFAs, when they came back, and what they've been saying for a long time is the other Services believe that they're unbiased, but if they make these decisions, that would make them biased, which we don't see in

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the civilian community, that bias. If police officers or detectives make a report and they determine that whether there's trivial information, that doesn't impact bias.

VADM HOUCK: What happens when the MCIO and trial counsel get together and decide that something is unfounded. You suggested the commanders can still take it. What's the point then? I mean, how are commanders going to be aware of this? If the decision is made at the lower level of the bureaucracy by an investigator and a trial counsel that something's unfounded, how does that even get to a commander?

MR. STRAND: They get every report, whether it's founded or unfounded. If we initiate a report on a Service member, that convener is going to get a final report one way or the other.

VADM HOUCK: So then, if the commander is going to get a report one way or the other, then what are we gaining by this?

MR. STRAND: We're making a criminal justice decision, or basically a police decision, in conjunction with lawyers, like every other police department. We're making determinations based on our investigation whether or not it meets the credible information standard, and we believe that somebody is a suspect in this and somebody is a victim in this.

VADM HOUCK: But do any of your police departments have convening authorities?

MR. STRAND: No, they have prosecutor that, whether they

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agree or disagree with the police, a prosecutor can take a report from a police agency, and maybe the police detective doesn't feel there's enough. The prosecutor can still potentially go forward based on the evidence that is there.

But again, with the military, it doesn't take away anything from the commander. They can take that unfounded report, false or baseless, and they can move forward based on the statements, the evidence, and they can still prefer charges.

BRIG GEN McGUIRE: I had an instance where it was a mistaken fact. And so, they said, "Don't go forward with any action," and then, went ahead and did.

COL COOK: Sometimes it is -- Mr. Strand can correct me -- the DoD instruction on the titling piece, credible evidence at the time the decision is made, sometimes that titling decision is made by law enforcement a little earlier in the process.

CHAIR JONES: Right.

COL COOK: Additional information could come up later which allows the commander to completely go forward with it.

The other thing on the titling decision -- please correct if this is wrong -- ultimately, it is a law enforcement decision to make it. However, you are supposed to coordinate with the trial counsel. The trial counsel can say, "I disagree," and when you make that titling decision, you can put that the investigators made the

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decision anyway over the objection of the trial counsel that advised you.

MR. STRAND: Correct.

CHAIR JONES: Right.

COL COOK: And then, that would be another reason why -- because I have had that happen, where the investigator will say to me, "We want to title this person." And I will look at them and say, "You don't have enough information." Their response is, "I'm doing it anyway." That is your call that you need to note that you coordinated with me and I disagree.

So, it is at the time the decision is made, and at the time that it is made you don't always have all the information. So, a case can develop where you can have a disagreement, but the DoD instruction now is a law enforcement decision with coordination.

CHAIR JONES: But that's for titling?

COL COOK: That's for titling. So, this is the unfounding. My comment is I don't know where this takes place to determine.

The first sentence, I have no objection.

VADM HOUCK: I agree, I have no objection to the first sentence.

COL COOK: Right. The second sentence, what should be done, let that be part of the first sentence.

VADM HOUCK: Yes. I don't think I have an objection to the

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third sentence, but I do object to the middle sentence.

COL COOK: I don't object to the third sentence, either.

CHAIR JONES: Well, I guess when I read the middle sentence, I thought founding reports was more the end of the road in terms of shifting, since it says shifting there.

PROFESSOR HILLMAN: If it is false or baseless, I would say it is pretty often the end of the road.

CHAIR JONES: Well, I mean the end of the road in terms of taking a look at it.

MR. STRAND: It's basically how we end up categorizing our police investigation.

CHAIR JONES: Well, I know that. Kelly?

LTC McGOVERN: I think to clarify the instances that Russ is talking about, not necessarily going to prefer charges. But if they find that it is baseless because it doesn't constitute a crime, let's say in the sexual assault realm, it might be some sort of sexual harassment or unprofessional conduct. Then, the commander can still go forward with a letter of reprimand or other adverse actions, not necessarily a court-martial because it is also baseless, but, say, taking action on that conduct may still be appropriate and give the convening authority that flexibility.

VADM HOUCK: From my standpoint, the presumption ought to be that the convening authority make decisions on the disposition of cases. The

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convening authority can make that decision with the recommendation of a law enforcement officer and a trial counsel, and should have that input.

But I'm been concerned about the fact that we have three Services who are objecting to this. And that is not determinative in and of itself, but I don't understand why in this particular case, we would remove this on the discretion of the convening authority.

Then, you say, "Well, we're not really moving it from the discretion of the convening authority. The convening authority can still do what they want to do." That takes me circularly back to, then, why are we doing this?

Because there's a technical issue of categorizing as a police issue or a law enforcement issue versus an operational issue. To me, at the end of the day, what we are doing is recommending a change that divests the convening authority of some responsibility for this decision, or at least appears to be doing that.

PROFESSOR HILLMAN: Judge Jones and Admiral Houck, it is a fair point. I think that our effort is to standardize. I mean, we are getting --

CHAIR JONES: I am all for that.

PROFESSOR HILLMAN: When we were in Austin, Texas, and we heard the waterfall slide descriptions of trying to understand what happens to an allegation that comes forward, it was a completely impenetrable set of materials because of the different ways in which these decisions get made.

So, we looked at civilian practices with respect to this decision

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and applied them as best we could to the Service-specific practices on these decisions and took the model that was closest to the civilian best practice, actually, and it seemed reasonably applicable within the special military environment of retaining prosecutorial discretion within the convening authority of making this decision about unfounding, which has to do with a factual determination that involves the investigative, the front-end really of it. And that seemed to be a way to actually come up with apples and apples in the process at the very beginning of the waterfall, you know, the process of what happens with an allegation, because that has been a source of great confusion and frustration, this idea that many reports are coming forward and we're not actually dealing with them effectively.

So, this was our effort to make a process that actually would apply across the Services, and some of the presenters at the end of their presentations, when we were in Austin, said, "Please tell us what to do," because they are not going to converge on a solution to the tracking of these statistics unless it is set up. So, that is the rationale.

CHAIR JONES: Well, I think it is critical to the statistics. We are never going to be able to compare how poorly or how well the military system is working with the civilian system unless we have a category of unfounded cases. There is no doubt about it.

VADM HOUCK: Again, I am with you on standardization. I am not objecting to the standardization. But, if we are going to be prescriptive and

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recommend something, I am not persuaded by the civilian analogy in this situation because those are two different systems.

If we are going to say, "Let's pick a standard," well, we have got three Services who are doing it the opposite way of what is being recommended here. And I think the rationale is, well, the civilians do it this way.

MR. STRAND: Right. We have also only got three law enforcement agencies in the United States that aren't doing what every other law enforcement agency in the United States is doing, and they are different.

VADM HOUCK: They are different, but a commander will get a civilian police report as well. They don't just get investigations from our military, from our investigators. They get murder investigations. They get sexual assault investigations from our civilian counterparts as well. And they take action on those reports. They have no say in whether those are founded or unfounded or baseless or false.

But they take that information the same exact way, and it doesn't harm them. And they are not part of that police decision. Because they aren't part of that police decision, it doesn't take away anything from them. They take those same police reports from the civilian police and make their own determinations, just like they would from the MCIOs.

CHAIR JONES: If we look at this as a categorization and opinion from the investigator and the trial counsel, and just decide that they get to

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reach that conclusion and put that label on the case, if we were to add language that the commander is not losing the initial disposition authority, because this is not a disposition -- this is a label -- if we can craft some language like that, will that help? Because I am acutely aware of the need to have these cases labeled unfounded if they are.

VADM HOUCK: I think, from my standpoint, it could help.

The current language talks about a decision to unfound should shift from.

CHAIR JONES: Right.

VADM HOUCK: And that's what's problematic --

CHAIR JONES: And I think if we could put a caveat in there that this is not a disposition --

MR. STRAND: I make a recommendation on case determination instead unounding decision, that this is a case of determination, a criminal investigation case determination decision. That might clean it up a little bit.

CHAIR JONES: And we still want the label "unfounded," but why don't we talk about this language? I think we can all agree on it.

So, 13 is accepted and we will add some wording and take out their shifting language in there with respect to the commanders.

Was there anything else on that?

(No response.)

Okay. Recommendation 14. And that is (a) and (b).

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I'm sorry. Yes, Kelly?

LTC McGOVERN: Your Honor, if I could refer everyone to page 98 of the report, that may help facilitate your discussion because it also explains the flow of the process that CSS proposed to standardize.

CHAIR JONES: Thank you.

All right, 14(a), again, is recommending that the Secretary of Defense direct the investigative organizations to standardize their procedures, require the investigators coordinate with trial counsel, review all the evidence, annotate the case file, and that the trial counsel apparently, yes, agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition decision.

And I think, Liz, that your question was, doesn't this contradict what we just talked about in 13? And actually, I think this does show a distinction. Unfounding is one thing. Making a disposition decision is another. So, I don't think it contradicts 13.

REP. HOLTZMAN: Well, I only raised that because I was concerned about the probable cause issue in 13.

CHAIR JONES: Right, right.

REP. HOLTZMAN: Because of the Army, you know, the Army's practice.

CHAIR JONES: Right.

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REP. HOLTZMAN: But if we are taking out probable cause from 13, then --

CHAIR JONES: Then, you're fine? Okay.

REP. HOLTZMAN: Then, I'm fine.

CHAIR JONES: On that one, is your point, the second half of 14(a).

REP. HOLTZMAN: Right.

CHAIR JONES: "Neither the trial counsel nor the investigator should be permitted...."

So, is there any objection to 14(a)?

MR. BRYANT: What do we mean by -- and I was on the Subcommittee -- "dispositive opinion"?

CHAIR JONES: I'm sorry, where are you?

MR. BRYANT: As opposed to any opinion? It seems odd to have trial counsel --

LTC McGOVERN: Mr. Bryant?

MR. BRYANT: Yes?

LTC McGOVERN: That was General Cooke's input to the Comparative Systems. And in the discussion in the report it explains that an attorney will still offer an opinion -- an opinion, like you said -- to an investigator or to a commander in their opinion whether or not probable cause exists. But they are not

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going to make a dispositive opinion to be recorded in a law enforcement record, which could, then, later be contradicted at an Article 32 probable cause hearing.

So, when the investigator or a commander are asking for advice, does this look like you have reasonable belief, or whatever, probable cause, it is natural for an attorney to issue an opinion, but not be this dispositive opinion which the Army currently does, which prohibits 25 percent of the cases from ever reaching a commander.

BRIG GEN DUNN: In the Army the practice has been that it shuts down --

CHAIR JONES: Could you speak up a little bit? Sorry.

BRIG GEN DUNN: In the Army, the practice has been that it may shut the case down, and then, it doesn't get to the convening authority for review and disposition. So, this is an effort to ensure that the convening authority makes that disposition decision with the opinion of the counsel as to whether probable cause exists, but it gets to the --

LTC McGOVERN: The trial counsel, instead of issuing this dispositive decision of probable cause, will issue a decision that, yes, I believe all the investigation has been done that is needed now to present it to the commander, which is what the other Services do, but the other Services don't have that recorded in the law enforcement record. That would not be recorded in the law enforcement record and then be presented to the commander. So, all the Service would change a little bit.

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MR. BRYANT: So, by this, we would be changing the procedure of the Army?

LTC McGOVERN: Correct, and formalizing the procedure of the other Services.

MR. BRYANT: What was the Army's opinion on this changing of procedure?

LTC McGOVERN: We do not have the Army's opinion on that change. But we do have testimony that they are very confused between what is probable cause and what is unfounded, and that 25 percent of their cases didn't go to the commander. Only 75 percent did, because they determined that there was no probable cause in 25 percent of their cases.

MR. BRYANT: I recall all that. I just had those questions. I am not sure about "dispositive" because it would seem very odd for the trial counsel who has reviewed this report not to be able to get an opinion about whether or not probable cause exists.

CHAIR JONES: Admiral?

VADM HOUCK: Along the same lines, with respect to dispositive, it may be that I got in too late last night, but I am trying to imagine where military judges or Judge Advocates at Article 32 hearings make dispositive decisions, "dispositive" meaning to me determinative, about probable cause. The convening authority would.

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LTC McGOVERN: The new 32 they will, sir. It is a probable cause hearing now.

PROFESSOR HILLMAN: The question is how binding that would be.

MR. BRYANT: Right.

PROFESSOR HILLMAN: That remains to be seen.

MR. BRYANT: Right.

PROFESSOR HILLMAN: Our Subcommittee made a recommendation that it ought to be binding, but that is not what the new 32, which does not yet exist -- it doesn't become effective until December -- will have, right.

VADM HOUCK: So, I guess my question is about this statement that says, "Because a convening authority, a military judge, or the Judge Advocate...." I'm not sure about the appropriateness of including military judge or Judge Advocate in there. I think it is a question.

COL COOK: What is interesting to me is in the military justice system, just an observation that when somebody, anyone subject to the Code can prefer a charge against somebody. And when somebody prefers that charge, initially, it is the company commander, the junior-level commander. When they prefer that charge, they are saying, I thought the determination -- and somebody can correct me -- that it was probable cause to believe it is not -- what is the standard --

LTC McGOVERN: Well, that is the chart --

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PROFESSOR HILLMAN: "Personal knowledge of the offenses and belief in the truth of the charges".

COL COOK: Okay. That's fine then.

LTC McGOVERN: The chart shows that there is a progression or there should be a progression in a standardized way, that the level of proof required or analysis increases every step of the way. And that is why it would be premature for an investigator, an attorney, to make a probable cause decision before preferral, since preferral is a lower standard.

COL COOK: When is probable cause determination made if it is not in an Article 32, if it is not a general court-martial?

LTC McGOVERN: It would be by the special court-martial convening authority deciding to refer a case.

COL COOK: Okay.

VADM HOUCK: Couldn't you just end the sentence after the word "exist"? Isn't that what this is kind of trying to get at?

BRIG GEN McGUIRE: No objection.

CHAIR JONES: Okay. All right. So, 14(a), then, is accepted, and with the removal of the second half of the first sentence in the second paragraph. Okay.

This is a recommendation to ensure investigators continue to remain responsive to investigative requests. After the commander receives the case

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file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until either final disposition of the case or a determination that the allegations are unfounded.

COL COOK: I would put the period after "until final disposition of the case," period. That last part, "or determination that the allegations are unfounded," if I look at your chart on page 98 of the report, it says, "The MCIO" -- at the very bottom in yellow, it says -- "The MCIO can unfound the case at anytime throughout the process after consultation with the special prosecutor.

And I guess my question is the way it is worded now. So, if a military investigator has determined it is unfounded earlier in the case, then maybe a commander or the trial counsel, then they no longer have to support the investigative reports that are out there. So, the way it is worded now and the way it is reflected in here, am I misreading something? They can unfound it any point. So, why leave that as one of the points? If they decided to unfound it earlier, why don't we just -- it states, "Open for further investigation until a final disposition decision is made."

CHAIR JONES: I'm fine with that, "until a final disposition is made".

PROFESSOR HILLMAN: I just think, what if there is no final disposition? If it is unfounded and the investigation ceases, and then some information comes up later -- it was just an attempt to be inclusive as to all the situations that might arise.

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LTC McGOVERN: There are two ways a case would be closed under the CSS proposal.

PROFESSOR HILLMAN: Right.

LTC McGOVERN: And one way is the final disposition of the case. The other is unfounded would close a case.

COL COOK: But if the military investigators, which is what -- if we make it back to be solely a decision by the military investigators to unfound a case, if they make that, and a convening authority decides that they want to continue to go with it, then they may have closed the case and, according to this recommendation, not have any other investigative requirements, even before the convening authority is ready for that case to be -- they can make the unfounded decision, but they haven't made the disposition, and you're saying they wouldn't have, or the way it is written currently says they would no longer have an obligation to continue the investigation.

PROFESSOR HILLMAN: No, it's "or". It is either final disposition or the determination, I guess. So, it wasn't an attempt to close this down. I mean, this was a --

COL COOK: How about whichever is latest then?

VADM HOUCK: Well, the earlier explanation was the case isn't over just because it has been declared unfounded.

COL COOK: Right.

PROFESSOR HILLMAN: Convening authorities still have an

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opportunity to decide the case.

CHAIR JONES: That is the logical problem, yes.

COL COOK: Could we say whichever is later? I mean, I guess you are saying it could be unfounded, and if they decide not to dispose of it, you can rely on the unfounded requirement. I guess that's fine.

CHAIR JONES: In most cases we have commanders who are going to agree that it is unfounded and sign off on it and close it. I mean, that's really what we are talking about here.

COL COOK: I am not sure of the other Services. In the Army the commanders are all supposed to sign a report of action, even if the decision is no action will be taken. I mean, that's dispositive as well. It is supposed to happen. I agree it doesn't always happen.

VADM HOUCK: So the way it reads now, supporting Colonel Cook's earlier comment, the way it reads now, it would appear that a determination to unfound a case ends the case, and I realize that is not the only one we are talking about, but this is a way that I think you could read that from this statement.

LTC McGOVERN: I think that is the way it was originally intended, sir. I mean, the discussion today speculating that it may go forward I think with some adverse administrative action is a possibility for the underlying misconduct.

But, generally, if you found out that something is false or it is baseless because you have the wrong suspect, then the investigation is closed.

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CHAIR JONES: In reality, it is probably closed, but the bottom line is that we are talking about a temporal thing here. It can't be unfounded for the purposes of this if the commander hasn't reviewed it yet. That is, I think, what we are talking about.

REP. HOLTZMAN: Well, you could do it. Just change the order and instead, "until a determination that the allegations are unfounded has been made or if no final disposition of the case has taken place," "until a final disposition in the case has taken place," something like that. Or the way you have done it.

But I think the way it is worded now, it doesn't take into account these issues that have been raised.

CHAIR JONES: Well, I think once the commander plays his role, reviews the unfounded decision of the military investigator and approves it, it is the same thing as a final disposition. So, maybe we need not get into it at all. And I think that was your suggestion five minutes ago.

VADM HOUCK: Just to say, "until the disposition of" --

CHAIR JONES: Right. So, let's just finish it off with "final disposition of the case".

Okay. So, anything else on 14(b)?

(No response.)

All right. It is accepted with the deletion of the last couple of clauses. "Or a determination that the allegations are unfounded".

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All right. Recommendation 15. I don't believe there any comments with respect to that one.

It is a recommendation the Secretary of Defense direct the commanders and directors of the MCIOs to authorize the utilization of Marine Corps Criminal Investigation Division, Military Police Investigators, or Security Forces Investigators, to assist in investigation of some non-penetrative sexual assault cases under the direct supervision of a SVU investigator to retain oversight.

I think that one makes perfect sense. Any objections?

(No response.)

All right, 15 is accepted.

Recommendation 16 involves pretext phone calls and text messages. And I think there was a suggestion of some wording from you, Liz.

REP. HOLTZMAN: Yes. I thought that the finding suggested that the problem related to the fact that these calls were not being made in a timely manner. And so, it seems to me the recommendation ought to respond to that. So, that's why I would suggest adding after the word "conduct," add the word "timely," and that would relate the recommendation to the finding.

And I also don't understand why we are focusing on the DoD Inspector General and the DoD Office of General Counsel. These are the people who would make this decision or should we just leave it to the Secretary of Defense direct a review of the procedures?

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LTC McGOVERN: Well, it is because of the different General Counsel offices of the Services differ on their opinion of the law regarding pretext phone call requirements. So, by having the DoD weighed in, they can, then, dictate the policy.

REP. HOLTZMAN: I understand that, but why isn't it sufficient just to have the Secretary of Defense review the military procedures as opposed to requiring the General Counsels to do that or the Inspectors General to do that? That's all.

COL COOK: No objection.

CHAIR JONES: All right. Yes, don't decide who's best. So, we are going to remove that and accept the word "timely". And it will read, "The Secretary of Defense direct a review of the military services procedures...."

REP. HOLTZMAN: "And conduct timely pretext" --

CHAIR JONES: Right, "and conduct timely pretext phone calls".

All right. With those word changes, 16 is accepted.

Seventeen. The Secretary of Defense should exempt DNA examiners and other examiners at the Defense Forensics Science Center from future furloughs to the extent allowed by law.

And I know you wanted to discuss this, Liz.

REP. HOLTZMAN: This goes to a point that was raised earlier by Colonel Cook about selecting some specific focus with regard to appropriations.

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Is this the only areas that should be exempted from furloughs? That is my concern with this. What about investigators? What about victims advocates? What about special counsel? What about all of them?

BRIG GEN DUNN: They were counselors.

REP. HOLTZMAN: They were. Yes, they were. I think that was how this came up, is that everybody --

BRIG GEN DUNN: Oh, okay. I got it. I got it. Sorry.

REP. HOLTZMAN: The cases got stalled.

BRIG GEN DUNN: I'm with you. Sorry.

BRIG GEN McGUIRE: You know, it is in the same manner as others.

COL COOK: In the same manner as others involved in the military justice process. I mean, that becomes an issue. If you don't have the evidence, you have this big trial issue there, too. So, this makes sense, but reflecting in the actual recommendation that "as were other critical members of the sexual assault investigation process or the criminal justice investigation process".

CHAIR JONES: All right. Everyone's in agreement?

COL COOK: Yes.

CHAIR JONES: Okay. And there are no comments from Admiral Houck.

So, 17 is accepted with the additional language "as were others,"

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and will continue from there.

All right. Recommendation 18. All right. This is a recommendation that the Secretaries of the military services direct their Surgeon Generals to review the National Defense Authorization Act for fiscal year 2014, requirement, to review the requirement that all military treatment facilities for the 24-hours, seven-days-a-week emergency room capability maintain a Sexual Assault Nurse Examiner, a SANE, and provide recommendations on the most effective way to provide Sexual Assault Forensic Examinations, SAFE, at their facilities.

General Dunn, I think you wanted to comment on this?

BRIG GEN DUNN: I think I had said earlier that I think the important language is down in the Finding 18-2, but that the NDAA is overly restrictive. Depending on the location, there may be better expertise in the civilian medical communities, and that even within civilian communities, Fairfax County being a prime example, it is common practice to transfer victims to a single location because that is where the expertise resides. And if the examiners can travel, they will.

This is all about the best services for the victim, not about if you have a 24-hour emergency where you will have a SANE examiner. It makes no sense to have a SANE examiner who does one exam a year, for example, or two exams a year, when you have maybe one resident eight miles down the road that is far more experienced.

CHAIR JONES: Well, Beth?

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PROFESSOR HILLMAN: Agreed. I mean, maybe if we alter the language somewhat, the Secretaries -- we did focus on Surgeons General because we are focused on medical treatment here. So, that seems the appropriate place to push this, but what if we say "direct the Surgeons General to provide recommendations on the most effective way...." In other words, move the second clause up there. So, we are going to direct them to find recommendations and consider a change.

Because, really, what we are recommending here is that the NDAA provision is not so wise, given the breadth of different locations where we are providing these kinds of services.

CHAIR JONES: I think we are all in agreement on this particular one. I didn't know if you wanted to just add something like "in light of the many civilian facilities with more experienced SANEs and which also serve as the Community Center of Excellence". But we can fix that. I think we can draft this.

All right, 18 is accepted.

I am advised that we have some movers who are going to help us do some things and, also, the lunches are here. So, we will take a break.

(Whereupon, the foregoing matter went off the record for lunch at 12:20 p.m. and went back on the record at 1:21 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:21 p.m.

CHAIR JONES: All right, we are on 19, Recommendation 19.

Any --

PROFESSOR HILLMAN: Move adoption.

CHAIR JONES: Pardon me?

PROFESSOR HILLMAN: I move adoption.

CHAIR JONES: Second?

COL COOK: Second.

CHAIR JONES: Okay. Recommendation 19.

Recommendation 20.

PROFESSOR HILLMAN: I move adoption.

CHAIR JONES: I agree. Twenty is accepted.

All right, 21.

General McGuire?

BRIG GEN MCGUIRE: I want to listen to more discussion is all.

It is not that I don't agree with it. It is just that I was thinking, you know --

CHAIR JONES: It is an audited sexual assault, right?

BRIG GEN MCGUIRE: You know, outside of DoD, specifically qualified to conduct such audit. My question was of military unique organizations.

So, who would be uniquely identified to be able to do an audit unless they were part of

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it at one point. I don't know.

BRIG GEN DUNN: I think it was we are talking about completed MCIO investigations of. So, there ought to be plenty of people qualified to do that.

CHAIR JONES: Yes, and we saw at least one site visit that was an eye-opener on that in Philadelphia, where they have the outside -- it is really a victim advocacy program -- come in and just look at the investigative files, and it works. They are happy to be given the opportunity. They make constructive comments.

COL COOK: Yes, but what they are looking at is the process itself is followed throughout and every aspect of it, as opposed to second-guessing the ultimate disposition of it.

LTC McGOVERN: They are looking at unfounded cases.

COL COOK: I'm sorry?

LTC McGOVERN: They're looking at unfounded cases a lot of times and random-sampled cases.

COL COOK: And what if they find something they disagree with? If unfounded becomes the investigator's decision, what happens in the civilian sector usually?

LTC McGOVERN: Well, in Baltimore and Philadelphia they refer them back to the detective to relook and possibly reopen the case.

COL COOK: They just get a look at their views and pass that

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information on for whatever --

CHAIR JONES: Yes, okay. They don't have any authority to change anything.

LTC McGOVERN: Right.

REP. HOLTZMAN: But they might write some report --

LTC McGOVERN: Right.

REP. HOLTZMAN: -- to say, well, these procedures are closing. I mean, they didn't question -- I don't know -- they didn't do self-examination that they should have done. In a number of cases we have seen that.

BRIG GEN McGUIRE: And I know in corrections arena they have outsiders who come in and assess and audit.

COL COOK: And who pays for this? Is this something that DoD would, then, pay for? An outside agency would come in and --

BRIG GEN DUNN: Payment is required, I guess.

CHAIR JONES: Yes, if we are going to direct, unless they wanted to do it gratis.

(Laughter.)

PROFESSOR HILLMAN: I think it could get funded in many ways, including by grant, say, by a foundation that was interested in crime prevention and investigative effectiveness that a researcher or a scholar get and, then, do this. And some of these are done by -- there are community groups, but also by scholars

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who are working on this in these areas. They might come up with their own funding and resources.

LTC McGOVERN: Currently, the audits are done by the DoD IG, and many of them are retired agents.

CHAIR JONES: All right. Accepted.

That was 21.

MS. FERNANDEZ: I move to adopt 22(a).

COL COOK: I agree with adopting it, but I have one question on line 3. It is "Optimize sharing of best prices, resources, and expertise for" -- this says "prosecuting adult sexual assault cases". I would just suggest moving that to "handling" because not all cases are going to result in prosecution, and our interest is in more than just -- I mean, we would like to see the prosecution, but there are going to be cases that, for whatever reasons, they don't get prosecuted, and you still want those handled most appropriately.

The rest of it goes to the defense and everything else. So, I would just take that one word and change it to "handling," so that you go through the entire disposition process that is involved in the military.

CHAIR JONES: Any objections to that?

(No response.)

All right. With that --

REP. HOLTZMAN: I just have one spelling question. On line

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4 is "The Service Judge Advocate Generals" -- is the "The" capitalized?

COL COOK: TJAG is the title, "The Judge Advocate General".

But if you want to be truly technically correct, then it would be "Service The Judge Advocate Generals". So, it would be "Service TJAGs". But the "Service" in front of the capitalized "The".

Or, you know, Vice Admiral Houck is a former Service --

(Laughter.)

VADM HOUCK: Yes, and we didn't do that in the Navy.

COL COOK: We do it in the Army.

CHAIR JONES: What are we talking about? This went way above my head.

(Laughter.)

COL COOK: We'll just make an adjustment in line 4, yes.

LTC MCGOVERN: This Recommendation 22(a) actually fell at the beginning of the prosecution section of the CSS report and as part of the Special Victim Capability, the working group was designed to look at are the Special Victim Prosecutors, is that an effective way to handle prosecuting sexual assault cases? And that is why the word "prosecutor" was in there.

CHAIR JONES: And are we intending this to be broader than that now in 22(a)?

LTC MCGOVERN: If you look at the bottom, again, we are

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looking at the specialized military career track, the HQEs, TCAP and DCAP.

COL COOK: But it also has defense in there as well. So, it is not just the one-sidedness.

CHAIR JONES: Yes, trial counsel, and defense counsel --

COL COOK: And defense counsel, which it should be. It should look at both sides.

You can say "prosecuting" or "handling". If your concern is addressing the specific requirement, then having it say "prosecuting or otherwise handling," I'm fine with that. I just think that is more than just prosecuting.

LTC McGOVERN: Do you want it "prosecuting and defense"? I mean, "handling" to me includes investigators.

CHAIR JONES: Well, "prosecuting and defending," then. You're saying we are restricting this to the lawyers, the trial counsel. Okay.

All right. Does that mean 22(a) is accepted or is there anything else in that second paragraph?

REP. HOLTZMAN: Can I ask a question, Judge Jones?

CHAIR JONES: Yes, sure.

REP. HOLTZMAN: You raised defense counsel. Do we anywhere in this report deal with training of judges?

CHAIR JONES: Yes.

REP. HOLTZMAN: We do? Okay.

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CHAIR JONES: There's a recommendation on that.

REP. HOLTZMAN: Okay. Okay.

CHAIR JONES: Are we on 22(b) then?

22(a) is accepted.

BRIG GEN DUNN: Should 22(b) also say "prosecuting and defending"? We changed it --

CHAIR JONES: Yes, "prosecuting and defending".

All right, 22(b) is accepted.

Twenty-three.

COL COOK: Move to accept.

(Laughter.)

CHAIR JONES: I agree. All right. No objections.

Twenty-three is accepted.

Twenty-four.

COL COOK: Move to accept.

PROFESSOR HILLMAN: Twenty-four and 25 we also don't have any comments on.

COL COOK: Yes, the same here.

CHAIR JONES: All right. All right, 24 is accepted.

Twenty-five is accepted.

Twenty-six.

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BRIG GEN MCGUIRE: I only defer for more discussion.

COL COOK: This is on the notes that we dealt with the combined groupings. I think Vice Admiral Houck and my comment on this one are about the same.

CHAIR JONES: Uh-hum.

COL COOK: I agree that this should be a goal. I just don't think the SECDEF should mandate that the only people -- I mean, that's the goal. That is the perfect world, but defense counsel only have to have litigation experience. Let them be in their jobs at least two years, if not longer, if that is possible.

VADM HOUCK: We could say to encourage it.

COL COOK: Right.

VADM HOUCK: But I think it is really --

COL COOK: But I think mission requirements, training requirements, even to the extent that you will adversely affect the defense attorney, or having a defense attorney who can sit in on a particular case to represent that entire case to completion, but not to a full tour; you limit all of that if you put the wording the way it is right now.

CHAIR JONES: Well, I had inserted "as well as set a goal of a minimum tour". But I heard another possibility.

COL COOK: I had given the language in the draft that said, "SECDEF should direct Service TJAGs and the SJA to the Commandant of the Marine

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Corps," quote, "to assign counsel with litigation experience to serve as defense counsel and to maintain a two-year tour length, so defense counsel can develop expertise and experience in defending complex criminal cases whenever possible."

I also took out the limitation on adult sexual assault cases. They could be in an assignment for two or three years, but if it is not sexual assault that gets there, as long as they have got complex criminal case experience, that still serves the purpose of ensuring we have the best-trained defense counsel.

VADM HOUCK: Are you recommending that we leave the word "direct" in there, that would "direct"?

COL COOK: I did leave the word "direct". Well, no, I said they should -- to assign; yes, they should direct them to assign whenever possible, though, to assign for at least two years, to assign with litigation experience, if that's possible. And if it's not possible, it is up to the Service Secretaries to determine.

REP. HOLTZMAN: And you made the "whenever possible" that was --

COL COOK: "Whenever possible," the last two words I put at the end to apply to both of those conditions.

VADM HOUCK: Yes, and I don't mean to split hairs, but I think "whenever possible," I am not really sure what that -- if I am the JAG and I get "whenever possible," I don't know what that means.

COL COOK: Okay.

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VADM HOUCK: And I think that we are really into the weeds here, and we are talking about, the group talking about telling the JAGs how to set tour lengths for defense counsel, I just think it is beyond the scope of what this group --

BRIG GEN DUNN: Although this did spring from one Service in particular, which I think we can't name. But the Army, the Navy, the Air Force, I think all of them pretty much are onboard in terms of trying insofar as possible to assign experienced counsel to be defense counsel and have two-year tour lengths. The Marine Corps, on the other hand, appears to have a possibility of a one-year tour for defense counsel, which is caught our attention.

PROFESSOR HILLMAN: The Subcommittee put this forward because, if we are going to have military defense counsel defending people in sexual assault cases when the stakes are as high as what they are in sexual assault cases, they ought to be prepared to do a decent job. And we don't think they can unless they have a minimum tour length of two years and have expertise in actually sexual assault cases, defending sexual assault cases, not defending any case.

So, our feeling was, if they can't do that, then it shouldn't be military defense counsel who are defending it. It affects the legitimacy of the system.

Other recommendations, likewise, we are moving into some that go to supporting the defense as well as the prosecution and the investigation of sexual assault cases. And this is one that I know I feel strongly about. I don't think we can have a military justice system that is functioning fairly for the defense if those military

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accused Service members don't have a qualified defense counsel.

VADM HOUCK: So I have a superb defense counsel who we would all agree is as good as anybody there is. And then, suddenly, they have an issue with a disabled child and they need to be assigned to a different place in a year and a half. Am I not allowed to assign them? We are way into the weeds on this, and I am in complete agreement --

PROFESSOR HILLMAN: Admiral Houck, this wouldn't stop that, though. It says set the minimum tour length to two years or more. It would still be a minimum tour length. You would reassign them and get the next person in. I mean, this doesn't say in absolutely no circumstances could there be an exception to the rule. It just sets a minimum.

VADM HOUCK: So now I understand it a little differently, and I think that is my point, is that I think it is appropriate for this group to recommend to set as a standard or set as a principle or recommend to the Secretary of Defense encourage this or some such, but for this group to be recommending mandatory tour lengths, I think it is beyond the scope of what this group is supposed to be doing.

And I don't think we have done it for judges. I don't think we have done it for prosecutors. I don't think we have done it for anybody else except defense counsel. There is nobody in this room who believes that defense counsel should be qualified and aggressive and do their job more than I do, but I just think this is an inappropriate recommendation as specific as it gets.

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MS. FERNANDEZ: When we came up with the Special Victims Counsel, we did try to set a minimum amount of years in the courtroom, and I think we decided against it, was my recollection.

COL COOK: Right. Because one of the concerns is, when you have got people to come into the Corps and they really do, talented attorneys that come in and may not have the same experience base, but that doesn't mean that they are not competent to do these cases with having the reachback that we have with the trial counsel assistants and the defense counsel assistants and the Regional Supervisors in the defense and prosecution community.

I know at least in the Army they do not assign -- you can be a first-term Judge Advocate and be assigned to a defense position, but there's already been an assessment that you are a pretty talented attorney before anybody would even consider that. On-the-job training, when there is somebody sitting next to you, and due process rights are high stakes, is not safe in my opinion.

BRIG GEN DUNN: I think the thing is, and what we consider is, that the Services have now created all of these special prosecution capability. And you can probably bet your bottom dollar that the new lawyer in the JAG corps with four months of experience is not in one of those Special Victim Prosecutor Programs, generally speaking. I mean, at least I know how the Army program works, and it wouldn't be in there.

So, how could you, then, on the opposite side have counsel with

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less experience?

COL COOK: I think that it is more likely they will be on the prosecution side than they would ever be on the defense counsel side without the requisite baseline.

BRIG GEN DUNN: Yes, but that is not what we heard. That is not what we heard.

LTC McGOVERN: This is a request from defense counsel.

BRIG GEN DUNN: Defense counsel, this was a request from the defense side.

LTC McGOVERN: They said they sit around a table and stare at each other because they don't know the answer.

BRIG GEN DUNN: Right. Yes.

CHAIR JONES: I'm sorry, "Don't know the answer"?

LTC McGOVERN: They would pose a question as to how to proceed in a case, and they would --

CHAIR JONES: Oh, I see. I see. Okay.

BRIG GEN DUNN: And that they don't have resources for training in the defense. I mean, we are going to get into this. The Defense HQE for the Marine Corps doesn't have any travel funding and, you know, a few other things.

CHAIR JONES: I think, except for one of us, we are all in agreement generally about the recommendation. It is a question of whether it is a

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goal.

BRIG GEN MCGUIRE: I think they should strive toward it, but to mandate it is really tying the hands of --

VADM HOUCK: Am I the one?

CHAIR JONES: You're the one, Admiral.

(Laughter.)

BRIG GEN MCGUIRE: Well, that was my concern as well. Yes, I just wanted to hear the discussion as well. It was just that it was a directive.

MS. FERNANDEZ: Is this sort of like the appropriations question? Don't we have to look at ensuring that there are sufficient resources for prosecution, Special Victims Counsel, and defense counsel? So, it is resources with regard to money and experience, because we have upped the ante on all these cases.

So, you need a higher degree of training and experience now than when maybe a sexual assault case was something you threw at a very inexperienced attorney. Now what we are saying is we are giving these cases more than an elevated look. And therefore, the counsel in all three areas need to be somewhat elevated.

I don't know if that is sort of a finding and a recommendation all on its own.

VADM HOUCK: Yes, I don't mean to prolong of the group over this, but I do think that there must be a way to stand for the principles that you all are

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talking about, and we all agree with, without using a 1,000-mile screwdriver to dictate the minimum tour length for one group of attorneys in the Service. I just think that is a degree of micromanagement that is not appropriate for this.

If there is a particular Service that is an outlier here, then I also think that there could be a way to address that as well. But that is not really the issue. The issue is the specificity here and directing assignment policies in the Services.

COL COOK: Okay. Can I ask a question? If we all got a copy -- this morning I think all of us were given out a copy of this consolidated list of what people have for input and stuff on there.

CHAIR JONES: Right.

COL COOK: On page 3, under Recommendation 26, I had proposed language that, Admiral Houck, if we change the word "direct" in the first line -- it is under Recommendation 26. In the first line, if we change the word to "encourage," but, then, left the other words that are there, would that meet your requirement? And, Professor Hillman, does it still -- it doesn't direct anything. It says this should become the goal.

VADM HOUCK: I would suggest maybe that we take the Secretary of Defense out of it, and the panel recommends that the Services adopt that practice, because I don't think the Secretary of Defense encourages subordinates to do anything.

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COL COOK: Okay.

VADM HOUCK: I think the Secretary of Defense tells them to do it or leaves them to exercise their discretion.

So, it might be the kind of thing that the Panel recommended be done. I hadn't thought of that particular one.

COL COOK: So, then, if we did that, "The Panel recommends that Service TJAGs and SJAs of the Commandant" -- take out the word "to" -- "assign counsel with..." and the rest of the words that are there.

CHAIR JONES: We have other recommendations where they don't start off, "The Secretary directs," where this one does. So, I think if we drop that, then it is just our Panel.

REP. HOLTZMAN: Do you think the recommendation should somehow reflect the point that Mai raised, which is that what we are trying to accomplish is, given the increased attention and focus on these cases, to ensure that the level of defense counsel is sufficient to ensure the fair administration of justice, and that the Panel, therefore, believes that standards "such as" should be adopted or "standards ensuring that sufficient" -- unless you feel that they definitely need these two years, I mean, that's a different story, if they really feel that they need the two-year tour of duty or whether they really feel that they need litigation experience.

VADM HOUCK: I think as General Dunn said, they are already the norm. They are already considered the norm. So, that might be an element of

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this as well: tour length sufficient to ensure a quality prosecution and defense and adjudication of these offenses.

I'm not helping, but something that gets close to it without just mandating the length of tours in an inflexible way.

COL COOK: But, going on that point, it could be that could be an overarching comment for our final Panel report that said this can continue to be the recommendation by the Subcommittee, but in the overarching report just recognizing this is going to be competing demands for the resources, as Mai had just said.

Care should be taken to ensure that fair and sufficient levels of support across the defense, the prosecution, across all of these specialized areas should be given.

LTC McGOVERN: And that's not Recommendation 36 again. This was specifically in the training section, and whether training can substitute for experience, or vice versa. And so, that was in looking at the defense counsel's training and experience.

Later CSS looked at prosecutors. They saw that they were specialized. Defense counsel do not specialize. And that is why this resourcing and experience recommendation came later. And Dean Hillman had considered combining because of the discussion you are having right now. So, we will definitely take that into consideration for the final report.

But that addresses Representative Holtzman's concern, too, I

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think, is Recommendation 36 and 38.

VADM HOUCK: I think for me the issue is -- and I am not trying to jump us out of order, but, by way of example, Recommendation 30 talks about implementing a system to ensure defense counsel are doing their job, I think, right? I have no objection to that at all.

The issue here is what's the performance. Don't tell people how to get the job done. Insist that they get the job done.

And by evaluating whether it is effective or not, that seems completely right, to have that kind of recommendation.

COL COOK: I also noted that.

BRIG GEN MCGUIRE: In the manner of how it is presented.

COL COOK: Right.

PROFESSOR HILLMAN: The specificity in this recommendation was based on what we heard about people defending complex sexual assault cases with very little experience and very few resources. So, that is why this drills down. And then, later, we make the broader recommendations, because we thought that shouldn't happen. We would like that not to happen. So, we made this recommendation that would make that not happen.

CHAIR JONES: I'm for this recommendation coming from the Panel, not having anything to do with the Secretary of Defense directing anything. And I would even leave in the recommendation about the minimum tour length

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because it is a recommendation from us based on testimony and evidence, and it is a recommendation and they can look at it. It is not mandate which makes it more difficult to support as a recommendation.

REP. HOLTZMAN: May I just suggest that -- I mean, I don't know whether this makes you feel more comfortable, Admiral; I don't know -- but if we said "except in exigent circumstances"? I mean, it does give you some flexibility and sets a standard.

VADM HOUCK: Yes, and I think that is really all I am talking about here, is to not have this legislated in an inflexible way. I can guarantee you that this Panel cannot anticipate the different --

REP. HOLTZMAN: Right.

VADM HOUCK: -- legitimate circumstances that are going to require departures from this.

CHAIR JONES: Right. Well, we are going to make it a goal, and we can accept "in exigent circumstances".

VADM HOUCK: Yes.

CHAIR JONES: Is that good with everybody?

I'm sorry, Liz.

REP. HOLTZMAN: I didn't know that we were making it a goal. I thought we were directing. If it is a goal, then you don't need "exigent circumstances". I'm making it a requirement with an exception.

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CHAIR JONES: All right, I could go for that. Set the minimum tour length and except in "exigent circumstances". Okay?

Twenty-six, then, is accepted.

Twenty-seven. I don't see any comments with respect to this one.

REP. HOLTZMAN: Admiral Houck.

COL COOK: His comment was going to 26, actually.

CHAIR JONES: All right, then, hearing no objections, 27 is accepted.

Twenty-eight.

BRIG GEN MCGUIRE: Ma'am, I just had just a minor recommendation for just a modification. It was just to take out the last part of the last sentence "to assist the defense bar with complex cases". I was just thinking there is no need, I think, to quantify what they are going to be doing. I think we should still leverage experience, but how would you define complex cases could be up for debate.

REP. HOLTZMAN: So, you want to strike "with complex cases"?

BRIG GEN MCGUIRE: Yes, just end the sentence at "attorney for training expertise and experience," period.

REP. HOLTZMAN: So, you don't want the defense bar --

BRIG GEN MCGUIRE: No.

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CHAIR JONES: They are already covered in the first --

BRIG GEN MCGUIRE: In the first sentence.

CHAIR JONES: -- sentence.

BRIG GEN MCGUIRE: I'm just trying to look through here.

CHAIR JONES: Yes. And it also makes it sound like the defense bar needs assistance but the trial counsel don't. So, I would agree with that exception.

COL COOK: The only word that I had for it was --

CHAIR JONES: A deletion.

COL COOK: -- on line 1, on line 2, where it says "continue to fund," just like you have got in No. 29, I said, "should continue to fund". I think that should be continue to fund, but it just makes the language the same.

CHAIR JONES: So, are we adding a "should" or taking a "should" out?

COL COOK: No, adding a "should" in front of "continue". I mean, it is happening now and it should continue. It should be subject to availability of resources.

CHAIR JONES: Right.

COL COOK: And 29 has already got that language.

CHAIR JONES: All right.

LTC MCGOVERN: That is kind of the debate we went through,

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and if you all could provide us guidance? Before we had said "should" in just about all of them, and we deleted it to make it a little stronger. So, as a way of proceeding towards the final report, if you all could provide your guidance? In general, do you want these to be "should" or do you want to direct?

CHAIR JONES: So, we would go back and remove all the "shoulds" if we could.

(Laughter.)

BRIG GEN McGUIRE: Would we?

CHAIR JONES: No, in terms of language, I prefer it without the "should". I think it is much stronger.

BRIG GEN DUNN: I would agree.

CHAIR JONES: Okay.

BRIG GEN McGUIRE: And so, we just take the "should" out of 29, I guess.

CHAIR JONES: Okay, and leave 28 as it is.

PROFESSOR HILLMAN: Judge Jones, just to pause for one moment on this --

CHAIR JONES: Yes.

PROFESSOR HILLMAN: -- on page 137 in the report, I just want to point out this is one of the charts that our staff pulled together that is very powerful, because it points out, first, the different training budgets across the Services,

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the annual defense budgets, the trial counsel budgets, the average spending. We tried to drill down. It is on page 137.

CHAIR JONES: Thank you.

PROFESSOR HILLMAN: We tried to drill down, and it is exactly what is being spent, and found it very difficult from the RFIs that we got because of the different ways this money gets allocated.

So, you can see there's "not provided" and "unclears" and "uncertainties" in this. So, that is why these recommendations are crafted this way, to try to shore up. Well, we actually couldn't tell what was insufficient or wasn't because of the way the data was available to us.

CHAIR JONES: What are you speaking to there, Beth?

PROFESSOR HILLMAN: We are on 28, just this one that you were talking about. This is about funding and spending programs --

CHAIR JONES: Right.

PROFESSOR HILLMAN: -- to provide a civilian presence. And this is all about the training of defense counsel, in particular, focusing on that. And this is how tough it is for us to even tell what is happening across the Services. It is just not standard.

CHAIR JONES: Got it.

REP. HOLTZMAN: Can I ask a question with regard to that? Should there be a recommendation with regard to clarity in budgeting on how much

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defense counsel and prosecutors are getting? I mean, maybe there needs to be a separate recommendation on that point, so that it is a lot easier to track.

COL COOK: One of the difficulties will be in terms of the requirements on the trial counsel side. It is not in terms of looking at how the resources are. The trial counsel get all the administrative -- it is more fun to be a defense counsel sometimes if you used to be a trial counsel because the trial counsel, on top of the litigation and the prosecution, does things that you wouldn't see a civilian prosecutor doing in terms of they are responsible for the travel of the accused to get there, all the witnesses, make sure the accused is in the right uniform. It is all the administrative backwork for a court-martial itself that you wouldn't have -- you have got other people doing that logistically for civilian courts that the prosecutors do.

But I do think the level of training, the level of resourcing for investigators, all that stuff probably could be equalized a little bit more.

REP. HOLTZMAN: Well, I am just saying that they could probably work out the budgeting for that, too, on that there, how much time is spent by trial counsel, and so forth.

But if it is opaque, and you talk about comparative systems, if you can't compare internal systems internally, what is being spent for defense counsel training, trial, and so forth, with what prosecutors are getting, I think that that is a problem. That is just my own personal point.

Maybe you want to think about proposing that. Or, since your

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report is finished, I don't know. Maybe we propose it, but --

CHAIR JONES: Yes.

REP. HOLTZMAN: But maybe somebody could prepare, the staff could prepare something on that.

PROFESSOR HILLMAN: I second it.

CHAIR JONES: Okay. So, 28 and 29 are accepted.

COL COOK: Without the word "should".

CHAIR JONES: Without the word "should," right.

Thirty. All right.

BRIG GEN McGUIRE: Again, I just wanted more discussion.

CHAIR JONES: Sure. General McGuire?

BRIG GEN McGUIRE: Again, I wanted to have this discussion as well because I thought that we already have a system of evaluations, I thought. So, I was just going to defer to our legal team here that has that experience.

COL COOK: And Representative Holtzman's and my note are about the same. You have got a recommendation in No. 22(a) that says there is going to be this working group that is going to look at different components of the process now, including this Navy evaluation process. So, why not let that determine whether it is useful or perhaps appropriate, but not just jump into this right now.

It seems if this particular issue is covered by 22(a), let them look at it. And if it is a best practice, and agreed that it would benefit the entire

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Department of Defense, at that point, then, you can implement it. But doing it just right now from the beginning, when you haven't even evaluated it, doesn't seem like the right time.

CHAIR JONES: I think this goes beyond what is in 22(a), though.

MR. BRYANT: It just says, "consider implementing". It doesn't direct them to do anything. It says, "consider implementing the Navy's program".

So, I understand Colonel Cook's concern, but I don't think that we are asking them to get involved or stick their feet into something that is going to cause a problem. We are just simply asking them to consider implementing a program similar to what the Navy has been doing for some time now.

LTC McGOVERN: But it is, sir, in the second-to-last clause of 22(a). CSS does say the Navy's use of quarterly traditional evaluations of counsel is something that the Judicial Working Group would consider. So, we have done that.

REP. HOLTZMAN: I mean, that's why I raised it. You know, in the first place, we say they should review it, and here we say they should consider implementing it. Well, which one do we want?

PROFESSOR HILLMAN: I think that 22 is a non-exclusive list of individual Service practices that ought to be considered, and this is one of them. And I think that 30 is saying quarterly evaluations seem like a good plan that is working

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for the Navy, and let's everybody consider implementing that.

Because one of the repeated concerns that came up is the maintaining advocacy skills, given the low number of courts-martial out there, notwithstanding the emphasis on sexual assault. But there isn't that much experience that they retain. Those are perishable skills. So, doing more evaluation of the advocacy skills was something that was recommended by the more experienced defense counsel.

And this was just one way to do it that we raised as a possibility. That is where 30 was coming from. But it is on the list of things in 22 that a joint working group ought to do, which hasn't existed formally. There is informal collaboration, but we are suggesting more formal collaboration.

LTC McGOVERN: We could move 30 under 22(a) as part of the narrative and discussion, if that would help.

COL COOK: How long has the Navy been doing their evaluations? I am not familiar with that. With this thing, this quarterly evaluation process, is this something that just started or has this always been out there?

MR. BRYANT: It has not always been out there.

Do you know, Beth?

PROFESSOR HILLMAN: I don't know.

Kelly, do you?

VADM HOUCK: I don't want to get specific, but it was my

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understanding like, I don't know, at least several years --

COL COOK: It has nothing to do with the sexual assault case. It is just in the day-to-day evaluation, this person should be an advocate. I mean, I don't have a problem with that. I think that is a good idea, evaluating on both sides, who belongs in the courtroom, because we do assign people that don't always necessarily belong inside the courtroom, nor do they want to be.

MR. BRYANT: I think it was sometime after 2009.

CDR KING: Sir, I think when I was a reserve military judge, I did it, and that was from at least 2009, maybe even earlier.

REP. HOLTZMAN: I am fine with evaluations, but it just seems to me to be telling them that we need to have four evaluations a year -- maybe three would be fine or two, you know.

If they are going to look at it once -- that's my view -- if they are going to look at it already, we put that in 22(a). I think this is redundant and maybe a little bit too prescriptive. That is just my view. I mean, I could support it, but --

CHAIR JONES: Are we talking about judicial evaluations in both? Or is there another broader Navy evaluation? It is all judicial?

COL COOK: This says judicial in the findings.

LTC McGOVERN: The recommendation, the discussion explains that judges are evaluating what they see from the bench. Because once people leave the JAG school, they are evaluated by their supervisors, their general

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performance, but you never see whether that training is really working.

CHAIR JONES: So, it is all judges? Whether it is 22 or 30, we are talking about judicial review? That is all my question is.

BRIG GEN DUNN: It goes to the TCAP rather than uses it for training.

COL COOK: I'm so sorry.

BRIG GEN DUNN: It goes to the TCAP in the Navy.

COL COOK: In the Navy, and they use it --

BRIG GEN DUNN: They use it for training. So, it is not something that goes in the counsel's personnel files, as far as I can tell, because it is used for training purposes.

COL COOK: Is it defense, too, or just the prosecution?

BRIG GEN DUNN: I think it is just advocacy. I don't know.

LTC McGOVERN: So, if they identify do you not lay a foundation, the TCAP would know we need to improve our training on laying foundation.

CHAIR JONES: So, are we content to just leave 22(a) and (b) and not accept 30 because it is redundant? Or is there a different motion here?

COL COOK: I would like a proposal, what Colonel McGovern had said, where you could take -- I think there is value in evaluating from the judges' perspective what they are seeing in court, because often Judge Advocates, for whatever

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reason, don't always go to the courtroom and see what is in there. So, I think incorporating that as part of 22(a), saying, as part of that evaluation, let it be reviewed. And as part of that process, consider whether we should be implementing some kind of judicial evaluation process into the advocacy for both prosecutors and defense.

CHAIR JONES: Aren't we already saying that, that the working group is going to identify best practices and that would include the Navy's use of quarterly judicial evaluations of counsel?

COL COOK: And I am fine with that, yes.

CHAIR JONES: And so, I think we don't need --

COL COOK: So, go ahead and take it out.

CHAIR JONES: I don't think we need 30. Okay.

Thirty-one(a) and (b).

Let me just check.

COL COOK: Sorry. I like 31(b), that the SECDEF is going to assess the strengths and weaknesses of the co-location models used in the military.

My concern about 31(a) is this says we should go directly to this co-location model, and we have never tried it. Not all the civilian jurisdictions follow it. It is not going to be appropriate at all installations. It does have in there the language that says, "where case load justifies such an arrangement," but I think I would be more comfortable with just saying, if you are going to assess the weaknesses of different co-location models, as it states in (b), why don't we just make that the

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recommendation, and they can consider what is put in (a) or make it a pilot program to try it someplace.

But I think (a) and (b) to some extent contradict each other, because you are saying we should do one co-location model, and then, you say we should study the various strengths and weaknesses the way they are. So, I like (b).

CHAIR JONES: Well, are there co-location models now in the military?

LTC McGOVERN: Yes.

CHAIR JONES: There are?

LTC McGOVERN: Yes.

CHAIR JONES: So, it is not just special victim capability? They actually have a co-location model?

LTC McGOVERN: Yes. The table is on page 143 that shows the variety of co-location models that we visited in civilian and military jurisdictions.

PROFESSOR HILLMAN: Judge Jones, I think that we thought co-location is a good idea, when it is possible. We don't want to mandate it across the board. So, that is what these two parts say.

CHAIR JONES: Uh-hum.

PROFESSOR HILLMAN: The first one says, "when feasible". It is actually already working well in some places. We aren't positive it will always work well in those places because it depends on the individuals who are assigned.

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So, this is sort of a long recommendation pointing towards our conclusion that co-location was working and ought to be pursued when possible because of the advantages for the victims and the efficiencies that can be gained there, but that we think a broader assessment, what works in different places, makes more sense as an aspirational recommendation.

CHAIR JONES: Then, why don't we just go with 31(b) then?

PROFESSOR HILLMAN: We can. I think that the point of 31(a) is that co-location, in the absence of -- we don't want to undo where co-location is working. Some of the best models in the military right now are places where co-location is happening.

For instance, Joint Base Lewis-McChord, which is in Figure 5, No. 1 there, has everything together. It is actually working really well. It is model. They are pulling experienced personnel from that installation to serve other sexual assault investigation/prosecution needs in the Services.

So, we are reluctant to undo that. By saying that we assess all these different strengths and weaknesses, I think we just don't want to undo that. So, that is the point of the first one.

We are just losing some of the specificity in this. If you don't want to accept 31 -- 31 doesn't really say all that much in terms of what to do. It just sets out best practice, essentially. So, we could make 31(a) a finding instead of a recommendation and make 31(b) the recommendation, because 31(a) --

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CHAIR JONES: As 31(b) reads right now?

PROFESSOR HILLMAN: Yes, definitely.

REP. HOLTZMAN: But 31(b) doesn't give any indication that you think it is a good idea. And that is why 31(a) --

PROFESSOR HILLMAN: That's true. We do think it is a good idea.

REP. HOLTZMAN: -- does have some value, because it sort of says this is a good working model.

PROFESSOR HILLMAN: And 31(a) is so long with the last sentence because we also see some potential harm in this which has to do with the protection of the privilege.

COL COOK: Then, can I make a recommendation? Make 31(b) 31(a), and then, put your 31(a), instead of starting it the way it is where, again, you are being directed to tell the TJAGs, just start with recommendation -- take out the first couple of words. "TJAGs and MCIOs should continue to work together to co-locate prosecutors who handle sexual assaults," and everything else stays the same. So, we ought to continue to work it that way, as long as uses are available and it makes sense.

But, in the meantime, you should look at different co-location models to see what is best practices to be used in other places.

REP. HOLTZMAN: Are they working together now?

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COL COOK: According to this chart, yes. Yes, some are.

There are some places where they are already working.

PROFESSOR HILLMAN: Some are, in fact, working together now.

REP. HOLTZMAN: The TJAGs and the MCIOs, some are working together? Not all, but --

PROFESSOR HILLMAN: Well, TJAGs is saying the chief legal officers, essentially, right, do that and work together with the investigating officers.

REP. HOLTZMAN: Okay. So, my concern was, if you say "continue to work together" and they are not doing it now, then that doesn't really --

PROFESSOR HILLMAN: They are not all doing it now; that is correct.

REP. HOLTZMAN: So, then, maybe that recommendation is not --

PROFESSOR HILLMAN: We should just say "work together".

REP. HOLTZMAN: Yes.

CHAIR JONES: Okay.

BRIG GEN DUNN: Excuse me. Professor Hillman, I think it is safe to say that the one thing we took away from this whole co-location discussion is that investigators and prosecutors should be together, wherever possible, correct? That is the one thing we took away, civilian and military?

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PROFESSOR HILLMAN: Uh-hum.

BRIG GEN DUNN: And I think that is what we were trying to capture by separating these out. And then, there are other co-location models, some of which may have privilege issues, some of which may not be particularly applicable to the military. So, therefore, Recommendation (b) which is, you know, kind of keep an eye on all of them.

But it did seem to us to be that the prosecution and investigator co-location is clearly beneficial, and the language is in there "where caseloads justify and resources are available". I mean, that language is in there. We thought that was a pretty clear best practice that emerged.

CHAIR JONES: So, the first sentence, and I might leave in the last one because I think it is important to say you are not recommending.

REP. HOLTZMAN: Yes, I would have.

CHAIR JONES: Yes.

REP. HOLTZMAN: My suggestion is to leave it the way it is. I mean, you ought to invert the order, as Colonel Cook suggested. Maybe that is not a bad idea. But I don't know that the language needs to be changed.

COL COOK: Okay. Yes, Representative Holtzman, if I understand, so you would leave it at "The Service Secretary should direct the TJAGs"?

REP. HOLTZMAN: Uh-hum. Or you could have just the TJAGs and MCIOs, if you want, but --

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COL COOK: "Should work together," not "continue," "should work together to co-locate prosecutors who handle" --

REP. HOLTZMAN: Will they need the Service Secretaries' support if they want to relocate because they need the resources and other things? They don't need that? They can make those decisions on their own?

COL COOK: Yes.

REP. HOLTZMAN: That is my only reason for including the Service Secretaries, is that you may need to get their help if you need resources to co-locate people?

COL COOK: I don't think -- the TJAGs have assignment authority by law over their personnel.

VADM HOUCK: Right.

COL COOK: I don't know whether the investigators would need their own help. So, TJAGs can work with the prosecutors to put them on a co-location without Service Secretary support.

REP. HOLTZMAN: Suppose you need money for facilities? All I'm saying, you know, you want to put people together, but there's no facilities to have the people together. That would be my only concern, that if you need some money to make this happen, can these two groups do it on their own? If they can't -- you know, I don't know. That is where I defer to those people who know a lot more about the military than I do.

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CHAIR JONES: That's you, Colonel Cook. On the money.

(Laughter.)

COL COOK: Yes, I was going to say the point is well-taken, the money and the resources and the space, but they usually come from part of that installation commander. There is usually space on an installation or a base to start with.

REP. HOLTZMAN: Because the choice about locating a forensic examiner and that kind of stuff. So, I see money, dollar signs, and so forth.

VADM HOUCK: I think that concern is right. I don't think that TJAGs --

COL COOK: The TJAG doesn't own the --

VADM HOUCK: -- and MCIOs can do all of this.

REP. HOLTZMAN: Right. Right.

BRIG GEN DUNN: But if it is the Service Secretary's responsibility --

VADM HOUCK: Right.

BRIG GEN DUNN: -- then the funds will follow.

CHAIR JONES: So, we should leave "Service Secretaries" in.

COL COOK: Then, I would just ask -- then, I will accept both. Can we just switch them around? You know, have them assess the various strengths, and then, the points -- I like the statements that are in there, especially the lesson

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learned about the importance of the SARC, victim advocates, be careful about where you merge them.

CHAIR JONES: Right.

COL COOK: I like that point, but I would just recommend that they be upside-down. That is what drew my attention to it. When I looked at the first one, you're saying to do something; the second one, you're saying to assess it.

CHAIR JONES: All right. I mean, I agree with that. I think we can put 31(b) first and, then, 31(a).

Any objections?

(No response.)

All right, 31(a) and (b) are now reversed and accepted.

Thirty-two. It is the special victim capability.

COL COOK: I had said just to add the word "defense attorneys" after "prosecutors" in the third line.

CHAIR JONES: Of 32(a)?

COL COOK: Uh-hum.

CHAIR JONES: Okay. Accept this, just the prosecution side?

PROFESSOR HILLMAN: Yes, this is special victim capability.

COL COOK: What I didn't see is, do you, then, capture the further develop and sustain the expertise of defense attorneys in a separate recommendation?

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LTC McGOVERN: We do.

CHAIR JONES: Oh, we have lots of them. Yes, there are lots of them.

COL COOK: I saw the one where it talked about having them separately evaluated, but I didn't see it as strong as this.

LTC McGOVERN: The CSS members determined that defense counsel don't actually need to be specialized in sexual assault, as prosecutors who had the burden of proof. That is based on Colonel Morris and Colonel Henley --

BRIG GEN DUNN: Interesting.

LTC McGOVERN: -- and General Cooke's experience.

BRIG GEN DUNN: And if you go to Recommendations 36 and 37, you think they are very specific defense-focused recommendations coming up shortly.

LTC McGOVERN: We felt it was more important to have the defense supervisory leadership playing an important role in overseeing cases.

CHAIR JONES: Okay. All right. So, 32(a) is accepted.

32(b) there were no comments on, I don't believe. Accepted.

32(c).

COL COOK: I just didn't understand what the --

CHAIR JONES: Ah, okay.

COL COOK: The only comment I have written down was you

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want to reflect specific offenses currently listed in Article 120. What I don't understand is what happens -- Article 120 is screwed-up. And the offenses under Article 120 depend upon the timing when the offense occurred. So, when you are saying "currently under 120," I don't understand exactly what you are trying to capture, if you are going to end up missing offenses that were under it if a crime occurred in a different period of time. What are we going to lose?

I just didn't understand the recommendation. I am not saying I agree with it. My head hurt and I didn't get it at the time I read it.

PROFESSOR HILLMAN: It is just a change, making sure that we continue to track the definitions as they evolve in the DTM, which is what sets up the special victim capability with what the statute currently sets up.

LTC McGOVERN: Yes, if I can refer you to page 147? The second full paragraph explains the DoD policy of covered offenses. The way that they have defined covered offenses does not align with Article 120, 2012 forward, but it also, then, will include some things which are not a crime and exclude other things which are a crime. And that is why they need to relook; the Committee would say relook and revise.

COL COOK: Are they not a crime because the Article 120 changed and they are no longer included in there or are they not a crime because they never were in Article 120 under any of its versions?

LTC McGOVERN: Those situations could occur.

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REP. HOLTZMAN: Will it solve the problem just to remove the word "currently"?

BRIG GEN DUNN: No, because I think our whole perspective was they should continue to update the DTM to keep it tracking with Article 120.

REP. HOLTZMAN: Apparently, it may create an ambiguity because it may refer to right now as opposed to the future. So, if they change it in the future, maybe "currently" --

CHAIR JONES: Well, isn't another problem the fact that, depending on when the offense occurred, a different version of 120 may apply?

COL COOK: That is my concern.

CHAIR JONES: Yes.

COL COOK: Right, it is a different version of 120 that applies, and it might be different versions of it to different charges within the same --

REP. HOLTZMAN: I think we can fix this.

LTC McGOVERN: Rather than being too prescriptive, let them figure out what covered offenses if people just want to say Article 120. I think the Subcommittee just identified the problem and would have DoD figure out how to fix it. Because, currently, by just saying a covered offense is sexual assault, we're not including rape. So, clearly, there could be a disconnect.

CHAIR JONES: No, I think we are all in agreement we need this recommendation. Maybe all we need to do, and we can figure it out later, is say,

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"offenses listed in the relevant version of Article 120," something like that.

LTC McGOVERN: Okay.

CHAIR JONES: So, with that, 32(a), (b), and (c) are accepted.

Oh, I'm sorry, I missed (d). It is on the next page. We have
32(d). I don't see any comments with respect to (d).

Is 32(d), any objections?

(No response.)

All right, accepted.

Thirty-three. I see no objections on that. Any discussion?

Objections?

(No response.)

All right, 33 is accepted.

Thirty-four.

REP. HOLTZMAN: Madam Chair?

CHAIR JONES: Yes?

REP. HOLTZMAN: I just had some wording. Because this
talks about metrics, but it talks about in the same sentence "metrics that measure a
measure". So, I just thought somehow it should be rewritten. I have some
suggestions. I don't frankly care how it is rewritten.

CHAIR JONES: Well, let me read what your suggestions were
as they would change this, and then, we can just take a vote.

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"The Secretary of Defense assess the special victim capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics, including consideration of the victim dropout rate, rather than conviction rates, to determine success."

I think that was one of your suggestions. That makes sense to me. I think I would accept that.

All right? No objections?

COL COOK: Agree.

CHAIR JONES: Thirty-four is accepted.

All right, 35. Representative Holtzman clearly what does "the legal office" refer to in Recommendation 35. And when I read that, I realized I didn't know exactly what that meant, either.

COL COOK: The legal office on an installation. The investigators go on a post, camp, and station. So, where is the legal office? They will know where it is. And the investigators, wherever they are, there is a legal office that supports them, servicing the Judge Advocate, whoever that is. They need to notify their legal office.

LTC McGOVERN: And that is the language from DoD as well.

REP. HOLTZMAN: I understand that it is a technical term, but maybe somewhere for normal human beings it should be explained.

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(Laughter.)

MS. FERNANDEZ: "Servicing the legal office".

REP. HOLTZMAN: I still didn't get it.

COL COOK: Okay.

LTC McGOVERN: We can draft a footnote.

REP. HOLTZMAN: Yes, or maybe Finding 35-1 should be "The legal office is an office that" blah, blah, blah, does whatever. Give the definition right there.

MS. FERNANDEZ: Yes, the legal office and, then, define it.

And then --

REP. HOLTZMAN: That's all.

CHAIR JONES: So, we will add that to the findings, and then, people will know exactly what we are talking about.

All right. With that, Recommendation 35 is accepted.

Thirty-six. I see no comments. 36(a), 36(b).

PROFESSOR HILLMAN: The only thing on that, because of the conversation that we just had before where we took out, where I had said "defense counsel," we took it out, on here, I would just recommend adding in line 3, "including defense supervisory personnel with training and experience comparable...." So, you try to get the same level of support. They are adequately resourced and trained --

CHAIR JONES: Are you in (a) or (b)? I'm sorry.

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PROFESSOR HILLMAN: I'm in (a). I'm sorry. The third line.

CHAIR JONES: That's okay.

PROFESSOR HILLMAN: The third line where it says "with," add the words "training and".

VADM HOUCK: This is where I want to note for the record that I am speaking in enthusiastic support of 36(a) and (b) and, when we get there, 37 and 38.

CHAIR JONES: Move to accept.

(Laughter.)

VADM HOUCK: But at the risk of being held in contempt, I think these were the provisions that I was thinking of when I was contrasting them back to Recommendation 26, which, as I have had some period of somber reflection here, I think merits at some point even more discussion in light of these recommendations, which I think are really sound. And so, at some point, I would like to revisit 26 in light of all of these.

CHAIR JONES: Fair enough. We'll do that.

VADM HOUCK: Yes.

CHAIR JONES: Now, I'm sorry, but you want to add what to 36(a), the third line? My apologies.

PROFESSOR HILLMAN: That's okay.

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Just after it says "supervisory personnel with," add the two words "training and", "experience comparable to their prosecution counterparts."

CHAIR JONES: Any objection to that?

(No response.)

Okay. Then, (a) is accepted.

36(b), any comments?

(No response.)

All right, (b) is accepted, 36(b).

And 37, there were no comments about this, and Admiral Houck has spoken in enthusiastic support of this one and 38. Well, we have some discussion on 38.

Thirty-seven accepted. Yes, 37 is accepted.

All right, 38.

COL COOK: You have spoken in enthusiastic support of it. My concern about singling out -- it is the only recommendation that is here that we are saying the Secretary of Defense direct the Services to assess military defense counsels' performance in sexual assault cases.

We are not directing a separate assessment of the trial counsel in sexual assault cases. I don't see us doing that here.

I do agree that, if you are going to go to something like the Naval Judicial Examination or input into how people do in court, I think that is fair. But I

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think we have performance evaluations annually, professional responsibilities. There is a Senior Defense Counsel in those installations, a Regional Defense Counsel, and their constant assessment. They are not going to take chances on a defense attorney, and I do not agree with having a separate evaluation process just for the defense attorneys.

It looks almost like we are singling them out when they are trying to do their best for their client. If they don't belong there, they would taken out of that. I have complete confidence in that.

So, to me, this is just very one-sided.

VADM HOUCK: I think my enthusiastic support for what I think the Subcommittee was trying to get at is the notion of really evaluating counsel performance. And I am not sure that our current system of fitness reports gets at that as rigorously as it could, which is why in the Navy we went for those judge evaluations of what counsel do.

So, to your point that it should be equitable on both sides, I completely agree with that.

COL COOK: So, I don't mind if you want to say "to assess military trial and defense counsel performance in sexual assault". If you have both, that is fine. I was concerned about singling out one or the other.

PROFESSOR HILLMAN: Agreed, we shouldn't single them out.

Colonel McGovern can speak more of this. But we already

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actually are looking at prosecutors and at Special Victim Counsel, including surveys, for instance, for Special Victim Counsel. We actually are using metrics to assess effectiveness in these other realms. So already defense counsel are singled out for not being actually subjected to measures.

LTC McGOVERN: This is parallel to Recommendation 34 for prosecutors where DoD has established their memorandum with a list of like eight metrics for Special Victim Prosecutors, and CSS recommended -- in addition to that, the Army measures dropout rate to see if prosecutors are keeping victims onboard.

And DoD directed that for all Special Victim Prosecutors. DoD has not taken any steps to look at metrics for defense counsel. So, that is where there was a parallel made.

COL COOK: No, and I don't see it as clearly stated in 34 as I do here in 38. If there is already a requirement that Special Victim Counsel have a separate evaluation, then I would suggest that become a specific finding underneath that recommendation, that you've got to find the units since there are no requirements to measure defense counsel's performance. Then, why not note the fact there is a requirement that Special Victim Counsel, the prosecutors' performance, is evaluated, and you're filling the gap? You are saying it is for one right now, but not the other, and your recommendation is just going back out.

If it is not, then I don't object to this as long as you put "trial counsel" in front of "defense counsel" as well.

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LTC McGOVERN: And if you look on pages 150 and 159, that is exactly what CSS did, Finding 38-1. "There are currently no requirements to measure military defense counsel."

And certainly, for the RSP's final report, we can add to that 'See 34,' or whichever, from page 150, where there is a list of those.

COL COOK: Because one challenge you are going to have is you have a 594-page report, and that is amazing. It's a lot of work, and someone who needs background will go to it. But, for the most part, people are going to go to the Executive Summary and they are look at just what is here. And right now, what it looks like is the defense counsel is just singled out in this one differently than it is anyplace else in the report.

So, I am just looking for so balance or the finding specifically stated here that says it is already done for the prosecutor side; we think it ought to be done for the defense as well. And I would agree with that.

BRIG GEN DUNN: Yes, I think that is a good idea, to capture that in 34 it is already done for prosecutors.

CHAIR JONES: So, you want to add to the finding underneath the recommendation?

BRIG GEN DUNN: Yes.

CHAIR JONES: And that makes it clearer?

COL COOK: To me, yes. It says it is already done for

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prosecutors; it is not done for the defense. So, there is a gap. Your recommendation is just filling that gap. It is not singling them out.

CHAIR JONES: But the recommendation itself everyone agrees with?

COL COOK: Yes, the recommendation itself would be fine with me then.

REP. HOLTZMAN: We might, instead of putting it in a finding, then, actually, put it in the recommendation. Put a comma at the end, and say, "given that such assessment of prosecutor performance is already done," something like that.

COL COOK: They do; performance is already done for prosecutors. That's good.

REP. HOLTZMAN: Then, you don't have to look anywhere else.

CHAIR JONES: Yes. All right.

REP. HOLTZMAN: Some people don't even read the findings.

(Laughter.)

COL COOK: But we can't help that. Okay. So, I feel better with that.

CHAIR JONES: Any objections?

(No response.)

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Okay. So, we will add that to 38 --

COL COOK: Thank you.

CHAIR JONES: -- in the text of the recommendation.

And 38 is accepted with that.

COL COOK: Enthusiastically.

(Laughter.)

CHAIR JONES: Enthusiastically.

Recommendation 39. No comments that I see on that. Any discussion?

COL COOK: To me, this is just like asking a defense attorney, "Have you given the accused his allocution rights?" and "Prosecutor, have you given the victim all their victim rights?" Is that what the intention is? If it is, I have got no objection.

CHAIR JONES: Well, this just requires judges to inquire on the record.

COL COOK: Yes. Okay. That's fine.

CHAIR JONES: Any problems?

COL COOK: No.

CHAIR JONES: All right, 39 is accepted.

PROFESSOR HILLMAN: Judge Jones?

CHAIR JONES: Yes?

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PROFESSOR HILLMAN: Excuse me. Pardon me.

In the interest of economy, could we accept all the Victim Services Subcommittee recommendations related to this one? It is 34 --

CHAIR JONES: I need to find my chart.

PROFESSOR HILLMAN: This is in 34, Victim Services. This is 34, 34(a) and 34(b) all relate to 39. And I think 39 implements these mechanisms, which is going on the record, essentially, on the victims' rights.

COL COOK: No, on 34, when we met last time, we said that it was deferred for now, and we were looking for some best effort language.

Thirty-five said "Not accepted, but keep the finding."

CHAIR JONES: Well, why don't we do this?

Thank you, Professor Hillman.

We have accepted 39, which basically requires military judges to inquire, to make sure that the trial counsel are complying.

And the first recommendation in VSS that relates is 34, which says, "Implement mechanisms to ensure that victims are notified of and accorded the rights provided by Article 6(b) UCMJ."

Well, Recommendation 39 from the Comparative Systems is certainly one way to implement. So, it is not inconsistent.

BRIG GEN MCGUIRE: There just may be more ways than that.

REP. HOLTZMAN: I'm sorry, you're looking at 39, and now

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looking at what? Can you --

CHAIR JONES: This is what you need. We were comparing this.

REP. HOLTZMAN: Oh, the Victim Services with 39?

CHAIR JONES: Right, the Victim Services. Actually, no, we're comparing Comparative Systems 39 with Victims Services in this chart.

REP. HOLTZMAN: Okay. Well, I have them both here.

CHAIR JONES: Thirty-four.

REP. HOLTZMAN: Yes, they're right here, yes.

CHAIR JONES: Okay.

REP. HOLTZMAN: Victim Services 34, right. I'm sorry.

So, the question before us is what?

CHAIR JONES: Well, so far, all we have said is that 39, which we have accepted already, isn't inconsistent with Recommendation 34 from Victim Services. What we have accepted is one way to implement mechanisms to ensure that victims are notified of and accorded their rights.

Are there other ways that Victim Services has come up with, other specific suggestions along the lines of 39?

MS. FERNANDEZ: Well, if you look at 34(a) --

CHAIR JONES: Uh-hum.

MS. FERNANDEZ: -- it starts with military investigators, and

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39 doesn't seem to reach them.

CHAIR JONES: Okay.

MS. FERNANDEZ: So, starting with the investigators, the victims should be told about their rights. If this is being done right, by the time that the victim gets to the judge, the victim should be like, "Yeah, yeah, yeah, yeah, all that's been done."

So, it should be the investigators, the trial counsel, the Special Victim Counsel, everybody along the way should be informing the victim of their rights.

CHAIR JONES: So, is 34(b) the same as 39? And we'll get back to 34(a) in a minute. 34(b) of VSS, "Defense recommend to the President..." So, I think those two, we accept 39 and strike 34(b) from VSS.

Okay, so we should discuss 34(a). "Recommend to the President changes to the Manual for Courts-Martial."

COL COOK: On the VSS finding, this reminded me of something and we discussed this last time. Under Finding 34-2, the Criminal Victim Rights Act requires that prosecutors and investigators use their, quote, "best efforts" to see that the crime victims are notified.

I would request that the language of that you use your "best efforts" be incorporated both into 39 and into 34(a). So, at the last part of the line of 34(a), which does reach to the investigators, which 39 doesn't, it says "the military/civilian employees engaged in detection, investigation, and prosecution of a

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crime use their best efforts to notify and afford victims the rights specified in Article 6(b)."

The same thing with No. 39. I'm sorry. I will just go back to say, "Ensure trial counsel use their best efforts to comply with their obligations."

If there are reasons why that doesn't always happen in the civilian community, I can guarantee you that the Expeditionary Force, a victim who leaves the Service who might have rights even during the appellate process, there may be reasons why somebody is not notified. So, I don't think it should be any more stringent on the military than it is for the civilians, which is the "best efforts" here.

LTC McGOVERN: And I think that Comparative Systems received information from JSC-SAS that one of the best practices is investigators, prosecutors, everybody has a card that they just continually hand out to inform victims of their rights, and that satisfies the "best efforts".

REP. HOLTZMAN: Forgive me for asking this question, but is that specified in any of our recommendations?

LTC McGOVERN: I don't know if it made it into the VSS report. It is not in the CSS report, no.

MS. FERNANDEZ: I mean, the problem with the card is -- I wouldn't say it is a "best effort". I think it is "an effort". I mean, I think somebody needs to explain to you what that card means. Otherwise, particularly if you're in trauma, you have absolutely no idea what that card means.

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COL COOK: Well, then, do you want the trial counsel being the one that gives it to you or do you want the Special Victim Counsel who is there to help you, and you might have a more appropriate relationship --

MS. FERNANDEZ: I want everybody.

(Laughter.)

I want everybody to be on it.

REP. HOLTZMAN: Would everybody be handing out that card?

MS. FERNANDEZ: I think by the third time you get the card and you still don't understand it, then there's a problem there. But, hopefully, it is not so much the card; it is that every time you hit somebody from the criminal justice system or the military justice system they are explaining to you what your rights are. So, if you don't get it the first time, you are going to get it the second time; you're going to get it the third time.

PROFESSOR HILLMAN: I think that the importance of that sequencing and repetition means that we should keep something like 34(a), which actually lists the different parts that you're specifying here.

MS. FERNANDEZ: Uh-hum. Right.

PROFESSOR HILLMAN: But I think that probably 34 --

MS. FERNANDEZ: Thirty-four is the umbrella. I think we can get rid of 34.

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PROFESSOR HILLMAN: Yes, I think it is subsumed by the other two. But I think 34(a) we should adopt that because it is giving this list, and we don't have a precise set of procedures that we want to recommend.

MS. FERNANDEZ: Right.

PROFESSOR HILLMAN: But we are recommending changes in regulations to ensure that these different parties in the process advise victims of their rights essentially.

REP. HOLTZMAN: Yes. I agree with that. My only question is, should we indicate in this list of people, including the practice of handing out a card, or should we not refer to that at all? No, you don't think it is necessary? Okay.

MS. FERNANDEZ: We don't have to say the "how", just that they need to do it.

COL COOK: Is there any objection to incorporating the using "best efforts" standard into both 39 and 34(a), so that it mirrors what the CVRA is?

CHAIR JONES: I think we have to incorporate "best efforts" --

COL COOK: Thank you.

CHAIR JONES: -- because there's a lot of rights there. Well, I don't know what happens to you if you violate the Manual for Courts-Martial by missing a couple of rights when you advise them. So, I think "best efforts" is important.

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COL COOK: So, we are just going to make 34(a) become 34 for the VSS?

CHAIR JONES: Sure. Hold on one sec. Sorry.

So, we have accepted 39 already, and we would make 34(a) with "best efforts" added, and we would also put -- that would make it 39(a) and (b)? Is that what we are doing?

PROFESSOR HILLMAN: I think we should leave numbering to our staff looking at it.

CHAIR JONES: That sounds like a great idea.

MR. BRYANT: But are we incorporating the use "best efforts" language into 39 as well? "The Service Secretaries should ensure trial counsel use their best efforts to comply with the allocation to afford...."? It makes it consistent with the other.

One is the trial counsel and having the judge ask. And if trial counsel hasn't been able to do it, they are going to have to state on the record why they were not able to give the victim their rights.

PROFESSOR HILLMAN: I don't have a strong feeling, but the fact that this is on the record with the judge, the judge is actually complying, he is inserting a standard of compliance anyway, not a sort of bright-line rule that is leading to --

CHAIR JONES: I am not so worried about trial counsel when it

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comes to -- they should know how to advise them.

COL COOK: I'm not, but it is CVRA saying prosecutors and investigators use best efforts. I would say the same here.

CHAIR JONES: I see.

COL COOK: And that is what in Finding 34-2.

CHAIR JONES: Parallel?

COL COOK: Right. I just don't want a higher standard for us. Then, it could be more difficult, depending on the circumstances.

CHAIR JONES: Well, actually, 39, though, it is the Secretaries are ensuring, they are making their best efforts to ensure that trial counsel comply.

REP. HOLTZMAN: I think the term "obligations" includes the "best efforts". I mean, it is modified by the idea of "best efforts" because the obligation is to be ensured in all cases, is to use their best efforts. So, I think I wouldn't worry about 39. I think as long as it is in 34(a) and (b), then I think you are okay.

CHAIR JONES: I agree with that.

BRIG GEN DUNN: But we dumped 34(b). We dumped that, right?

CHAIR JONES: All right. So, 34(a) will include "best efforts"; 39 is going to stay the way it is, and the staff is going to figure out the numbering.

REP. HOLTZMAN: And 34(b) also needs to have it.

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BRIG GEN DUNN: We dumped 34(b).

REP. HOLTZMAN: So, we dumped 34(b) already.

BRIG GEN DUNN: It is just going to be 34.

REP. HOLTZMAN: Okay. I'm sorry.

CHAIR JONES: Okay. Recommendation 40.

LTC McGOVERN: Judge Jones?

CHAIR JONES: Yes, Kelly?

LTC McGOVERN: In your packet you have a PowerPoint presentation which aligns with that Excel spreadsheet. And it went on to say the specific mechanisms in the findings. Did you want to go over the findings as well for the Victim Services or just stick with the recommendations at this time?

CHAIR JONES: Stick with the recommendations.

LTC McGOVERN: Okay. Thank you.

CHAIR JONES: Okay. So, thanks, Kelly.

We're on 40. I don't see any -- do I see any comments? Two.

Okay. All right.

MS. FERNANDEZ: Could Dean Hillman explain it?

CHAIR JONES: I'm sorry, Mai, what did you say?

MS. FERNANDEZ: Could Dean Hillman explain 40? I am not sure I am understanding 40.

PROFESSOR HILLMAN: This is an effort to evaluate Special

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Victim Counsel not only by --

MS. FERNANDEZ: It says "Measure the performance of the defense counsel" on the top.

LTC McGOVERN: Right. That is a mistake. It should be "Measure Special Victims Counsel".

MS. FERNANDEZ: Okay. No problem.

LTC McGOVERN: I apologize. That was a typo

MS. FERNANDEZ: I guess my question is in just reading this, do prosecutors evaluate defense counsels and judges? Does that ever happen?

CHAIR JONES: Uh-uh.

MS. FERNANDEZ: So, then, why are we having a special evaluation by them of Special Victims Counsel?

PROFESSOR HILLMAN: Because this is new and we don't know how it is going to work out yet. And we would like to get multiple angles on how it is going. This doesn't give a sort of veto or promotion-based assessment or anything of the SVC. But because this is a novel process and we aren't sure how it is working, we were looking for multiple angles from which to assess how the SVC is working out. That is what this was about. So, to have more than the Victim Satisfaction Surveys on this new corps of attorneys who are engaged in the process.

BRIG GEN DUNN: It is not how bad they are doing their jobs; it is how, what problems we assess in the courtroom process, and what --

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MS. FERNANDEZ: That is a survey, not evaluate. It seems as though these are the actors who have some sort of supervisory power over the Special Victims Counsel, the way it is written now.

COL COOK: And you can take some of that out by saying -- you're saying not the individual; it is the process generally. Then, why not say that it is the Special Victim Counsel Program as opposed to the individual, the counsel themselves.

MS. FERNANDEZ: Right.

VADM HOUCK: In particular, if I am a defense counsel, I have to think hard about what I say at all about this.

COL COOK: Not upfront. It says "Victim satisfaction with Special Victim Counsel". Oh, okay. So, you are saying the victim has got to do the satisfaction with the counsel, and the Service Secretary has got to do assessments with the program. I got it.

REP. HOLTZMAN: Yes. But where does it say -- oh, I see.

COL COOK: The question, I guess, is every SJA, every defense counsel, every case? I just didn't understand what --

MS. FERNANDEZ: It is to survey them, to talk to them, to get input, but I don't like the word "evaluation". It just seems they have some sort of supervisory --

BRIG GEN DUNN: The Service Secretary's survey, that's their

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job, to get prosecutors, defense counsels, and investigators in order to assess or determine or something, yes.

LTC McGOVERN: Provide feedback.

BRIG GEN DUNN: I could live with that.

VADM HOUCK: Is there any institutional issue with asking defense counsel to provide feedback on a program that on some level helps put their clients behind bars?

REP. HOLTZMAN: Well, they may have a negative view about it. So, that would be important to have.

VADM HOUCK: Okay. Okay.

REP. HOLTZMAN: It doesn't say it has to be positive. They can say, "Oh, this is terrible. It is undermining my ability to provide defense," right? That is how I read it. I could be wrong.

MR. BRYANT: We heard on a site visit that some counsel, defense counsel -- so, we talked about that -- thought that the program was redundant --

REP. HOLTZMAN: Was what?

MR. BRYANT: -- was redundant because of the victim liaison programs that existed and, also, thought, quoting, "good for public perception, but a waste of manpower". Now that is the sort of thing I think the Secretaries would want to try to evaluate and take a look at. So, yes, just in general.

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Prosecutors, on the other hand, on that site visit told us it was all working fine and no problems.

I think we found out, and they brought up last time or our last public meeting that some of the Special Victims Counsel were calling the local prosecutors' offices, and whether or not that was contemplated or intended, and I got a lot of "noes," it was not contemplated nor intended.

REP. HOLTZMAN: You know, now that you raise this point, Mr. Bryant, why aren't judges included in this list?

MS. FERNANDEZ: They should be. They should be.

MR. BRYANT: Yes, absolutely, sure.

MS. FERNANDEZ: It is everybody who exists in the system should be surveyed as to how it is working.

MR. BRYANT: Yes, and that was really our intent, just to see how it is working, because even the Special Victims Counsel on this particular site visit told us they are unsure of where in the program they should sit. Do they stand when they address the Court? Do they have standing to address the Court? So, all those issues are still out there, and we are just trying to give a mechanism or suggest a mechanism for getting a handle on assessing this.

VADM HOUCK: Should convening authorities be asked as well?

MS. FERNANDEZ: Sure.

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CHAIR JONES: Convening authorities, military judges, Staff Judge Advocates, prosecutors.

MS. FERNANDEZ: Investigators.

CHAIR JONES: We have them in here I think already, right, and investigators.

REP. HOLTZMAN: SARCs? Do we have victim advocates and the rest?

MS. FERNANDEZ: Yes. I mean, because they may be thinking that they are tripping over each other.

CHAIR JONES: All right. So, we will expand that list to cover the players.

And I only have one question. In addition to assessing victim satisfaction with Special Victim Counsel, are we saying in the second line it is Service Secretaries direct assessments of the Special Victim Counsel Program? Is it "program" in both lines or "counsel" in one and "program" in the other?

REP. HOLTZMAN: That's a good point.

PROFESSOR HILLMAN: It should certainly be "program" in the second. And if it is "program" in the second, it might as well be in the first, too.

CHAIR JONES: All right. So, we will make it just the "program" in both instances.

PROFESSOR HILLMAN: That's right. And we do want to

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soften that language at the top, the general language, "The Service Secretaries' Survey" --

CHAIR JONES: Survey, survey.

PROFESSOR HILLMAN: -- to assess --

CHAIR JONES: Survey to assess?

PROFESSOR HILLMAN: Yes.

CHAIR JONES: Okay. All right.

So, with those modifications, we approve 40? Fair enough?

Okay. Forty is approved.

Okay. Forty-one. Forty-one is parallel with a Victim Services Recommendation. Let's see.

PROFESSOR HILLMAN: So, Judge Jones, sorry. Victim Services introduced this. This is in response to a mandate to assess the pending litigation. This is the section of the Victims Protection Act which --

CHAIR JONES: Right.

PROFESSOR HILLMAN: -- puts the victim's preference into the jurisdictional process.

CHAIR JONES: And these aren't inconsistent. They are the same. Everybody is agreeing that 3(b) should not be enacted?

MS. FERNANDEZ: Well, no. I mean, what we said was we needed more evidence. We needed some hearings on it, that before it get enacted,

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that we actually get more evidence. So, we defer the adoption while --

CHAIR JONES: You're saying out now, yes.

BRIG GEN DUNN: Yes. I mean, it is either -- if the offense occurs on exclusive federal jurisdiction installation, you know, there is no trial by the State of Tennessee in the case. So, the victim's preference doesn't impact on it. If the case occurs in the civilian jurisdiction, you know, at that point I guess the victim's preferences might be considered.

MS. FERNANDEZ: I thought this was saying that, even if it happens in an installation, great weight should be given to the victim to choose not to be tried in military court.

BRIG GEN DUNN: But, then, who would do that? The U.S. Attorney's Office, and we had evidence that said don't do that because the U.S. Attorneys don't have any more experience prosecuting these criminal cases, sexual assault cases, than the military prosecutors do.

But that was a very frank discussion, yes, that we had with some U.S. Attorneys who said they did not think that they had any more experience at this.

MS. FERNANDEZ: Are you okay with that?

CHAIR JONES: I am.

MS. FERNANDEZ: Okay, let's not do it.

CHAIR JONES: So, Recommendation 41 is accepted. VSS --

REP. HOLTZMAN: Yes, and the reason, also, that I could

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support that is because we have a Special Victims Counsel there, and if the Special Victims Counsel for some reason thinks that there is a better for going to the civilian court, I am sure they would say it.

BRIG GEN DUNN: Yes, or there is legally an option.

REP. HOLTZMAN: Yes, right.

BRIG GEN DUNN: I mean if it is an exclusive jurisdiction installation, there is no option.

CHAIR JONES: All right. Forty-two.

Mr. Bryant?

MR. BRYANT: Really, it is just a minor objection. And the more I re-read this, I guess we are just suggesting that -- and maybe I should ask the question of myself and my Subcommittee since I was on it -- are we asking the Judicial Proceedings Panel to come up with the wording for legislation, that is, to recommend specific legislation? Because if that is what we are doing, then maybe I withdraw my objection because, certainly, we don't have time, nor are we in a position to craft the legislative change that we would like to see adopted. So, if that is what we are recommending, then that is fine.

I think it is clear that throughout this in all three Subcommittees we found issues and problems with Article 120 the way it is currently worded and what it does include and what it doesn't include. And it has got ramifications for a lot of folks, the prosecutors, defense attorneys, and so on.

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So, I think we could recommend that Article 120 needs to be changed. But, to repeat myself, and then I will stop, if what we are saying is we are recommending the Judicial Proceedings Panel come up with a specific legislative recommendation and wording, then I have no objection to that.

PROFESSOR HILLMAN: Judge Jones?

CHAIR JONES: Yes, Professor?

PROFESSOR HILLMAN: Mr. Bryant, we were torn on what to say on this, and this is a compromise recommendation which does not say the Judicial Proceedings Panel should recommend a change. It says they should consider whether to recommend a change. So, actually, it is not quite the route that you stake out.

MR. BRYANT: Well, it says "recommend legislation," and maybe that is why I keyed-in on are we asking them to rewrite the statute and make a recommendation there. Because, otherwise, I think our Subcommittee and this Panel could say we recommend that Article 120 be parsed out, broken down into segments that are more, like can be dealt with easily by both the convening authorities, people who want to not prosecute collateral misconduct, that sort of thing. It has been replete through all of our hearings that Article 120 as currently written creates some problems.

CHAIR JONES: I think the way you describe what you are recommending the JPP to consider touches on both of those issues.

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MR. BRYANT: I don't want to hang it up because it does need to be considered.

CHAIR JONES: Yes. Right.

MR. BRYANT: The only issue is, should this Panel say, "Hey, Congress, 120 needs to be changed. Thank you very much." Or do we move it on down to the Judicial Proceedings Panel? That's all.

COL COOK: I think the fact that it has been changed so many times in recent years has made what is already a complicated provision of the UCMJ even more complicated. So, having it out there to say, "JPP, look at this. Should it be studied?", I wouldn't wait for the JPP to get started.

I would also just add into here the Joint Services Committee continually looks at changes to the UCMJ and what needs to be up there. I think this one needs to be looked at by them, and I am sure they are going to have to testify in front of the JPP. But I would just add the Joint Service Committee, which it already routinely looks at changes to the UCMJ and the second- and third-order effects those changes may have.

I would add them to it. "JPP, you look at it." "JSC, you look at it and decide do we need to change the stat, and if so, how? And how do you implement that change, so that it makes it better, not even worse than what it has been over the years?"

BRIG GEN DUNN: And what we are trying to get at, aside from

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all of these issues, is that in the civilian world when you say "sexual assault," you are talking about penetrative offenses or the attempt. In the military where we are going to say "sexual assault," you are talking about that broad range in 120. And somehow we have to separate that out, so that everybody understands that, when we use this terminology, we are talking about serious crimes. When you use this terminology, you are talking about much less serious crimes.

CHAIR JONES: Potentially.

BRIG GEN DUNN: Exactly.

CHAIR JONES: Right. I don't have a problem with adding -- who is it we are adding, the Joint Services? Is there any reason not to that anybody can think of?

(No response.)

Okay.

LTC McGOVERN: In some of the previous recommendations we have just said the Secretary of Defense, knowing he is going to refer it to OGC or JSC, do you want to stay consistent with that or did you want to specify?

For instance, in studying collateral misconduct, we know that that will be referred to JSC, but we said "Secretary of Defense".

CHAIR JONES: I think Joint Services -- collateral misconduct, we want to get the Secretary's attention, not that we wouldn't want his attention on this, but this is sort of more -- these are the people who are going to look at it in detail.

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We know it. So, I am happy to have the inconsistency.

(Laughter.)

Enthusiastically.

So, is 42, with the addition of the Joint Services Committee, accepted?

(Chorus of yeses.)

All right. Forty-two is accepted.

Forty-three. Let me just see. Yes. We are saying 43 does go through (a) through (f). Okay. And 43 also has parallel to it a Role of the Commander suggestion. Okay.

So, 43(a) is on the subject of military judges. And the initial recommendation is that they should be involved in the military justice process from preferral of charges or imposition of pretrial confinement, whichever is earlier, to rule on motions regarding witnesses, experts, victim rights issues, and other pretrial matters.

REP. HOLTZMAN: Madam Chairman?

CHAIR JONES: I'm sorry, Liz I didn't hear you.

REP. HOLTZMAN: I was just asking for the right to be heard because I have a question about this.

CHAIR JONES: Please.

REP. HOLTZMAN: I mean in general, in my own

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preconceptions, it sounds like a very fair recommendation. But before I can support it, I would like to know what kind of investigation that you did, Professor Hillman, in your committee about this. And what impact this would have on the system.

I mean to me it's very concerning that defense counsel for example has to ask the trial counsel for permission to examine witnesses and find witnesses. And to reveal basically trial strategy and defense strategy. And this is something that I'm uncomfortable with about having judges resolve these issues.

But I think it's in terms of being responsible, what evidence, what examination did you do, the impact that this would have on the system -- on the existing system.

PROFESSOR HILLMAN: So maybe I should talk generally about all the recommendations related to those roles of a military judge. And that's -- the recommendations are based on the military justice experience of the subcommittee.

So people who came from different positions of responsibility, so judges, defense counsel, prosecutors, in military justice, and then the comparable civilian system. Because we were comparing the systems, we were comparing what's different about the military justice system compared to what's happening.

So the first recommendation is to involve the military judge earlier. And we thought about exactly what point that should be at. Referral of charges, or a position of pre-trial confinement, whichever one is earlier, so that motions

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would be resolved more efficiently.

This is based not only on what we saw when we talked to defense counsel about issues that came up, but also the experience of those on the subcommittee, and existing research into this, including a report that's highlighted in the discussion, a 2004 Army study of this issue, that recommended changes very much along the lines of what we set out here.

So the first one suggests the military judge gets involved earlier to streamline the motions. To continue the evolution of the sort of court-martial -- of a court that comes into being when the charges are referred to trial, to a court that actually comes -- that is available for resolution of legal issues at an earlier point in time. The essentially the preferral of the charges, that initial point.

The second recommendation runs to we may need more judges in order to do this. So look at whether a cadre of judges, of magistrate judges would be required.

The next one runs to the pretrial requests from the defense. And that goes to making sure that defense counsel have enough -- have the resources they need going forward.

The next one says if we're going to have military judges there, they might as well issue subpoenas for defense counsel, because they can't do that right now. That's another thing that came up repeatedly, that defense counsel struggle with a lot.

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And then finally, the sentencing piece of this. Actually, first before we get to the sentencing piece, we're at the -- military judges and their role as judges. Their -- what we recommend that they be actually judges in the Article 32 and make a probable cause determination that would be binding. So that if they dismiss a case for lack of probable charge, it would be without prejudice to coming back again. But it wouldn't allow the -- it wouldn't allow charges to go forward at that point because they'd be making a decision about that.

Which again, is a sort of rationalizing of the process with an eye towards if we're going to have a judge involved from there, and we're going to make a probable cause determination, it makes sense to have the military judge, as a military judge, in the process there. So that's what that's based on.

REP. HOLTZMAN: And did you look at what impact this would have on the handling of sexual assault cases?

PROFESSOR HILLMAN: This would -- it would ease the defense of sexual assault cases in some ways. We also thought it would potentially slow the ratchet towards prosecution in every instance when it's not warranted. Because we were concerned about that and heard concerns about that in the field. And the elevation of the referral, which we -- of referral decisions, which we actually reference later. This is also another way to service some, you know, objective authority making decision in those cases.

So that's what -- it's a response to other changes in the system.

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Inserting a decision maker earlier. Really many of these issues, it's an efficiency issue in part. Many of them come to the military judge already, they just come later.

And we thought this would not be -- this isn't a huge change of what they're doing already. It's a -- this first part at least, it's a modest change, because they do see these issues, they just don't get to resolve them from the start.

MS. FERNANDEZ: My recollection also on the victim services was that if a victim was denied his or her rights, they wouldn't have any recourse if the trial hadn't begun because there was nobody to bring it to. And in most of those things, those things are timely.

And you lose your moment to get notice on something, it doesn't help if you're going to get a, you're going to have a judge down the line. You need it pretrial.

PROFESSOR HILLMAN: Judge, I'd ask the other members of the subcommittee here to weigh in on their sense of what our goal is at this time.

MR. BRYANT: Well, we were also trying to eliminate the fact that we heard in site visits that defense counsels' request for expert witnesses were routinely denied. This -- and we thought if we had a judge who could hear those requests, and they would have to have some basis, and I think in one of our recommendations, we actually put some of -- and ex parte hearings were appropriate, or were necessary as determined by the judge. So that was one of the things that we were trying to move along.

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Also, at one of the site visits, we heard from, well I won't say who we heard from because we're not supposed to. But a lot of these cases, the sexual assault cases were taking up to two years to get to trial.

So that when the victim or the defense had issues, that they needed to be resolved, if they had to wait to get before an actual military judge, it was often, and they used the word often, two years from the time the case was referred -- or preferred rather, to the time that it actually got to trial.

So we're trying to get a judge involved earlier so that some of these issues that hang out there apparently for up to two years can get resolved earlier.

CHAIR JONES: One quick question. Right now, once you get a judge after referral, they do decide whether you get an expert witness or not. Am I right about that?

BRIG GEN DUNN: Yes. The issue is the delay. Because now the defense counsel comes into the trial counsel and says I need an expert witness for the following reasons. In the obvious cases it's not an issue, and it generally proceeds through, and defense counsel gets the expert and we all move along.

But in the cases that are a close call, or in cases where the government, trial counsel thinks that the defense request is ridiculous, then the request is denied. And the defense counsel then has no recourse until the case is referred.

And then if the judge decides to join in, then you're building more delay into the process. So it makes sense to us just to get the judges involved

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earlier to you know, have the authority to resolve those issues earlier in the process.

LTC McGOVERN: That's also where Judge Henley had said he would have to reopen Article 32s. If that was even a remedy. Sometimes it is too late to even cure.

BRIG GEN DUNN: I just think we support the proposal.

CHAIR JONES: I'm sorry, Russ?

MR. STRAND: It provides judicial oversight for the whole process. Right now it's not there. It involves most issues, or other military rules of evidence issues that are coming up, on the hearing record as the JAG oversees it, and have no judicial oversight on decision making.

And those can cause a lot of problems for you know, maintaining the victims rights. Some of the stuff that shouldn't come in, actually do come in. And that would provide additional protection for the victim's rights.

COL COOK: Some of the things that didn't come in do come in where?

MR. STRAND: In the 32.

COL COOK: But that would be cured now having changed the Article 32 process. So are we trying to cure something that's been cured based on the change to the procedures. I mean things that come in at the Article 32, you're right, under the procedures as they have stood, if it was an Article 32, and the case could be played out, a victim would testify, a person could be cross examined, which as

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we've seen happened.

That has arguably been cured. Or that's the intent. So Judge Henley when he testified, or when he gave a statement saying that they think the military judge ought to sit over the Article 32 and have it become a binding decision later on, and they become the same judge that sits. I don't know even under the new process whether that that in any way forecloses any rights of the accused in terms of how they play that case.

My bigger concern with this, on some if it, if you look at like Article 43a, the suggestion is you make them military magistrates. I agree. I like the idea of getting a military judge involved earlier in the process. Especially when it comes to witnesses and some of those other issues that I think would make it go more smoothly.

Well my concern is I don't know that we have information even with -- when I look at the experts that are on the panel, we have incredible judicial experience and background. You have an Air Force officer who previously served as a judge. You've got two military officers who have extensive -- Army officers who have extensive experience.

I don't know that's there was any input from the Navy or Marine Corps in terms of the feasibility of this on them. I know from the Army's point of view, on data, but there used to be there were 26 authorizations for military judges. Has anyone gotten any input in terms of the feasibility of how do you sustain this, and

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either to increase the judges, is that how we're going to use our authorizations in the time that we're minimizing the -- we're reducing some of the authorizations.

And when I look at this military magistrates right now, the way that process works, it is a judge advocate assigned at the installation, who has no care and connection to the prosecution, the defense, or the judiciary, and there's been no information put out to us that that's not working. That's not a huge case load.

The Article 32 piece, we're not sure how that would change. We don't know what the feasibility of sustaining this over time would be. I'm looking at this and thinking this one is one that I would just say take the whole issue and let the judicial proceedings panel look more thoroughly at it.

Get input from all of the services, and allow them to decide what if anything is better. Because right now what I feel like is it's the opinion of some very talented military judges, but not necessarily a discussion that has been vetted sufficient to do this drastic of a change in terms of resourcing over time.

VADM HOUCK: I completely agree with that. This is a -- I mean we abused the barer of sexual assault who walked into the room of a full scale and wholesale change to the way that the system has been operating for a long time.

Changes might be appropriate, but I mean I think the role of the commander subcommittee recommended that it be -- that the institutions designed to look at this, the joint services committee, or this military justice review board opine on this and get a comprehensive analysis of more than just you know a few people who

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are in support of these reforms. So I completely agree with what Colonel Cook said.

LTC McGOVERN: This was extensively studied in 2004 by the Army, which was incorporated into the CSS report.

VADM HOUCK: Maybe the Air Force, Navy, Marine Corp involved in the 2004 study which is a decade old at this time.

COL COOK: I was going to say, it's over a dozen years old, and even within the Army at that point, we've still since cut the military justice authorizations. I understood that extended war and they weren't going through the downsizing that they're going through now.

Are the judges the positions you want to keep on the books in order to keep our reduced force going forward? I'm not saying no. I just don't know, and I don't know that we know enough to make that kind of drastic change.

BRIG GEN DUNN: Although, recommendation 43B does specifically say additional resources carry out the change. I mean that you know, we didn't leave that just hanging out there.

COL COOK: No, I know that. You have to assess whether there should be additional resources. Judge Henley had said in his statement to us that additional resources would be necessary. He also made the comment that it would be the same judge both doing all these preliminary matters and then also doing the trial itself.

Colonel Morris who's also on that same panel, made the

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comment he -- I don't know whether he's actually been a judge, but he's a former prosecutor and a defense attorney. And my comment to him is does that in any way affect -- because I've not been a defense attorney. Does that in any way affect any of the rights? And he said well, I don't think anyone intends it to be the same judge. I said well one does.

So even within that subcommittee that was testifying that day, that they hadn't completely discussed the whole issue. I'm not saying it's wrong. I'm just saying I don't know, and I don't know that we have enough information to go forward with these changes based on what we know right now.

Nor do I think it's worth it for us to continue to consider these right now knowing that our report is just about due. I just --

CHAIR JONES: Can I ask a question? Can anyone tell me how much delay is occasioned by the whole process that can now, and I guess will continue until the legislation takes effect, takes in a 32B process? Is that a lengthy process?

COL COOK: It depends. It depends on the case. If there's a request for a sanity board and the accused is going out to determine what their mental capacity is, that could be a delay.

There's lots of reasons for delays, but if there is -- if the access to witnesses is there, if there is no sanity board, if the evidence has had its forensic analysis and the case is where it's appropriate, then it's not a lengthy process.

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CHAIR JONES: I'm trying to figure out why the military is doing it the way it's doing it now. Which is waiting until after refer.

COL COOK: Because often it could be a very quick case -- I've got a premeditated murder trial, where a body is found. On October 1st somebody's in pretrial confinement by October 5th and then they're tried and convicted of premeditated murder by February, and they're in jail for the rest of it.

It can go incredibly quickly if there's nothing that would delay the case. There's other cases where you know, you could look at a Fort Hood case, that took a couple of years to try. You may not have a judge that gets involved until later on like the mass shooting that happened at Fort Hood. Not sexual assault.

So there's lots of reasons and different complexities of the cases that are involved.

PROFESSOR HILLMAN: Judge Jones?

CHAIR JONES: Yes?

PROFESSOR HILLMAN: I think that with the comparative system subcommittee, we were looking at civilian practices and comparing them to what's happening in the services. All of the services, although not with long reports from all of the services. So not with, you know, a huge amounts of information from every single one because of resource constraints.

But I will say this is a part of the system that seems not to work that well for victims. Because there's no court that's there from the beginning.

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Because they have to wait through this process.

But it also doesn't seem to work very well for defense, for defendants, for the military accused persons awaiting that point, because there's no where for their counsel to go to get these issues resolved. And they go through the government essentially, and then the convening authority to prepare for trial essentially.

In the meantime, while we were looking at this, Congress passed these changes to Article 32, which is exactly what Admiral Houck says, opening the door to changing the system based on concerns about sexual assault, that has changed the system, and Article 32s are going to be different from now on. It's starting in December.

So it is changing.

CHAIR JONES: Well and my question is -- if the Article 32 is no longer this discovery process, and is a probable cause hearing, this may collapse things. There may not be this big demarcation between referral and preferral, or I should say it in reverse. I guess that's my point, I don't know.

I don't know where that takes us, I just -- I always worry about something that exists. I wonder why it's working that way now. I don't disagree with any of the principles here. Coming from the civilian system that I can't even imagine having to -- as a defense lawyer, you know putting requests into trial counsel. You're a trial counsel, not a prosecutor.

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Mai?

MS. FERNANDEZ: Two questions. First is, this is all contingent upon the authorities -- convening authorities?

PROFESSOR HILLMAN: Yes, it does. Because it would mean that if there's a military judge at an earlier point -- I mean it depends on which of these measures we adopt. But if we, for instance, taking the first one, so the military judge is involved early, that doesn't change, because the convening authority is not ruling on motions essentially. So that doesn't change the convening authority's power.

The second, getting resources, it does. Because essentially what happens now is the defense counsel submits a request to trial counsel. Right, and the -- General Dunn can explain this better than I can.

But it does go through the convening authority, because resources are used for that. So it is actually a decision that would be made by a judge. Now if the convening authority says no, it already gets made by a judge, but it comes up later -- at a later point in time.

So when I say yes, in some ways it's not -- it's not taking something away. The convening authority always holds the past two alone. But it is changing the disciplinary process.

BRIG GEN DUNN: I mean, the judge has the authority now to overturn the convening authority's decision to deny a witness, or to deny the resources

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that a defense counsel requests. So this would just put the judge in the system sooner.

CHAIR JONES: But the judge still could not unilaterally order it.

PROFESSOR HILLMAN: No, it would be in response to the defense.

CHAIR JONES: It would only be in response to the defense, but the convening authority could still overrule it.

BRIG GEN DUNN: No, I don't -- I don't think so. Now a judge can overrule a convening authority.

CHAIR JONES: So in that sense, if it involved allocation of resources, the money would go even though normally the convening authority would have to approve that kind of.

PROFESSOR HILLMAN: And if the convening authority says no and then the military judge says yes, then the convening authority essentially would have to provide it anyway because the military judge doesn't have separate resources.

REP. HOLTZMAN: Under the present system it would happen, it just would happen later.

CHAIR JONES: Exactly.

REP. HOLTZMAN: Because right now at the beginning before there's a trial, the convening authority makes all those decisions. Before the trial

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starts.

COL COOK: The other thing that's still going to impinge on -- the other place where I see this impinging on the convening authority is whether that it's a question of whether it's necessary in the Article 32 process. You already have, I think the rule has already been changed that requires it's a judge advocate in a sexual assault case be the Article 32 officer, is that correct Colonel Ham?

COL HAM: Um-hum.

COL COOK: Military judge already can be, and have been assigned to be the Article 32 investigating officers. Not in their capacity as a military judge though. In the capacity as the 32 officer, who understands the process better for complex cases. So we're already using them.

They would then not be the same judge that sits in the trial later on. What this is saying, is to put the judge there, in their capacity as a military judge, make what ever decision they have binding, and General Cooke, when he testified to us on that, said that one of the benefits of that would be to take the onus off of the convening authority of making that decision, and put it on to the judicial process itself. And then that same person would sit later in the court.

And I just don't know that we ever found it -- I'm not saying that it's not the right answer.

MS. FERNANDEZ: So it's the same person would be --

COL COOK: In the 32.

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MS. FERNANDEZ: In the 32, would be doing the trial.

COL COOK: Would be the trial judge. And we've heard nothing from the defense community to think is there a concern with something. And I'm not saying that there is or there isn't. I don't know is what my concern is.

But there's too much about this, the resourcing of I don't know how many judges we have across the services. How much time would this actually take? There's not a lot of people that -- there's not a lot of pretrial confinement hearings within the military, because we tend not to put people into pretrial confinement. The goal is not to do that.

So I just don't -- there's too much that I don't think -- I don't know enough to accept the recommendations as it -- as they pertain to using military judges in capacities that they're not used now.

But I agree that especially when it comes to the witnesses and stuff, getting them involved earlier is not a bad thing. And some of that can be done. But how to do it and how to structure that is going to be an art, so that it doesn't --

PROFESSOR HILLMAN: Judge Jones.

MR. BRYANT: Should we let the -- I'm sorry, go ahead.

PROFESSOR HILLMAN: I'm sorry Mr. Bryant. I was going to say should we look at 43C and say do we want to adopt something like 43C? And then let the services figure out how to make that happen?

I mean that doesn't run to the larger resourcing issues of having a

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judge available from referral -- preferral, rather than referral. This would address what is one of our most significant concerns.

LTC McGOVERN: And that ties in with 43A.

PROFESSOR HILLMAN: But if we adopted 43C, then we wouldn't be saying you have to make this change. We'd say military judges should rule on these requests. And the services would have to figure out how to make a military judge available to rule on that request rather than sending it through the trial counsel. It would be a less political change. Sorry Mr. Bryant.

CHAIR JONES: What were you going to say Mr. Bryant?

MR. BRYANT: My comment was going to be I don't know that -- or should we let the number of judges available, and so on, be one of the factors as to whether or not we make this recommendation.

Because since we're talking about comparative systems, in the civilian world, there are constant recommendations that jurisdictions have drug courts, family courts, we need more juvenile judges. Those are still recommendations that sometimes come from the legislature themselves, but they don't fund the judges. Or that's the issue.

But that recommendation is still a good one. Still a necessary one that they get involved early in the process. That they are available.

Somebody else has to make the decision well fine, but we're not going to fund that. As opposed to well we're not even going to make the

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recommendation because we don't have the resources.

Like saying we need to -- we only have three nuclear weapons, but I want a nuclear weapon in 20 states. It's a good recommendation, but somebody's got to decide whether they're going to make another 17 nuclear weapons.

COL COOK: And I guess part of me, I'm not still convinced that they're needed in parts of those processes. It might be the gold standard, it might be nice to have, but I just don't see a need -- the way that it's working right now with judge advocates across the force, they can do those magistrate decisions, I don't see that as being a problem.

The way judge advocates in complex cases are already assigned to do Article 32s that are completely unrelated to the case, and judges in more complex cases are already being used, non-binding, but as a 32 investigating officer, not as a military judge. I don't see where there's a problem with that.

Do I like the -- do I agree that there is some concerns with the defense counsel who has to go to the trial counsel and say hey, I'd like to -- you know, on a sentencing portion where it becomes numerous witnesses and we're deciding whether you need all of them, that's different.

But on the substantive piece of then coming up with a tactical way of how to present the best defense for their client, and they have to vet that through a trial counsel, I think there might be a better way for us to do that.

What the implications of all that are how you structure it. I

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don't know that we've got -- it's going to have to be done smartly. We can make it.

VADM HOUCK: I think that in theory, I think I could support, could conceivably support every one of these recommendations. What troubles me is that the sort of process issue of this, in that I mean, we have a really credibly thorough report.

I mean we don't really know what the services think of this because of resource constraints. And we haven't asked the military -- the Joint Service Committee on Military Justice to opine on it, which is the very institution within the Department of Defense that should be considering these kind of wholesale changes to the system.

And I just don't know why we would want to endorse this without getting those views. I'm not per se opposed to a lot of this. But I think there's a process issue involved here.

MS. FERNANDEZ: Just two quick things. If we were going to look at recommendation 43C, it should be rule on defense, and special victim's counsel request. I mean I think there could be a request -- a special victim's counsel also needs to have more of a pretrial request.

PROFESSOR HILLMAN: The other thing, can I just support that because that one actually helps some of the 513 issues that are being legislated on the Hill right now.

MS. FERNANDEZ: What's 513?

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PROFESSOR HILLMAN: Privilege issues related to the victims of psychotherapist privilege issues. And that would create a place actually to go sooner for that, that would address one of those issues.

MS. FERNANDEZ: The other reason that I think that we should support this recommendation is that previous questions about how does this impinge on the convening authority. I also think it brings another check and balance to the convening authority. And when we report out a whole report, there are going to be people who look at every one of these recommendations.

The biggest one that they're going to look at is the role of the commander. And it would be really phenomenal to say that we're creating another mechanism so that there is another check and balance on the convening authority. And I think you are creating one through this methodology. Which isn't as onerous as taking away all that authority from the commanders.

So I think it solves a lot of problems.

COL COOK: Judge Jones, well for Mr. Bryant, Rep. Holtzman and Judge Jones. In the civilian system, I mean like you said, you already know that you don't have to go to the defense -- the defense doesn't have to come and ask you for permission.

But when do -- who makes the decisions on documents and other evidence, and at what point in the trial process does that happen? Does it happen once the case is into the court? Or does it happen in advance of the court

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that you would ask for access? You're not getting Brady material, do you --

CHAIR JONES: Nothing happens until there's a judge, in terms of getting in the civilian system.

COL COOK: And then how long between when defense counsel and --

CHAIR JONES: When the judge is -- the judge is your trial judge, at least in the federal system.

COL COOK: And how long does it take before -- between an offense to when you get into court for a judge? How that could also take year, years? Or how long does it take -- okay, how long?

REP. HOLTZMAN: Immediately.

COL COOK: Immediately.

REP. HOLTZMAN: I mean you have to be arraigned for example, if you're in a criminal case within -- it was within 24 hours. It's supposed to be within 24 hours you go before a judge on bail and all kinds of other -- whatever other arguments you want to make.

And the judge is there from the get go. The judge is there from the get go. You can't have the criminal process, or even civil process without a judge. They're there, or the magistrate in the process.

COL COOK: And then at what point can people start asking for the documents?

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CHAIR JONES: Once you have a judge, as opposed to something that's -- there is a brief period of time. And I say brief because in most cases it's extraordinarily brief where there's not a -- there is not the trial judge on it. There may be a magistrate judge, because you've only been arrested and there's no indictment yet.

And during that period of time, there's a time limit on how you can remain in that status. It could be 60 days or 30 days. And you don't ask, you don't get discovery or anything else in terms of what you would get once you are indicted and there is a trial judge assigned.

So there is a very brief period of time once you get arrested where you have a magistrate who takes care of the probable cause hearing if one is you know, required, and bail issues. But then once there is a charging instrument, the indictment from the grand jury, you have your trial judge. And that's when you begin asking for discovery and witnesses and whatever else the defense wants.

COL COOK: Yes, well then that's similar to what we do now. I don't know that it's that much because we've got 120 day trial clock. Is it 20/20 right now? 90 day? 120?

PROFESSOR HILLMAN: And your --

COL COOK: In general, 120 day trial clock that gets elongated when you have requests for delay that a defense attorney would concur with. The magistrate -- I don't think that going to a military magistrate -- a military magistrate

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would be where you put the request for experts or documents or anything like that.

I don't think that that's inadequate. I think it's waiting for that judge.

CHAIR JONES: Well, that's why I'm trying to figure out why we have this pre -- I mean nothing happens in terms of the defense lawyer until there is that final charge. The referral, which would be the -- it's unclear to me why people are running around and asking for expert witnesses and everything else in the pre-referral stage, which wouldn't be happening in a civilian system.

But thank you for bringing that up, because that was what's been bothering me, the timing of all this.

PROFESSOR HILLMAN: And your sense is the shift of the Article 32 to a civilian like probable cause hearing will shrink that time.

CHAIR JONES: Well that was what I wondered, yes.

PROFESSOR HILLMAN: A discovery process to the point that you won't have these number of requests that would go unresolved.

CHAIR JONES: Exactly. So I guess one of the things -- and I really appreciate your clarifying or asking that question, in my view is we don't know how the 32 is going to play out. Or whether that will shrink the time.

But there are lots of changes going on now. And I don't think I would feel comfortable either recommending these. I'd feel very comfortable with the role of the commander recommendation, and perhaps making it -- adding to it from

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the list of issues that you've raised in your 43A through F.

Because actually, I guess I'm saying again, comparing civilian and the military, really nothing does happen until you get that trial judge in the civilian system. And I can't -- I don't think the time period should be that much different.

So that's why I'm curious of why we would insert a military judge in what should be a very short time period. Where you wouldn't be asking for all this stuff anyway in the civilian system.

COL COOK: And then one other thing, we're fixing by the recommendations that when we get to it, that I definitely do support is the, you know, the ability for the defense attorney within the military to have access to a defense type investigator.

One of the things that the defense may come and ask for early on in a case would be access to an investigator to help them look into things. Well we're solving that piece by not saying that goes to a convening authority or the judge, by creating that expertise within the structure of the services now. Assuming that we all accept that one.

LTC McGOVERN: I think that they did -- Comparative Systems did hear though that there is a great deal of discovery that goes on prereferral that does not go on in the civilian system. And that's where the defense counsel felt that there was a real imbalance in the system.

So in those cases where you're going to have a 32 maybe that

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would be different, but in many cases the 32 is waived, or it's a special court-martial. So it's still the process that's set up in the military, that discovery occurs prior to the referral, and requests for witnesses and other things.

CHAIR JONES: And my question only is why is that? And why is there a difference? Because I mean in the civilian system it does work. You get a trial judge relatively quickly and then one person makes the decisions.

You don't have the magistrate for instance making discovery decisions when they're not going to be the trial judge ultimately.

PROFESSOR HILLMAN: I think that the way that the staff wrote this up, the military justice system has evolved from a disciplinary system with ad hoc courts run by operational commanders into a -- what they describe as sophisticated legal system with increasing power in the military judiciary.

It's an incomplete evolution. I mean that's -- and this is a part that has not changed. That's why we're suggesting it should change, to bring this in line. To resolve the issues of victims and the accused service members have before they get to that point.

BRIG GEN DUNN: And this discussion was had as well in the context to the changes of Article 32, which had evolved, rightly or wrongly, but nevertheless evolved into a discovery process for defense counsel.

So now, let's assume, we don't know how it's actually going to play out, because you know, it's not December yet. But now it appears that the

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defense ability to do discovery, it's going to be restricted. And you know, there is no ability to resolve these issues about discovery, witnesses, et cetera, through a military judge prior to referral.

And in cases that you know, where the defense might waive the Article 32 as part of a plea agreement, et cetera, you know it's a, you know, it just further limits their ability to have a complete grasp of the facts, and to present a -- properly represent their client from that perspective.

CHAIR JONES: And I guess it --

BRIG GEN DUNN: And that you know, I am certainly no -- I was never a defense counsel. I did not grow up on that side of the military, and I was always a prosecutor and always a staff judge advocate. And I don't really object to broadening our system. We can study this you know, until we all die.

But it seems to me we have an opportunity to make some recommendations now that will enhance the system and we will prevent Congress from ad hoc'ing, you know, changes around the edge that don't make much sense, or don't help us as has happened up to this point, you know with some of these provisions that pop up in the NDAA, so.

You know this is an authority to make a cohesive recommendation.

CHAIR JONES: So it seems to me and I obviously have never been in the military and know this. But it seems to me the reason why so much goes

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on before referral is this whole Article 42, or 32 opportunity to put a lot of evidence together and have that investigating officer try to sway the just -- you know, the convening authority.

That doesn't -- that won't happen if an Article 32 becomes a probable cause hearing. And it will be much more like the civilian system, because what happens prior to referral is not going to be a period of time where you're going to be doing discovery, and making some of these other kinds of motions.

I mean, and maybe all of this is to say that I might be right or wrong, but Congress has already meddled with Article 32, so maybe we should see how that plays out.

COL COOK: Although it looks into, it also, it's not just the discovery that's at the Article 32, it's also not a military judge at every installation, or in every operational theater. They can you know, a lot of this happens beforehand, so by the time a judge does show up and you go into court, the prep -- you can have the arraignment and sometimes that is done separately. That you're arraigned then you set the trial date at that.

There are some times when the judge comes in to your -- when I was in Baghdad, the judge comes in, the person's arraigned, the case is tried, everything is resolved before that point.

And there's a lot of times when somebody does go to the military judge -- to the convening authority and says, I need this witness. And the trial

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counsel, depending upon the merits of what's being asked for may just be -- a lot of times will just say you know what, I agree. And the resources are provided up front.

So it's a lot of things that do get resolved. It's not every one of these things they go to the convening authority and the convening authority says no. A lot of them get resolved up front.

Sometimes they go over the top. Sometimes they say we want an expert. Well maybe the expert they're asking for isn't reasonably available. But they're provided another subject matter expert that's appointed as a member of the defense team to help them in the preparation of their case. And they can come back and say I don't want that person, I want this one.

So there are pieces that are resolved before cases. But I still remember being in Bagdad and knowing that a 120 day trial clock and saying to the chief judge that was in Germany, hey look we have cases. And he says well I have somebody coming for a week. Not good enough.

Not all the cases that we have stacked up are going to be done within that week. You need to expand that. I don't want to fight for a judge's time if they're that limited. Because now they're working on other things as well.

BRIG GEN DUNN: But this doesn't remove the convening authority.

COL COOK: No, it doesn't --

BRIG GEN DUNN: They still need to grant the witness request

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and to work that process.

COL COOK: It decreases the usage of the judges and they limit their ability to be available for the cases that are ready for trial.

BRIG GEN DUNN: Well but that's a commentary about looking at the resourcing and if these changes are implemented, do we need more judges. And you and I both know that in terms of the military judge coming in and arraigning somebody and trying the case. That it's a very wrong decision made on the witness, that the military judge would defend it and not tried that case.

COL COOK: That's exactly right.

BRIG GEN DUNN: Because he would have granted the defense request and delayed it.

COL COOK: You make motion hearings right up front.

BRIG GEN DUNN: Exactly.

COL COOK: Well I still don't see the need for it right now. I don't know that we have enough information to make a recommendation.

MR. BRYANT: But the changes in Article 32, to whom will motions for deposition of the victim go? To whom will those motions be made? I want to depose the victim. The government's not going to call it, they don't have to call her/him.

COL COOK: If you're a defense counsel and you want to request that, I'm assuming it's the same challenge that it is right now. You ask the

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victim if they want to talk to you and they can say yea or -- they can't be given an order to speak to you, but Colonel Ham, we have to use GS to talk to the victim or to any other witness now in the process.

And the victim refuses to speak to you. Then they go into court and normally give you a recess at that point, the opportunity to speak to them.

MR. BRYANT: And do they -- is that a judge? That's my question.

COL COOK: It's the same for a deposition. Who orders depositions now pre-referral?

COL HAM: The convening authority has the authority to. There is some pending language that may come out in the next NDAA that prevents that in the sexual assault cases. Don't know if it will pass, but that's very real in the military justice system, and no one can order any witness, including the talks with defense counsel and any witness including the victim. Now with some statutory backing, you can put any conditions or have any other person present, which I think is the same as in the civilian world.

MR. BRYANT: But we heard in site visits is that they're anticipating that there's going to be a lot more of these motions for depositions.

PROFESSOR HILLMAN: Because of the collapse of the 32.

MR. BRYANT: That they want to --

CHAIR JONES: What's -- and I'm sorry, I could barely hear you

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Colonel. So what -- what is the deposition authority right now? Either in legislation or in -- pardon me?

PROFESSOR HILLMAN: The convening authority.

COL HAM: When a military judge after a referral --

CHAIR JONES: Right, but I'm saying, the deposition -- the authority to request it, or the right to request a deposition already exists in the criminal process, and for what purpose?

COL HAM: One of the reasons right now ma'am, is if a victim is unavailable for the Article 32 hearing. That doesn't mean it's required, but that is a reason in favor of granting it. So the Senate Armed Services Committee was assessed. It has proposed changes to the convening authority's power to order a deposition because by statute now, the change to an Article 32 investigation makes the victim unavail -- declares the victim unavailable.

CHAIR JONES: Including for depo --

COL HAM: What did you say ma'am?

CHAIR JONES: Including for deposition?

COL HAM: It makes the victim unavailable if he or she does not want to testify at the 32.

CHAIR JONES: Right.

COL HAM: They're declared unavailable. Which is one of the reasons that you favor of granting a deposition. So it's like pulling --

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CHAIR JONES: As an alternative to having the victim who refuses and doesn't have to testify.

COL HAM: Correct. So I don't know how else to say it. You hope it goes then, and you hope that the sign on staff recognizes that and it appears that you're trying to cover them back in, for the deposition side. And I don't know how that passed, that came out of the stats.

CHAIR JONES: Why don't we take a vote on this. I would support the Role of the Commander recommendation, which is to direct the military justice review the group or judge services to evaluate. And then we have a big list -- I say we, because that was the committee I chaired, which I would be happy to expand to include the topics in the Comparative Systems recommendations 43A through F.

And that's what I would propose we do. How many are in favor of that generally? The Role of the Commander.

COL HAM: In addition to adding the --

CHAIR JONES: With the --

COL HAM: That's with defense counsel, also?

CHAIR JONES: Yes.

BRIG GEN DUNN: See I think the way the Role of the Commander one is written, implies removing those authorities from the commander, which I disagree with 100 percent. I mean what the language says, evaluate the feasibility and consequences of modifying authority, for a specific quasi-judicial

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responsibilities currently assigned to the convening authority.

And we are not talking about modifying the convening authorities here. We're talking about ultimately judging the process earlier to you know, handle some of the alternative.

VADM HOUCK: But if you're handling them in the alternative, aren't you modifying the convening authority's authority?

BRIG GEN DUNN: This paragraph to me implies removing those authorities. If we could change the language in that -- I think that that should be a long -- if we're going to do that under the Role of the Commander, well I don't think he should have a role.

CHAIR JONES: I can't hear you, sorry.

BRIG GEN DUNN: I don't think it should be under the Role of the Commander. I think it should be a CSS recommendation.

CHAIR JONES: Oh, I'm not suggesting that -- well I basically none of these recommendations. They are the panel's recommendations now. Whichever one we decide to accept. I don't think I know -- I have everyone's vote on this.

COL COOK: Can I propose a language change before we take the vote?

CHAIR JONES: Sure.

COL COOK: Based on what General Dunn had said. If you

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look at the Role of the Commander piece, I'd keep the first line and a half the same, but when you get to feasibility, I would change it slightly.

So the Secretary of Defense should direct the military justice review group, I'd say and joint services committee, to evaluate whether to increase the use of military judges for a specif -- for a quasi-judicial responsibilities currently assigned to the convening authorities. Including discovery oversight, court-martial panel selection, search authorization and magistrate duties. Appointment and funding of experts, consultants, victim's rights, -- yes, victim's rights.

PROFESSOR HILLMAN: Enforcement of victim's rights.

COL COOK: Enforcement of victim's right, I would add that into that. But it's what you're asking, whether to increase the use of military judges as opposed to the convening authority. Would that be okay?

REP. HOLTZMAN: That doesn't really quite solve the problem.

COL COOK: Okay.

REP. HOLTZMAN: Because I suggest that -- because the judges already have that authority. They have it at a later point. So you were saying an earlier point in this.

COL COOK: Okay. Whether to introduce the use of military judges earlier into the process for.

REP. HOLTZMAN: Yes, pre- with that.

COL COOK: Pre-referral. So right to introduce the use of

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military judges pre-referral for.

REP. HOLTZMAN: I also thought, excuse me if I'm incorrect here. But I also thought that this recommendation went to the issue of the selection of panel members.

CHAIR JONES: It does. Which is the Role of the Commander recommendation also talks about --

REP. HOLTZMAN: Yes, panel members, so it's got --

CHAIR JONES: Court-martial panel member selection. And that would be an area where.

REP. HOLTZMAN: Yes, it doesn't really relate to this.

CHAIR JONES: It does not relate.

REP. HOLTZMAN: I would take that one out, yes.

CHAIR JONES: I mean so maybe it goes into a different recommendation, or a similar recommendation, but it doesn't belong in this one.

COL COOK: I would probably leave it where it is with the Commanders on that. Because all the commander does in the identification of court-martial panel members, they look across their command and they identify a certain number of colonels, lieutenant colonels, majors who are not pending any kind of trouble that have the quality, training, experience necessary to sit in these roles.

Who can look at a panel, a list of it, and then that panel is referred to the case and then the defense and the prosecution both have the opportunity to voir

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dire the panel and decide whether or not, you know who actually ends up sitting.

So it's just a question of commanding party makes certain officers available for certain periods of time based on what his knowledge of operational requirements and their experience. And then it goes through a normal process I think that a regular civilian court goes into to.

CHAIR JONES: Well, it doesn't fit in of talking about everything else as things that they can do after referral. And this is in a different category. So I would take court-martial panel member selection out.

MR. BRYANT: Judge Jones.

REP. HOLTZMAN: Kind of put it into another recommendation. I wouldn't drop it.

MR. BRYANT: Your Honor. Since this is Comparative Systems, everywhere outside the military rule, this would not -- these would be called judicial responsibilities, not quasi-judicial responsibilities.

Are they quasi because this is the military?

BRIG GEN DUNN: They're still for the convening authority's judicial --

MR. BRYANT: I'm just asking because I would think that listening to this --

BRIG GEN DUNN: Responsibilities as quasi because obviously --

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MR. BRYANT: But they are in fact judicial responsibilities.

CHAIR JONES: But when the convening authority is doing it.

MR. BRYANT: That they become quasi.

COL COOK: So military justice responsibility is assigned to the commander because they're not judicial until the judge is involved.

MR. BRYANT: Okay. They're a judicial function being exercised by a non-judicial person.

COL COOK: Okay, only a judicial function if a specific judge is assigned to it. I -- they're administrative for some of it. You're going to get a -- if you want an expert, you're going to get the funding and the resourcing and the approval of that person.

CHAIR JONES: Well I think most military justice responsibilities covers it all. They're somebody's responsibilities.

COL COOK: Um-hum. Right.

CHAIR JONES: What else?

REP. HOLTZMAN: I'm not really decided in favor of this, but it would strengthen from my point of view, this recommendation, if we said what Mai had talked about, which is that this is particularly important as a way of insuring -- to consider this particularly because of the need in this interim period of time to enforce victim's rights.

CHAIR JONES: And we were going to add that to make sure

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that that was -- although we can certainly do it with more emphasis.

REP. HOLTZMAN: Well yes, it should be here as a reason for them examine this.

CHAIR JONES: Right.

REP. HOLTZMAN: And then somewhere we see some -- in some favorable you know, favorable view. I mean I'm the reason here to do this is not just because of the issue of one. We don't know yet before we have a defense counsel or a defendant's rights, but also victim's rights.

CHAIR JONES: Well I think from the standpoint of the purpose of this panel, the victim's rights in this instance are the most important piece of the recommendation. As opposed to you know all of the other things that are part of the military justice system right now. And we should certainly highlight that this is important to consider so that there is some ability to enforce victim's rights.

PROFESSOR HILLMAN: Your Honor, one example along the lines of what a victim would want, that would be tricky to figure out how to get, would be a no contact order for instance, protective orders.

So where do they go to get a protective order during that period of time?

CHAIR JONES: I was under the impression that the Commanders or others --

COL COOK: That's up to the convening authority and it would

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be the commander. The immediate commander who may not have the authority to convene. If there's a commander out there and there's a difference that they can give that commander of the accused. Whoever that is, because it might not be the same commander as the victim.

PROFESSOR HILLMAN: So this is a very different process than a civilian situation where you would go to a judge. You would go to a court essentially to get that protective order. But here you would have to go to a -- military officer who doesn't have any judicial -- I don't know, it's a challenge.

I mean it's a part of the challenge. The things that they -- apart from the pretrial confinement, pretrial punishment issues that could come up for an accused person, for the victim, there are issues that come up. But they don't resolve it through the chain of command essentially, so. Which troubles me from victim's rights perspective.

CHAIR JONES: Well, shall we rewrite the ROC recommendation the way we've discussed it? But I want a sense from the panel of whether who would prefer that to the individual recommendations from the Comparative Systems.

COL COOK: I would prefer that.

BRIG GEN DUNN: Will the Comparative Systems findings stay in the report as is? You know the underlying findings?

CHAIR JONES: I mean, they're findings. And I don't think

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we're --

BRIG GEN DUNN: But they're -- we're not going to replace ROC Finding 16-1 for all of those tons of CSS findings that fall under these topics.

LTC McGOVERN: Starting on page 180, the 43 series of findings.

BRIG GEN DUNN: They will all remain in group form. They're not going to be replaced by -

CHAIR JONES: They're no reason they should --

BRIG GEN DUNN: They're ROC for now 16-1.

CHAIR JONES: Well they're simply -- we're not. It's the recommendation, not the underlying facts. I think they're all factual. They are true findings here.

COL COOK: They are findings, but they're not -- I wouldn't say that they're all factual. I mean they -- some of them are speculative. I look at 43-1. But that's not what we're approving.

I mean military judges do not become involved until a convening authority refers the case to a court-martial, which can cause or result in inefficiencies in the process. Ineffective or inadequate remedies for the government, the accused and the victims.

I mean I guess it can, but it's not necessarily a matter of course. And having the military judges as we just discussed involved at the same time of the

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referral piece after the 32, is that about the same as the indictment in the civilian piece.

So it's not so different. But I mean I'm not advocating changing any of these. They can stay there as the -- because they're the substance of these reports. I just wouldn't -- and the panel's decision, I'd prefer broader the Role of the Commander piece.

CHAIR JONES: I mean the subcommittee reports are all next. And anyone can read your proposed -- subcommittee's proposed recommendations and your findings. As well as your entire subcommittee report.

The final panel report will not have your recommendations. And we will -- I think we'll be looking at once it's put together, I guess I shouldn't prejudge that everyone of these findings will show up in the final panel report. But my quick look to the extent that they're factual findings, and there's not you know, the panel doesn't disagree with them as a whole, that most of them should probably remain.

I can't tell you any more than that until we get to the point where we're looking at the final report, and what goes in and what goes out, which we'll all be talking about again.

All right well we need to rewrite what is recommendation from the ROC subcommittee 16. And we'll have to vet that tomorrow. If I'm correct, at least a majority of the panel would prefer that route then going through each of the 43A through E from Comparative Systems.

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COL COOK: Yes.

CHAIR JONES: Okay. I'll take a vote. Who prefers the Role of the Commander approach?

It's okay, never mind.

MS. FERNANDEZ: I'm sort of like, I don't know. I'm in between.

BRIG GEN DUNN: I mean I think I can come to it as long as we -- as long as we subsume the topics covered in 41A through E. In that. And to make it clear that we are not talking about taking authority away from the convening authority.

We're talking rather about inserting military judge in the process. Or which I understand may have some of the same fact but it doesn't -- I mean to me that is two different things.

It doesn't mean that the convening authority can't act on a witness request.

MS. FERNANDEZ: Write it and look at it fresh tomorrow.

CHAIR JONES: Yes. I think that's a smart idea. And so let's do that. And we can -- we'll revisit 43A through F, and we'll look at the revised ROC 16.

BRIG GEN DUNN: And that's also why I was concerned about the findings remaining, just because when the -- when this is looked at by the -- you

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know by the joint service committee, it will make them see the thought process of ideas that came from you know, from all of the discussion.

COL COOK: Can we take a short break?

CHAIR JONES: Yes. Sure. Okay, we'll take a ten minute break.

(Whereupon, the foregoing matter went off the record at 3:48 p.m. and went back on the record at 4:10 p.m.)

COL COOK: Next we're going to move to Recommendation 44 of -- I only have 44A and 44B. Liz I think you have -- yes sure, me too.

REP. HOLTZMAN: I just wanted to have some discussion. Perhaps you could present your report on this.

PROFESSOR HILLMAN: Sure. So 44A and B also engaged the Role of the Commander Subcommittee recommendation 2. 44B specifically in recommendation 2 are on the same topic, section 2 of the victim protection act.

But just to start with 44A. This is in response to assessment of already recently enacted legislation. And this requires that a higher general court-martial convening authority, or the service secretary review a decision by convening authority not to refer the specified sexual assault cases.

And we recommend that not be -- not say what the law is now, but that be changed. Because it creates an elevated level of review based on the outcome of a particular decision that is entrusted to the convening authority to

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exercise prosecutorial discretion according to the -- his or her best judgement with the advice of the staff judge advocate in the system as it's set up.

And it creates in our estimation, inappropriate pressure of what we refer to as a one-way ratchet towards prosecution, which doesn't serve the interest of victims or the interest of justice. Likewise, the section 2 of the Victim Protection Act --

REP. HOLTZMAN: I think we've been on that. We don't need to analyze that. We're okay on number two. I'm okay.

CHAIR JONES: Yeah I think we reached the same conclusion though on 44, 2 of ROC and 44B of CSS, same conclusion. So we really just need to focus on 44A.

REP. HOLTZMAN: Did you have any testimony from any men -- people who would be at the convening authority level about how they felt about this provision?

BRIG GEN DUNN: We had testimony from staff judge advocates.

CHAIR JONES: I'm sorry, I can't hear you. Go ahead.

BRIG GEN DUNN: I guess I have no microphone at all. Sorry. Okay, is that better? So we did hear from staff judge advocates who said that convening authorities were reluctant not to refer sexual assault cases. Even upon hearing that evidence was you know, at best difficult, and at worst unable to you

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know, unlikely to sustain a conviction because of all of the pressure.

And then I think that was reflected as well in the issues that arose in that case down at Fort Bragg, where the convening authority essentially said that in an email, so.

So you know so our recommendation is that Congress repeal that requirement for higher review because it just puts more pressure on convening authorities to refer, refer, refer, refer, refer without regard to the -- you know to a thoughtful review of the underlying evidence.

VADM HOUCK: I think the one way ratchet description is a very adept description because why aren't we reviewing then decisions to prosecute cases and to refer them. I mean I think defense has the same sort of interest in these situations as the victim does.

CHAIR JONES: Well in the pre-existing legislation, always permitted if I have this right, the staff judge advocate who was advising the convening authority, if there was a disagreement there, the staff judge advocate could always ask for a review, if I'm correct. It seems to me to be adequate.

I think the logic here is kind of inescapable.

MR. BRYANT: Judge Jones, I'm not sure who the staff judge advocate goes to for review if the convening authority doesn't take the recommendation.

CHAIR JONES: I think he goes to the judge advocate general.

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MR. BRYANT: Is that how it goes to?

CHAIR JONES: Of the service.

BRIG GEN DUNN: Or the next higher staff judge advocate.

COL COOK: The next higher. If I'm in a division and my convening authority doesn't want to send someplace, I can go to the corp. If the corp doesn't want to go someplace, then you probably go back to the judge advocate general and make them look at it at a higher level.

BRIG GEN DUNN: I mean there is already a process in place. Sometimes unused, which is probably what led to this legislation to begin with, but there is already a process in place.

VADM HOUCK: Well I'm embarrassed to ask the question, but the process in place, are we talking about the informal process that's always existed, or has this been changed? The recent legislation or one of the bills. Or is it -- this is what we're talking about, the proposal from the victim's protection act, that's the only thing that's really out there right now.

BRIG GEN DUNN: Well right now, we're actually talking about legislation that's already been passed. We're recommending repeal of this, is what we're recommending.

VADM HOUCK: Okay. Okay, thanks.

BRIG GEN DUNN: We're recommending repeal of 44(a), federal requirement listed in 44(a).

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REP. HOLTZMAN: This rule does change the procedure with regard to staff judge advocate. Because it's point number 2 in CSS finding 44(1). If the staff judge advocate recommends referral to court-martial and the convening authority decides not to refer the case, the service secretary will review the case file, as opposed to what would happen now, which is that the staff judge advocate could go to a higher staff judge advocate so he can take it back to the file.

PROFESSOR HILLMAN: So, Representative Holtzman on page 42 in the Comparative System Subcommittee, it does -- the legislative summary lists what Section 1744 does, which is it sets that elevation process, so. But the secretary's review all cases under Articles 120 A, B, 125 and attempts thereof, where the SGA recommends referral but the convening authority declines. And then anytime the convening authority declines, there has to be a written statement explaining. I mean that's the language in there. Which has changed the process.

REP. HOLTZMAN: Okay, here's my concern. I agree that there's a one-way ratchet, and I think that I have the same objection then that I had with regard to trial counsel. I mean why should a staff judge advocate trigger a secretarial review. That seems quite extraordinary.

But here we are with a mind set say, I don't know when it ended, but at some point in the military, the issue of as it was throughout society, the issue of rape is trivialized. So how do we make sure -- and this is an effort to make sure that that mind set is extirpated from the military. Which should be.

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So I have -- what's the alternative approach to ensure that those attitudes are gone. Is it through, are we going to have some auditing or review, or examination of these decisions? I'm not saying necessarily by higher up. But should these be reviewed by somebody else independently, or is there that process in any case?

PROFESSOR HILLMAN: I think that the -- I think that we recommended it elsewhere. First all the subcommittees have recommended training across the board, which should help to eliminate those attitudes that have led to dismissive attitudes towards reports of sexual assault. And then, all the other steps that are trying to increase reporting somehow.

But I also think the statistical, the efforts to standardize the way we count and what we're counting, should help us give us numbers that will demonstrate when there's an issue with respect to losing cases as they -- from the initial report through their ultimate disposition.

REP. HOLTZMAN: But haven't you recommended various kinds of audits? Haven't we recommended various kinds of audits?

PROFESSOR HILLMAN: There's audits, but the audit would just prove that the investigative process, also opening up the data that we have to external review by --

REP. HOLTZMAN: Well maybe there should be some sort of audit. I know you don't like that word Lieutenant, I mean Colonel Cook. But

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maybe not audit, but some kind of at least annual, semi-annual examination of some of these cases. You have spot-check, or something to get some ideas as to whether or not this authorities being abused.

PROFESSOR HILLMAN: Specifically the decision to --

REP. HOLTZMAN: That would be -- that would help me in supporting.

LTC McGOVERN: I don't think we heard any evidence in that a person bringing civilian jurisdiction, and this stems from the concern that the military is sweeping it under the rug. And that's why they elevated it to the O-6 level.

I think part of the CSS concern of this also is the perception or possibility of undue command influence. And that's why you have withholding authority. Here, instead of withholding authority, you're doing a review authority.

So I don't know if you all want to discuss the legalities of this legislation and under the command influence.

COL COOK: This is almost like a political, you're doing a review of a discretionary determination in part because of some the high level cases. We've had people, convening authorities around the -- what was the recent case? Was it the Air Force?

Well there was a convening authority who made the decision not to refer. Well the oversight of that one was when the nomination went forward to get confirmed to the next higher rank, the Congress said you know what, we're not

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confirming you.

That doesn't mean, I don't know the facts of that case. But that alone, I don't the facts. I don't know the facts of the case of her decision, and I don't know what made her come to that decision.

But having that oversight and saying that people are going to make a decision so that they don't get in trouble essentially, when something doesn't happen, if you're an accused, you want to make sure you get a fair shake in that process by a neutral and impartial person. Not somebody who's constantly looking over their shoulder in a discretionary decision.

But agree with the concern of not sweeping under the rug. It's that we handle things appropriately. So I don't think anyone wants that.

REP. HOLTZMAN: Well, I think maybe if there was some kind of review of these decisions. I wouldn't call it an audit, because that's too, I don't know, it's too descriptive.

But some kind of review of situations, and I don't know how to describe the review, where on at least on an annual basis, these decisions not to prosecute were reviewed by somebody outside who was not making those decisions.

I'm not talking about secretarial. I don't mean that at all. I'm not talking about it. But just somebody to review that. An independent maybe inspector general. I don't know who in the military would be the right person. Just to review, maybe spot check of these decisions.

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COL COOK: Do we ever do that in the civilian sector? I'm just curious.

BRIG GEN DUNN: See, it would have to be somebody with deep prosecutorial experience though, and you know which is not the inspector general.

REP. HOLTZMAN: Okay, I don't know who.

BRIG GEN DUNN: I'm just trying to think through you know, the privacy issues associated with the victim's statements and all of that. I mean because when a case has not gone to trial, and there's no public record, I think that --

LTC McGOVERN: But the services do provide in great detail in the DoD SAPRO report, a description of every case from report to final disposition. So if there is a pattern as Cassia Spohn said in the statistics, they could go to the SAPRO report and say okay, we need to possibly look at these cases.

But as of yet, I don't know if anyone's identified that there's a problem.

REP. HOLTZMAN: Personally, I'm just saying, I don't think Congress will agree with this recommendation unless you have some alternative to assure that the problem they were trying to address -- and they went overboard here. But to ensure them that the problem that they were trying to address was somehow being addressed.

BRIG GEN DUNN: But do you think that the fact that the

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SAPRO report has a summary of the case, and is published every year, and gives Congress a window into which cases from which jurisdictions were you know, closed and not tried. Do you think that's sufficient?

REP. HOLTZMAN: No, I think they need to have somebody review those cases.

COL COOK: Yes, I don't want the Congress reviewing them.

REP. HOLTZMAN: No, no. I think that the -- I can't speak for Congress here, but I think that you know, the better argument with them would be if you had an independent person reviewing, or someone in the spotlight reviewing those SAPRO decisions, and then somebody was coming back and saying you know, we've reviewed these and we haven't seen any problem.

PROFESSOR HILLMAN: We do take up a piece of that review in 49B, which Colonel Ham just reminded me of. Where we do direct a study of specific pieces. But it's not of the subjective decision.

It's actually of the rate of unfounding, the rate of referral against the advice of Article 32 officers. The role victim cooperation plays. So you know, there are specific pieces that run to the life of a case through the disposition process. But not the sort of review you're suggesting of that.

REP. HOLTZMAN: Then they disagree with that, mainly disagree with my suggestion and so I don't know.

PROFESSOR HILLMAN: I personally don't disagree with that

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suggestion. I think that outside eyes on this helps with transparency and the legitimacy of the system. And helps eliminate the impression that lots needs to be hidden from view.

I do think that there are some very complex cases. I mean and even on the site visits that we went on, when the counsel brought some of the records of cases, they brought awfully big stacks, and they said do you want to look at these? And we said thank you for offering.

But so I don't think it's not a light undertaking to sort of maybe assess some of this. But anyway, but I wouldn't object to that.

CHAIR JONES: And are you suggesting that we leave these -- this legislation in place, but put an audit, make an audit suggestion.

REP. HOLTZMAN: Oh no, I'm talking about accepting the committee's recommendation. But adding to it that there be some sort of review of how these decisions have been made.

LTC McGOVERN: Would that alleviate the pressure?

REP. HOLTZMAN: Well, if you accept that your -- yes. Because it would be --

MS. FERNANDEZ: I would state the alternative in the recommendation. So if Congress repeal FY14 NDAA section 1744, and in the alternative adopt --

REP. HOLTZMAN: Right.

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BRIG GEN DUNN: A random sampling review of cases not referred to the court-martial after the Article 32 or something like that.

LTC McGOVERN: They could review the written declinations in number 45.

CHAIR JONES: They could review the situations they're sending up to the Secretary's level, and this -- or the next superior commander even. Those would be the most important in order to inspect.

VADM HOUCK: And who would do the review?

BRIG GEN DUNN: That's what we haven't said.

LTC McGOVERN: Well once they start collecting these cases --

COL COOK: You just mentioned the SAPRO files, has that been provided or is that something that's new?

LTC McGOVERN: Yes ma'am. Every year the services painfully detail every case from beginning to end whether it's no action, Article 15 --

COL COOK: And who reviews that now?

LTC McGOVERN: The public. Everybody has access to it. It's just that it's a 500 page report. So you have to know where to look.

COL COOK: Okay, do the services, once that information is compiled, is there anybody within the services, some highly qualified expert or somebody that we get to look at those, and say do we see any kinds of a problem with that?

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LTC McGOVERN: I don't have that answer, ma'am. I mean that would be within SAPRO TJAG's purview of whether they're identifying patterns. But again, when you get to the statistical analysis that CSS proposed, those recommendations are there to look at trends and patterns, and that was also part of the JPP's agenda.

CHAIR JONES: I think for credibility, it would have to be an independent someone who looked at this, who did this audit, if we're going to propose an audit. I mean I'm not saying they couldn't use data for the audit.

BRIG GEN DUNN: It could say conduct an independent review of blah, blah, blah.

COL COOK: And it's not just a referral decision, but the decision's not to pursue certain cases. Because if a referral decision is going after the command authority, and that becomes that undue influence of what are decisions. But looking at the process in terms of decisions that ultimately get made.

And the information is there. It's a question of does anybody look at that besides this 500 page report that just goes out, so.

CHAIR JONES: But how -- I mean are we talking about going down to the level of the unbounding of reports? We're staying at the higher levels, right?

REP. HOLTZMAN: Yes, it's really looking at the command decision, and looking.

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CHAIR JONES: Okay.

COL COOK: Well I agree with the recommendation. I agree with stating in the alternative, requiring that an independent person look at some of the information that's collected of -- it's already out there. You're not creating a new study or a new audit. What we don't do on some cases is already out there. The question is, is anybody looking at it to decide if there is a problem with anything out there.

MS. FERNANDEZ: And the independent review, and shouldn't they then report to somebody on it?

REP. HOLTZMAN: It reports to the Secretary on it. It's a report to the Secretary to determine whether, you know. And they can decide then when they want to reinstitute this statute. Recommend a statute designed to deal with attitudes, protect against sexist or stereotyped attitudes about sexual assault.

MR. BRYANT: Judge Jones.

CHAIR JONES: Yes, Mr. Bryant?

MR. BRYANT: As I said in our last public meeting, and I'm not going to go through all of that again. With a great deal of respect for all of my subcommittee members, and the hard work that they put into this.

For the reasons that I stated at the last public meeting, I disagree with these two recommendations. And I'll just leave it at that. If commanders want to be in this convening authority position, then like their other war making

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decisions, it should be subject to a review.

CHAIR JONES: All right. Thank you Mr. Bryant. Admiral Houck?

VADM HOUCK: Except that they're not. I mean even the same kind of formal way that is prescribed in this legislation. Any decision that a commander makes, any decision is subject to review by the chain of command, by Congress, by the public. A war fighting decision for that matter.

And I -- and I completely understand the sort of pragmatic concern that you're raising with us making a recommendation that the legislation be repealed. And the likelihood that Congress will not adopt that recommendation. And the effort to have to increase the likelihood of its adoption, putting kind of a sweetener in.

I just wonder if we're not just sort of changing the size or changing the color of the one way ratchet by doing this. Because at the end of the day, there's a you know, talk about transparency, it's completely transparent in the report -- in the SAPRO report. So the information is already available to the public.

So I mean I think there's a sense in which we already use the word we used earlier, punting. We're saying well we'll find an independent review authority.

It's still a review, and it creates -- if we're concerned about a disincentive built in with this review process for peop -- commanders having people

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looking over their shoulders, therefore and maybe not a lot of them, but a human reaction, a commander says you know what, it's just easier to refer this then.

Okay, so it's not the service Secretary, it's not the immediate chain of command, but it's going to be an independent review authority now who's going to report on this thing to the Secretary of Defense. And I don't -- I think, to some extent I'm thinking out loud as I'm saying this.

But I don't know to what extent we're just kind of being complicit in legislation that we agree is -- I think we seem to agree with the exception of Mr. Bryant, who's articulated a different view, that Congress has gone overboard. So we're just sort of facilitating that overboard in a different way. It's just thinking off the top of my head.

CHAIR JONES: Mr. Bryant?

MR. BRYANT: Yes, I agree with an earlier comment by Admiral Houck, and that is that it ought to be included their decisions to prosecute if the SJA or senior trial counsel under the VPA act, recommended against prosecution. That ought to be reviewed too.

CHAIR JONES: Well that thought crossed my mind. If we're really concerned about whether this process works or not. Presumably you'd be looking at that as well.

VADM HOUCK: If you look at both decisions, then -- and it's going to create another new process, but it's hard to argue with the fairness of it if all

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decisions are being examined.

REP. HOLTZMAN: I'm ready to withdraw my decision. You know I thought my -- you know I hadn't really thought it through, so I'm ready to just withdraw and let our recommendation stand on its own two feet.

CHAIR JONES: Anyone opposed to that? All right, 44A is accepted. 44B as I said before, the recommendations are the same, neither subcommittee who looked at this -- or I should say both subcommittees who looked at it agree that we should not adopt section 2. I think the CSS recommendation may be the one we should go with.

Any disagreement on that? I mean either one works, they sort of say the same thing, but why don't we just say that we've accepted 44B and if anybody would like to make any changes to it, we've accepted it in principle. ROC 2 is the same recommendation.

Okay, 45. Okay --

COL COOK: I had written a discussion and requested because I didn't understand the goal. After the last discussion I now understand the goal. And so I don't have an objection to what's there. That if it's not repealed, but I do think there ought to be standardization in terms of the format.

The only question I have is where it says it's modeled after the contents of the civilian jurisdiction declination statements. What's in those statements?

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Because the only reason I'm asking that is there anything in those statements the way that they're modeled now, that if you're looking at it from the view of the military perspective with unlawful command influence being told what kind of discretionary determinations to make, is there anything that would be collected in that format that would provide -- pose some problem for us in a military environment?

BRIG GEN DUNN: The testimony we heard is that the civilian declination statements are short and sweet. And that if you compare them to some of the trial memos that are produced in the military now that are given to convening authorities recommending no prosecution, that the civilian declination statements contain far less information, and therefore pose far less risk of -- am I capturing this? -- pose far less risk of causing problem in the future should more evidence arise. Or should -- you know, and you want to prosecute the case later, so.

PROFESSOR HILLMAN: Like General Dunn said, some examples of the discussion, that they limit the details, they protect the privacy of individuals, they avoid victim blaming language, they preserve the possibility of future prosecution. They're generally quite brief. An overarching reason for declination and avoiding specific factual details of the case.

COL COOK: No objection.

CHAIR JONES: Shall we accept it? All right.

BRIG GEN MCGUIRE: I just had a short comment.

CHAIR JONES: Oh, sorry.

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BRIG GEN MCGUIRE: No, I just had a short comment then on one of the findings is that I too wanted more discussion. Only because I wasn't quite understanding the details of the previous discussion, and it helped me. But that finding of 45-3 that there are no formal requirements for military investigators in particular, because that is to provide written opinions or justification when declining to pursue criminal cases.

I'm just wondering, did you consider or look at the actual investigated cases. Because those are under review. They do go through a pretty good review when they're determining whether or not they think it's unfounded, or not substantiated.

And so -- and when they make that recommendation, that is actually reviewed through the MCIO chain of command. So I mean it is in fact documented as to why they're not going forward with it in those cases.

BRIG GEN DUNN: Yes, but this I think applies specifically to cases that were preferred and then not referred.

BRIG GEN MCGUIRE: Okay.

BRIG GEN DUNN: So it's a different -- a different part of the process.

PROFESSOR HILLMAN: There was no intent to suggest that there's an insufficient documentation process for military investigations at all. But just specifically what relates to this narrow legal process about the declination, so

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that's -- this is pretty narrow, not intended to reach more broadly like.

BRIG GEN MCGUIRE: All right.

LTC MCGOVERN: For the RSP finding, would you be more comfortable if we deleted the investigators and said judge advocates and commanders?

BRIG GEN MCGUIRE: Well, it does have the caveat if it does proceed to the trial process, so I guess that it's already gone past that. Okay.

CHAIR JONES: All right, so 45 is okay, accepted. 46. It's a recommendation to send something to the judicial proceedings panel. Any discussion or any objections?

COL COOK: My comments have been we're going to send it to the panel because it's a part of civilian practice, which to me is not a sufficient justification. And may undermine, even under CSS finding 46-2, it says -- I mean it seems to me we're correcting a problem that may not, a potential problem that doesn't exist yet just because civilians don't do it. And it might raise an issue later.

But the issue's never been raised now. It talks about the -- well you don't have sentencing guidelines in the military. It's a different system. I don't know that this has been an issue that if we change it, just because it will match the civilians, I don't know that that solves anything.

Victims will have better visibility on what that exact sentence might be. But basically you know, that one of the comments that were in here, 46-1

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says that in some jurisdictions, the plea deal consists of an agreement to a sentence which has been arranged.

In a military plea you can essentially say that what they have now agreed to is a cap of what the accused might get and everything up until that point, they get the benefit of their deal. That's still a range of sorts. It's just a question of if it can become much longer.

I just don't see why we're including that at this point. I don't see that there's a problem with the military -- I don't see that there's been identified concern whether victims have voiceded, it may raise some concern.

BRIG GEN DUNN: I think we did hear from victims. They don't understand the fact that an accused can make a deal. You know they don't understand that.

Now maybe what's applied when we recommend referring this to the JPP because they can look at this down the road a bit with the benefit of special victim counsel who can now ensure that the victims understand the process better and see whether that -- you know see whether this really does have an impact on their confidence or not. But --

COL COOK: Then I would just suggest leaving your findings that are there and put a period after modified. Again, they're looking at this to determine and you know, should we cross -- should we modify to improve transparency and understanding of a process or something like that.

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But I don't like the idea of just saying because of the parts in the civilian practice, a lot of what we do does. And stating that it may undermine victim confidence when there's limited information on that, you know I'd rather state the more positive to improve transparency or increase transparency and improve confidence in the system.

It's not just about the victims, it's all sides that are involved. It's the government, it's the victim, it's the accused in a military justice type process.

So my concern was more from the because forward, and the fact that I wasn't -- you're saying you heard some evidence from here, where it says it may raise the question. It didn't appear to me that had raised any questions.

PROFESSOR HILLMAN: This was a -- from the subcommittee, this was a compromise position. There was also a sentiment for actually ending the beat the deal phenomenon on the way the military pretrial agreements work. Because it -- and it actually came up in the Sinclair case while we were actually talking about this.

Where it was a military judge in sentencing and you know, gave a sentence well below what the pretrial agreement was in that case, which did raise more ire about this particular feature of military justice sentencing processes. And we -- because we are at Comparative Systems, we were looking at what departs from civilian practice. And that was a relevant consideration as we walked through this.

So recommended further study was the less assertive posture

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that we took rather than not looking at it all. In terms of victim confidence and their engagement in the you know, which is increased engagement with the victim's rights that are now protected within the process, and special victim's counsel. And we wanted to make sure that we don't leave out the importance of the sentencing process while maintaining its legitimacy to the system.

COL COOK: And further studies, I don't have any objection to that. You know to determine whether any changes need to be made in light of -- because you know when you say that the victim, that the Sinclair process, and I only know what's in the news on that one.

I don't know what point the plea agreement had been entered. I don't know if some of the evidentiary issues that came up, came up after the plea agreement, which is why the deal was beat. There's a lot of things that aren't known.

I know for me, one of the things that a judge can't do in a case like a Sinclair case, is they can't -- and this will be a statutory change, too, that I would think that the judicial panel should do, but it's beyond the scope of what we're doing, a judge -- a military judge can't reduce in rank, an officer who's court-martialed and convicted of things. They can do it for enlisted soldier, but that's an administrative process.

Why not give back to the judge, as well, the immediate response to the left for lower serving grade. But I don't mind the study. I mean, I don't think those are the reasons we are saying it should be studied. Just because it's a departure

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isn't enough.

VADM HOUCK: With the findings, does it not work to simply end it after the word modified and the findings pretty much elaborate on any reason for it, right?

BRIG GEN DUNN: And I agree on that, and should put a period after the last item in findings.

COL COOK: Okay, and I'd have no objection.

CHAIR JONES: All right, then 46 is accepted as modified. We have public comment this afternoon, and it's 4:45 and our adjourn time is 5:00 so I'd like to proceed right to public comment. Colonel Ham?

COL HAM: Ma'am, the public comment is Ms. Monisha Rios. And we're going to have here come in front of the bar and stand in front of the lectern.

CHAIR JONES: That would be great, thank you.

COL HAM: Ms. Rios.

MS. RIOS: Thank you. The following is something that was recently found online floating around. And my intent for sharing it with you is to personify even more the culture that bred my experience. And I'm aware that most of you probably read my statement already.

But again I'd like to say thank you for doing this. It's important. So please accept my gratitude for your presence and your effort on this panel.

It's an ominous problem that we're trying to solve, and it's one

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that has claimed many lives. In a period of three months, when I started getting involved with the MST advocacy community online, we lost four people to suicide related to PTSD following military sexual trauma. Thank you for appreciating the gravity of that.

I invite you consider the deep rooted nature of the oppression we strive to eradicate. And I'm not sure if all of you are familiar I'm a social worker. I am in the process of getting a doctorate in humanistic psychology. This is my dissertation. It's everything that I study.

Oppression is defined as an uncomfortable or distressing sense of physical or mental constriction, prolonged, cruel or unjust treatment or exercise of authority, control or power, tyranny, exploitation, rape, violation. The action of forcibly putting down or crushing. The repression or suppression of a person or thing.

What we in the social and psychological sciences understand about oppression is that it can be internalized and therefore perpetuated through the oppressor. Informed by chaos theory, we are empowered to view oppression as a non-linear dynamical system that can be influenced toward sustainable change. And that's what you're doing here. That's what I do everyday.

Sexualized violence and that's to include all abuse tactics and grooming all of that is just one of many -- one of its many subsystems. This genre of oppression is not new to humanity, nor is it a new phenomenon within military

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cultures.

I studied military culture since I was a teenager. Since I decided I wanted to enter service. I still study it. I'm a fan.

Throughout history, sexualized violence has been synonymous with military activity, including psychological warfare. It continues in times of peace while we prepare for the possibility of war. It was peacetime when I was oppressed by psychological and physical sexual violence within the socio-cultural context of the U.S. military.

And please keep in mind that my narrative is part of a collective narrative. And that my purpose in sharing is to illustrate the above concepts.

In 1997, at the age of 17, I swore in at Fort Jackson, where I and all other females in my company received immediate training on how to avoid getting raped. As if you could avoid it like catching a cold.

This training came in response to the changes that General Foote and the Army Senior Review Panel on Sexual Harassment were implementing. We were instructed to defeminize ourselves. To not cross our legs, tilt our heads, bat our eyelashes, smile too big, make eye contact with males, laugh too much and the list goes on.

Our number one rule was to keep our legs closed and not whore ourselves out. And we better not dare to fail anything because it would make all women who serve look bad. It's an example of internalized oppression leading to

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the oppression of another person.

Yet despite my best efforts to follow these rules and man up so as not to pussify drill sergeant's Army. I was still chosen for sexualized public humiliation. As punishment for answering a male soldier's question about a laundry slip, I was made to lay on my back in front of my company with my legs up and open while the drill sergeant in question yelled sexist epithets, accused me and my mother of prostitution. Told males to avoid me because I would get them in trouble among other things related to my body parts.

While I lay there, he made the male soldier do push ups. That drill sergeant psychologically oppressed me in this way throughout basic to the extent that he would yell disgusting things during chow about what I really wanted in my mouth each time I opened it to ingest food. All of this occurred among a large number of witnesses, including cadre.

My next duty station was AIT in a detachment at Keesler Air Force Base where a drill sergeant came into the female latrine while I was in the shower and stood on the other side of the thin curtain. Thankfully all he did was stand there. He was later removed from the detachment after harassing a Muslim soldier.

In a classroom full of airmen, one that I thought was my friend, attacked me from behind and bit me in the back of my right arm after I told him his sexually explicit and violent conversation about rape fantasies and how women really like it rough was making me uncomfortable.

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He bit me so hard that each tooth mark left a dark purplish, blue bruise. They were darker than the rest of the bruises. He threatened to hurt me if I got him in trouble. And not a single person in that room did anything, including the instructor.

A fellow soldier who saw the injury days later made me alert drill sergeants. I had to point him out. He and a friend of his came to follow through on his threat while I was surrounded by my platoon. And a safe drill sergeant who thankfully did not let him hurt me. And he was removed from the base.

The Air Force doctor who was already treating my back injury and gas chamber induced asthma attended to the bite. He offered me a choice that would change the course of my Army career.

He told me things would not get any easier for me. That I would most likely be assaulted in worse ways and that rape was in my future. On one hand he could recommend that I be placed on permanent profile which would limit my MOS options, but not the likelihood of being raped. Or he could recommend a separation based on my injuries and significantly reduce my chances of being raped while serving my country.

While I deliberated over the next few weeks, I thought of how terrified I felt, how depressed I'd become, how I'd washed out of classes. How unsafe and unprotected I really was in this environment.

I thought of what might happen to me if I stayed in. I hadn't

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even been in for a year and I did not want to return home as a failure for not handling Army life as a woman.

I still struggle with that. I still struggle with all of this. The overwhelming fear and terror outweighed my desire for an Army career, even though that's all I wanted. I accepted defeat and the doctor's offer to help me get out.

My next stop was out processing at Redstone Arsenal in Alabama where I endured more sexualized psychological and physical oppression at the hands of a female Captain and her boys. I would love to go into detail about that, but we don't have enough time.

It was like basic training all over again. This time with a woman leading the hatred brigade. I stood up for myself and was retaliated against. This time the retaliation consisted of a false accusation that I was the one perpetrating.

The female platoon sergeant who made the report took me aside to tell me she knew it was a lie. That it's what I got for standing up for myself against the boys club. And that she could not help me because it would ruin her career. It didn't matter that I was restricted to my room and not allowed out even to eat.

I had to rely on these people to feed me. Her fear was too big. Relief finally came when the Captain went on leave and the First Sergeant returned. I invoked the open door policy and spoke with the Command Sergeant Major. Afterward I was given jobs to do outside of the barracks until the day I was discharged.

Ultimately my relief came when we had international soldiers

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from Bahrain come and they decided to befriend me and that's when the rest of the platoon decided to leave me alone.

I will never return to the way I was before these experiences. I along with all who are affected by oppression of any kind, am tasked with finding a healthy way through the aftermath. Not everyone makes it. I almost didn't make it. Some succumb to an early discharge from life while others succumb to the internalized suppression becoming oppressors themselves.

Stopping the cycle of sexually violent oppression that includes socially, institutionally, and systematically reinforced victim blaming and shaming, is ultimately beyond the scope of this panel and the NDAA. Nevertheless, we can set new ethical conditions here that we hope will influence the trajectories and outcomes for the better.

And before I close, I want to reference Law Number 42 concerning Article 120, and that's where the consideration is whether to recommend legislation that would split sexual assault offenses into penetrative and contact. I think that's a great idea.

The reason why is because that's where rape starts. It starts in the culture. It starts in what's acceptable. It starts in the words we choose to use to describe people. It starts in the way we train. It's on a continuum, rape being the end result.

So if we can change that, then we can actually really deal with the

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issue and how we define it. If we're not defining the problem correctly, we're not going to handle it correctly.

So thank you. And I really am appreciative of what you're doing.

CHAIR JONES: Thank you Ms. Rios. We very much appreciate your coming. And we know how difficult it was for you to share that with us. Thanks very much.

All right, Maria, can we close the meeting now? All right. Thank you. We're adjourned.

(Whereupon, the above-entitled proceeding was concluded at 4:57 p.m.)

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