UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL
ASSAULT CRIMES PANEL

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FRIDAY
MAY 30, 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
Lieutenant Colonel Kyle Green
Commander Sherry King

TABLE OF CONTENTS

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

(9:00 a.m.)

CHAIR JONES: Good morning. We are about to get started.

All right, Maria, can we begin?

MS. FRIED: Good morning. Yes, ma'am.

CHAIR JONES: Good morning.

All right, this morning we begin with Comparative Systems and Recommendations 47(a) and 47(b). I'll give everybody a minute.

All right. The two Recommendations in 47(a) and (b) are also on our charts paired with two of the Role of the Commander recommendations.

Recommendation 47(a) suggests to recommend the judge advocates essentially should review sexual assault preventive training materials to ensure no taint of potential panel members or any inaccurate legal information.

The Role of the Commander recommendation is broader. It recommends the Secretary of Defense and Service Secretary should ensure prevention program, address concerns about unlawful command influence. And it, in particular, tasks commanders and leaders to ensure that the SAPR training programs and other initiatives don't create a perception among persons who may serve as panel members that commander expect particular findings, et cetera, which speaks to the unlawful command influence.

I believe that Recommendation 9 was accepted. But am I

wrong about that, the Role of the Commander recommendation? Okay, so that was already accepted.

I guess my only question is does anybody think CSS recommendation 47(a) is redundant or maybe we should specifically mention judge advocates in the Role of the Commander recommendation or we could actually redraft one. Any thoughts on that?

PROFESSOR HILLMAN: Your Honor, I think that 47(a) is largely subsumed by Recommendation 9 but I do think that is one method by which 9 can be implemented. And it came up specifically because of concerns about the panel member selection.

CHAIR JONES: Right. So, are we just going to withdraw 47(a)? Is that the idea?

COL COOK: I like the idea that Professor Hillman has just indicated but one difference between them -- I agree with both. The one difference between them is commanders are responsible for making sure there is no unlawful command influence. But having a judge advocate's eyes on any training they put out before it goes out to make sure, it is a check on the system and it gives another perspective.

So, I think that incorporating into 9, saying hey, commanders you are responsible, judge advocates should review training materials before they are used.

CHAIR JONES: All right. Well, maybe in the same way we

say in particular commanders should do something, we add in particular judge advocates should do what is recommended in 47(a). Any objections to that?

All right. So, we will accept 47(a), to the extent that it will be included specifically in the Role of the Commander Recommendation 9 as an additional part of that recommendation.

No one indicated that they had any discussion with respect to 47(b).

VADM HOUCK: I was just going to say, when we judges should continue to do something, there is no doubt that the proposition is correct but it does seem a little superfluous.

MS. FERNANDEZ: I guess I agree that it is superfluous and I also wonder why we would be instructing judges in what I think they should already know and do and probably do it.

PROFESSOR HILLMAN: Your Honor, likewise, commanders ought to already be stopping command influence but we are telling them again to do that.

So, I think it is -- you're right. It is what they should continue to do and we aren't recommending a big change in the procedure but we did hear enough about the difficulty of empaneling an impartial set of members, a jury essentially, that we thought we should say something about controlling voir dire.

COL COOK: But the difficulty that you heard in seating panel

members, was it because of something the judges aren't already doing? I understood from the findings that one of those reasons was because there is so much out there in terms of the training. It could be misinterpreted or misperceived but that is not anything that is happening with the judges in the courtroom. Or did you hear something different?

PROFESSOR HILLMAN: Counsel told us that this was difficult to manage. They didn't point to -- we didn't do a survey on what is happening specifically in the courtroom.

REP. HOLTZMAN: I have a concern following on what Colonel Cook said. The purpose of voir dire is not to make sure that we can easily seat panels but that the panels are fair. And it kind of suggests that there is another objective to it. So, I'm not sure I agree with that.

PROFESSOR HILLMAN: Well, it says control -- gain the information to exercise challenges intelligently and seek a fair departure panel.

REP. HOLTZMAN: I'm looking at the first sentence.

COL COOK: It says to decrease the difficulty of seating panels.

REP. HOLTZMAN: That's the objective.

PROFESSOR HILLMAN: It should say impartial panels.

COL COOK: If we are going to go with 47(b), and then you mentioned, Judge Jones, you had said that you had been getting comments on it. The comments that are submitted in advance were for the specific ones that have been

identified.

CHAIR JONES: Okay, fair enough. Got you.

COL COOK: But on the sentence number one on here, if we are going to do this, I think it is telling judges what they are already doing. But if you are going to do this, then I would suggest there is a period after voir dire and the second line and taking out the purpose of to decrease because it is not the purpose. And take out the last sentence altogether because there is no indications that judges aren't already taking an active role.

I would prefer not to have anything but I don't think there is anything objectionable in the first sentence after voir dire and take out the last sentence completely. All you are doing is reminding judges what their role is.

CHAIR JONES: I wouldn't make this recommendation without some finding that there was some deficiency in what judges are doing now. It doesn't read like a recommendation. We are saying twice, continue to do what they are doing.

PROFESSOR HILLMAN: Let me ask the other members of the subcommittee, General Dunn and Mr. Bryant, what if we asked that the finding 47-1 be included under Recommendation 9? Do you think that is sufficient there?

Then we are saying that it is increasingly -- this is the evidence that we are basically making the recommendation on. It is increasingly difficult to see panel members. And if you don't want to encourage judges to do this, which the

members of the subcommittee felt we should encourage judges to make sure they are doing the right thing, at least we can put that finding in under 9.

CHAIR JONES: I just don't see -- I just want to read this comment. There is no connect between having problems seating jurors and whether the judge is doing the right thing, which we are saying here, in essence, we are assuming they are by saying they should continue do to what they are doing. That is my problem with it.

LT COL McGOVERN: Judge Jones, I believe Ms. Jaus was the one who specifically thought that the judges, by taking a more active role, could control the line of questioning that attorneys may be asking, which is tainting the panel members and leading to this difficulty in seating the panel members.

CHAIR JONES: I don't find that enough. And I think it is going into the weeds here a bit with respect to judges. Everybody here is representing their own constituency.

BRIG GEN DUNN: Well, what if we do what Professor Hillman just suggested, which is under Recommendation 9, make sure we include the finding 47-1.

CHAIR JONES: Well, I have no problem with this being a finding. You are not suggesting it go into the recommendation because it is just a statement of fact. Right? Okay.

I wouldn't lose the finding. I don't have a problem. I don't

have a problem with the finding.

MR. BRYANT: I agree with her suggestion that we use the finding, put the finding in.

We did hear from, in our site visit to the Norfolk Naval Air Station, complaints that it was difficult to get a panel because of some of the training that was going on. And they provided posters that were put up all around the base that suggested that after one drink, a victim can no longer consent. They also complained that NCIS shouldn't be doing training on that aspect but we don't need to get into that.

But there was that issue. And I agree that that is different from is the judge properly controlling voir dire.

CHAIR JONES: All right. So, thank you, Mr. Bryant. We will accept 47(a). The finding for 47(b), which is 47-1 will be in the report; 47(b) is not accepted. Is that accurate? All right, thank you.

Okay, Recommendation 48, the good soldier defense.

COL COOK: Excuse me, Judge.

CHAIR JONES: Yes.

COL COOK: Role of the Commander Recommendation 13, did we already accept that? That was underneath of this --

CHAIR JONES: Oh, I see that, yes. Sorry.

CHAIR JONES: It doesn't really relate.

LT COL McGOVERN: Actually, those are two separate.

COL COOK: Okay.

CHAIR JONES: But I think this was accepted already. Or am I mistaken?

LT COL McGOVERN: Yes, ma'am, except that it didn't have both sides on this.

CHAIR JONES: Thanks for bringing that up and it is good to put on the record. It really doesn't relate to 47(b). Okay, great.

Okay, 48, character evidence, the good soldier defense. Ms. Holtzman, I think you wanted to talk about this and others may as well.

REP. HOLTZMAN: Yes. Could you explain the support for 3(g)?

PROFESSOR HILLMAN: The support for 3(g)?

REP. HOLTZMAN: Yes.

PROFESSOR HILLMAN: This about Section 3(g) of the Victim Protection Act.

REP. HOLTZMAN: Right.

PROFESSOR HILLMAN: And it is attempting to eliminate the good soldier defense. And this is somewhat unartfully drafted in some ways but we are trying to be precise because character evidence is not used all that differently in a court-martial, compared to a civilian trial. But this phrase, the good soldier defense

has been used to describe what happens when character evidence is introduced during findings. And good military character can be introduced during findings. So, that is what the Section 3(g) approach is.

We said so our conclusion there was that we could improve victim confidence. There are two issues here with respect to these changes. One is the perception that it would create among those before they might decide to report a sexual offense. And then what happens actually in the court-martial itself, with respect to the admission of character evidence and the victim protection act is attempting to change both. The impression that high rank and service protect an accused from being convicted of a court-martial, as well as police what happens in the evidentiary --

REP. HOLTZMAN: Can you give me an example of how a person's character would come into play in connection -- well, a record of military performance would come into play in connection with a charge of rape?

PROFESSOR HILLMAN: Well, 404(a), which is the Military Rule of Evidence, says general military character is admissible when relevant to the offense. And what has been read to mean is relevant to the offense, more generally, and not only in the narrow sense that it has been used in the civil sector. And that is what this provision is attempting to get rid of.

But what judge advocates have said, and Colonel Ham might want to speak to this, because she is -- in practice, this doesn't actually work out that

much differently than the measures of credibility that end up in a civilian criminal trial. But this impression that good military character rescues a person from criminal conviction is a problem.

COL HAM: Ma'am, it is character evidence the same as you are familiar with. Character evidence is admissible in trials around the country. It is a particular character trait of a soldier's performance of duty. So, it is, in lawyer speak, you are allowed to ask reputation and opinion questions after laying a sufficient foundation that you know enough about this accused soldier/airman/marine to render an opinion as to his character for duty performance, his character for whether or not the person is a good soldier, good marine. Like the defense counsel to the subcommittee members on site visits, it is of limited value in serious offenses, of course. And other defense counsel told the subcommittee that most of the time they don't have the defense. They don't have the evidence to put on because, of course, you put on evidence of a good character trait, that opens the door to specific instances of bad character.

So, if that answers your questions, I hope that wasn't too much legalese.

So, it is a particular character trait that you wouldn't find in a civilian trial but it is admissible in the same manner in which other character traits are admissible around the country.

BRIG GEN DUNN: I mean, I think to be frank, as we looked at

this, enacting that section of the VPA is not going to make any difference, except, perhaps in the mind of victims. That's all.

I mean legally, it is not going to make a difference. It is not going to make it any harder to prosecute these cases but it may provide some comfort.

CHAIR JONES: And can I just ask, were we specifically tasked to look at the VPA or this particular provision, rather?

PROFESSOR HILLMAN: It's part of the pending legislation.

CHAIR JONES: Yes.

MR. BRYANT: Judge Jones, we did hear from, again on the site visit to Norfolk Naval Station --

CHAIR JONES: I'm having a little trouble hearing you, Mr. Bryant.

MR. BRYANT: I'm sorry. We did hear on our site visits to the Norfolk Naval Station where, to give just a background, they are the largest jurisdiction in the Navy, covering 14 states. And during that site visit, it was recommended that this good soldier defense, good sailor defense be eliminated for non-military offenses, which would mean the sexual assault. They felt that it was still appropriate where there was a military defense being charged but not in the non-military. So, it has come from more than just the victims is the point that I am making by sharing that information.

I think I said in one of my other meetings I have a good friend

who practices law in Boston who was a special assisting United States Attorney for a couple of years that I supervised at. When he heard that I was on this panel, he called me from Boston to say the main thing you need to get rid of is that good soldier defense.

So, just a little anecdote.

COL HAM: Most charge sheets have military and non-military offenses on them, including sexual assault. I mean, that is something the subcommittee didn't examine. We don't have empirical data on that.

I mean, you say there is a sexual assault. There is an orders violation. There is a fraternization violation. There may be a maltreatment. I mean those are all military offenses. So, there is a big question as to whether this will do anything. And is a sexual assault in a rank structure a purely military, for instance, all those open questions.

The subcommittee did see something in particular with not a sexual assault case but what is called a naked urinalysis case. A positive urinalysis. That is the only basis for a court-martial and sometimes the only defense available is the "good soldier defense." And there was some concern expressed about eliminating it for those offenses which are not sexual assault offenses.

MS. GREEN: Colonel Ham, that section has been -- the House passed FY 15NDAA and also the Senate Armed Services Committee passed.

VADM HOUCK: So what?

MS. GREEN: It is included in the FY15 NDAA. It was passed by the House and also the Senate Armed Services Committee.

VADM HOUCK: I think my question is, and I think I know the answer, but just to throw a pinecone on it, if this provision goes through, then military defendants continue to have the same rights in a court-martial that they would in federal court to introduce evidence of their character.

LT COL McGOVERN: Yes, sir.

Colonel Ham and Colonel Morris, the experts on the subcommittee all read this and agreed that this will have no practical affect because the pertinent character trait that is relevant will still be admissible under 404(a). The language is drafted in such a way, as Colonel Ham said, to just go to some of these sexual assault cases. But it will still come in as to the other offenses anyway.

CHAIR JONES: So, exactly what is this law that we are pushing? It actually exempts evidence of military character when relevant. Right? The proposal exempts.

LT COL McGOVERN: If you look on page 196 and 197, ma'am, finding 48-4 describes what it proposes.

CHAIR JONES: Right.

COL HAM: I can read the statute. It says it is going to end Rule 404(a) of the Military Rules of Evidence shall be modified to clarify that the general military character of an accused is not admissible for the purpose of showing

the probability of innocence of the accused, except that evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.

CHAIR JONES: That's fine.

COL HAM: That is the law.

REP. HOLTZMAN: Well, my question would be, though, following up on what Admiral Houck asked, so, no rights have been taken away from a military defendant that he or she wouldn't have if the same case had been charged in federal court.

And my question is: Does the military defendant get greater rights to introduce character, let's say it's nonmilitary, on nonmilitary issues than he or she would have in federal court?

PROFESSOR HILLMAN: In the military jurisprudence, this is why this is referred to as a judicially created doctrine, relevant has been read to allow this evidence of good military character to prove guilt or innocence of all sorts of defense.

This is clarifying that relevant means relevant to an element of the offense. And it could restrict some of what happened in the past. I actually don't think it is happening now in any case. So, I think that is why, as Colonel McGovern said, this is -- the impact of this is minor but for the signaling.

CHAIR JONES: Well, maybe we could just say that we

recommend this as a clarification of the rule. Because we are saying it may include -- I don't know. It may increase victim confidence but it is actually not changing anything.

MS. FERNANDEZ: You said Congress is going to pass this.

CHAIR JONES: Right.

MS. FERNANDEZ: So, I mean, given that all we are doing here is (A) a signaling and Congress is going to pass it anyway, I think we should just go with the recommendation.

REP. HOLTZMAN: Maybe my question wasn't clear. My question was really does Section 3(g) go far enough in terms of protecting against this good soldier defense, I have always followed orders, therefore, I didn't rape this person. I mean, that to me, if that is the case, I can't say I am a happy camper.

LT COL McGOVERN: That is the misconception of the good soldier defense. In reality, judges only let relevant pertinent character traits come in as to that offense under 404(a). So, the --

REP. HOLTZMAN: I understand. But Professor Hillman said that in the military, the issue of relevance is broader than in the civilian law.

LT COL McGOVERN: The case file has --

REP. HOLTZMAN: Okay, so it is broader, can that character evidence become relevant, where it wouldn't be relevant in a civilian case? I'm not talking about military offenses like fraternization or not following orders or something

like that.

LT COL McGOVERN: Yes, ma'am. And I think the evolution of the case law isn't because it is broader. If things have been found to be a pertinent character trait as to the military defenses.

REP. HOLTZMAN: So let me ask this question. Is it a pertinent character trait as to whether or not someone raped somebody that they followed orders and were an obedient soldier?

LT COL McGOVERN: Your Honor, that would not be relevant -- or ma'am, that would not be relevant.

REP. HOLTZMAN: Okay. I just wanted to know. Thank you.

PROFESSOR HILLMAN: Congressman Holtzman, I think that this issue matters. So, I think -- but this is a softer recommendation than I, personally, would have drafted because I have been concerned about this in the past. And the impression of being on time makes one less likely to have committed sexual harassment, for instance, that seems to be entirely irrelevant.

I think the way that this is drafted narrows this again.

REP. HOLTZMAN: The statute.

PROFESSOR HILLMAN: Correct.

REP. HOLTZMAN: Yes.

PROFESSOR HILLMAN: The way that this statute is drafted.

And I actually don't think we can go much further at all and remain within constitutional bounds on what should be admitted for a defendant at trial.

REP. HOLTZMAN: Thank you very much.

CHAIR JONES: All right. So, any other discussion on recommendation 48, which is, essentially, approving the statute? Recommendation 48 is accepted.

Recommendation 49, are there any -- is there any discussion or comments with respect to 49? And that is 49(a) and (b)? This relates to using a single standardized methodology to calculate prosecution and conviction rates.

COL COOK: No objection to the wording in 49(a). In 49(b), no objection to having that study then look at these pieces. I just would request that we rephrase it to say the Secretary of Defense direct the study of prosecutorial decision-making and maybe just put beginning to say that the Secretary of Defense direct the study to assess the following and cross out the end of that first paragraph.

Or, do you want to leave that first paragraph, direct a study of the disposition process? Which we are not looking at the discussion of our decisions. We are looking at what the results and what the rates are. I just don't want that second guessing at somebody's discretion. That is what it is.

CHAIR JONES: What was the intent of the committee there?

PROFESSOR HILLMAN: This is the recommendation that Colonel Ham pointed us to yesterday when we were talking about a review of

prosecutorial decisions in terms of what doesn't go forward. And this is the recommendation that is responsible to that concern for wanting an expert to look at the way this works out.

And this, I just have to call out, our staff did an amazing job. There is a lot of the pages of the discussion that support this in trying to be precise with respect to what we want to look at and draw out what the calculation ought to be on this.

COL COOK: And I don't have a problem with saying these are the pieces we actually want to look at. My concern is just focusing in your looking at the discussion piece.

That's why I say, if you want to leave that first line in there because it does say you have a highly qualified expert look at it, then I would be more comfortable with a directed study of the disposition process, not singling out one person's decision in that process but what decisions are made. Because it is all based on evidence. And the fact that it is discretionary is the --

PROFESSOR HILLMAN: I think it is happening now that commanders are being reviewed for what they are doing in these cases. I don't think having an expert would really change how that is working out right now.

COL COOK: I'm not worried about the expert. And the fact that it is being reviewed now, I'm not necessarily saying I agree with how it is being reviewed in some cases. I am just saying that if you want the Secretary to have the

study, directed study of the disposition process by a highly qualified expert, I don't have a problem.

PROFESSOR HILLMAN: You're worried about just seeing the --

COL COOK: I'm just saying because you were focusing on the prosecutorial decision-making.

COL HAM: I think the intent, correct me if I am wrong, Dean Hillman, was to -- I mean an expert that you heard from who does this is Dr. Cassia Spohn, where she actually kind of divides up the parts of cases to see how decisions are made, depending on what that evidence is. And so she, in doing so, can reveal, for lack of a better word, biases or actually good decision-making.

So, I thought the intent was to examine in that manner.

CHAIR JONES: Maybe I am wrong but are we talking about all disposition? Prosecutorial, to me when I see that, I start thinking about the trial counsel and possibly their role in un-founding.

If we are talking about decision-making all the way through, leading to a charge, I don't know if that is what you are getting at, Colonel Cook, or not, when you say disposition decision-making.

COL COOK: I just said disposition process.

CHAIR JONES: Process.

COL COOK: Draft a whole process from the time that an

allegation is out there. I mean, that is what I thought you were looking at.

LT COL McGOVERN: The graph actually does what Colonel Cook is suggesting and captures every possible disposition. So, we could substitute -- we were saying the Secretary of Defense direct a study of the disposition process and eliminate the words prosecutorial decision-making and it would still be accurate.

REP. HOLTZMAN: The other way, suggestion, would be, since you talk about reporting prosecution and conviction rates in sexual assault cases in the prior cases, you just say direct a study of these issues in sexual assault cases, unless you wanted it to be broader.

COL COOK: No. I mean that is why I said you could also just take the sentence and just combine it. The Secretary of Defense direct a study by a highly qualified expert to assess the following. And all you have done is combine those two sentences --

REP. HOLTZMAN: Yes, I was going to combine the prior sentence with the --

COL COOK: With the other, right.

REP. HOLTZMAN: It's fine. I'm okay with either.

COL COOK: Okay, either one. I agree that you can review the process and you can look at what the results are. I just don't want the perception out there that somebody -- that your individual decisions are being second-guessed. You are looking at what the overall results are.

CHAIR JONES: All right. So, are we saying what is the military service's standardized definitions, et cetera, for reporting prosecution and conviction rates in sexual assaults and then just go to the Secretary of Defense direct a highly qualified expert in the field to study and assess the following. Does that work?

Okay, 49(b) is accepted then.

Recommendation 50. Okay, and Colonel Cook, I think you had a comment.

COL COOK: I just have a question.

CHAIR JONES: Yes.

COL COOK: The listing says as well -- in the middle of it, it says as well as the synopsis of all other unrestricted reports of sexual assault with the known defendant. Do we already get a synopsis like that now or are you adding something by putting that in there?

LT COL McGOVERN: That's in the DoD SAPRO report.

COL COOK: I'm so sorry.

LT COL McGOVERN: That's in the DoD SAPRO report.

COL COOK: So we already do that.

BRIG GEN DUNN: And we are doing our best to clarify, so that DoD quits reporting cases that either don't fall within the -- I mean that is what we are trying to do here. We are trying to get away from this whole substantiated -- you

used the word substantiated. It doesn't appear anywhere else.

LT COL McGOVERN: Currently, you have the unfounded cases and you have substantiated cases. So, you are missing a group of cases that may not be false or baseless but they might not be substantiated either. So, by eliminating that word, you fill a gap to get the full picture.

CHAIR JONES: In this recommendation, we were hoping that they have adopted our earlier recommendation of defining unfounded as false or baseless. That is the only -- so, we like both together.

COL COOK: Yes, I have no objection.

CHAIR JONES: Okay, any other discussion or objections? Okay, 50 is accepted.

Recommendation 51, this says Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates.

And is there any discussion on that?

REP. HOLTZMAN: Madam Chair, just note it or raise the question as to whether or not somehow we had addressed this issue earlier but I have no objection to the substance.

CHAIR JONES: Okay, me neither. And I think it fits right in with everything we have started to talk about at the very beginning of the report. So, I don't whether placement matters much.

But is there any objection to the recommendation itself? All right, then 51 is accepted.

Okay, 52, let's see.

COL COOK: The only comment I had is I don't mind that we are directing again the services to standardize the way they collect data and identifying what they should be collecting. The second sentence of it should be available to the public. You can leave it or take it out but it is already available to the public if they provide a Freedom of Information Act request to get it. You are not adding anything, unless I am missing something.

BRIG GEN McGUIRE: That was my question as well. In what form is it available to the public? And so because it is already available via FOIA, are we planning on what form, you know, like a website or something? I think that might not be appropriate.

CHAIR JONES: Well, this fits in with 53. So, we might as well just talk about them together.

LT COL McGOVERN: Those are distinct, ma'am, 52, and 53.

CHAIR JONES: Okay.

MR. BRYANT: I couldn't hear you, Lieutenant Colonel McGovern.

LT COL McGOVERN: Recommendations 52 and 53 are distinct. The subcommittee could not complete its mission of fully analyzing

sentencing procedures because this data is not standardized, collected, easily accessible and in a form that you could see whether or not there is sentencing disparities. It is not broken down by offense, those types of things.

Whereas, the next recommendation is the Navy has begun to release all offenses on the web or through the Navy Times they release each month the court-martial outcomes, so you can see generally what sentences are going for. But it is not the sentencing data that would be necessary for a study to be done.

CHAIR JONES: Well, 52 is fine and it is distinct, except for the last line that says this information should also be available to the public. That is what I thought bled into Recommendation 53. But why don't we just talk about 52. If it is already available through FOIA, --

LT COL McGOVERN: That's what I want to say, it's not, ma'am.

CHAIR JONES: Okay, that is the question.

COL COOK: When you say it is not available to FOIA -- but if you put out -- if you are directing that there be a data that they collect and you collect these pieces that are --

LT COL McGOVERN: It's not available to FOIA now because it is not -- this information doesn't exist right now.

COL COOK: But once you come up with a system that says this information will be collected -- it is going to be the system of records by the government. And somebody can submit a freedom of information act request for it

and it will be available to the public. So, the process already exists. That's all I'm saying. I got it, you couldn't collect what you needed. If you are looking for disparities in trends, you are going to find them, especially in a system where there is no sentencing guidelines. So, in the service cultures, there will be disparities. So, I don't have a problem about collecting it. I just don't think you need to add the sentence. You can leave it there. It doesn't even do anything.

MR. BRYANT: But we may be doing the services a favor if we are talking about doing something other requiring FOIAs. In my jurisdiction, the train stops while we find all these documents and get them and provide them. Whereas, if you can say it is on our website, done! I am just --

COL COOK: If that is what you are recommending that we put it out proactively on a website, that is a different issue. This should be available -- that's right. That's not what this says.

MR. BRYANT: I know it says available to the public and it is just open-ended. We don't know what -- I don't know exactly, frankly, what we had in mind at that point.

BRIG GEN DUNN: I think our perspective is, we are trying to increase the victim confidence in the system and the public confidence of the system. So, if you are going to put this together, then just have it available without people having to go through 47 hoops to get to it.

MR. BRYANT: Well, logistically having to respond to all these

FOIAs is a pain, I would think, in the military. It certainly is in the civilian world.

And so if we could give them a tool that helps eliminate the need for that, we may be helping out a little.

REP. HOLTZMAN: I completely agree with that. I think that even though something is available theoretically under FOIA, the willingness of the agencies to respond to FOIA in a timely manner, and the burden that is placed on individuals to make the request, and the victim will need a lawyer to figure out how to do a FOIA request that she or he wants to know.

I think that, given exactly what Mr. Bryant and General Dunn have said, in terms of increasing victim confidence, getting the Defense Department and the military to put out this data in a regular way, I don't know whether it should be every month, that is another issue, but to put it out on a regular basis so that the public can scrutinize and understand what is happening, will go a long way to making people feel that there is nothing to hide here. And there shouldn't be.

BRIG GEN DUNN: Exactly. And quite frankly, my personal perception is the data is pretty good. So, it is good to publicize it.

CHAIR JONES: Yes, I think we have to sharpen up what we are talking about when we say the information should also be available to the public in 52.

Kelly, you are right, 53 talks about releasing sentencing outcomes, which is different from what we are talking about, should this recommendation be adopted, where we actually get sentencing data characterized by

all of these different categories. That's great. But what do we want to say? Do we want to say should be available in a manner not requiring a FOIA request? I don't know. I am just trying to figure out what you want here.

COL COOK: Then just say when I look at this, unless you tell them what you are looking for, they are not going to be able to release it unless somebody puts out that FOIA. So, if the intent is to say this information should also be posted on a website or in a forum that is available to the public and that is what your goal is, then stay it more fully.

If that is what the intent was and all you are talking about is data, you are talking about statistics. So, it is not case data, I admit that but I don't have a problem with that.

The way it was, it just they can get it was FOIA. But that is not what you want. You want it out and available. Fine, then change the last sentence.

CHAIR JONES: So, it should be posted in a forum available to the public?

MS. FERNANDEZ: Easily available to the public.

CHAIR JONES: Okay.

MS. FERNANDEZ: I guess FOIA could be a forum.

CHAIR JONES: Considered a forum.

LT COL McGOVERN: Each service has a FOIA website where

they do discretionary releases or releases that they are expecting future -- they have released something and they expect future requests. So, there are forums easily available.

This will just guarantee the Navy isn't maybe doing it but then the Army decides not to. This will ensure every service does it the same way.

REP. HOLTZMAN: May I make a point aside from the information, which is number two? When we say identifying sentencing trends and disparities, the disparities word suggests that we have some concern about disparities. Maybe there is a reason to be concerned but you can't tell that just a difference in the sentence. It depends on the person's background, the facts of the case, how cruelly the crime was committed and so forth.

So, I would just strike the word disparities because I think that suggest a concern on our part for disparities in and of themselves.

COL COOK: Agreed.

REP. HOLTZMAN: I don't know whether sentencing trends would get insufficiently broad.

CHAIR JONES: Okay, any objection to that? All right, we will strike disparities.

And will accept some specific language for the last sentence in 52, essentially indicates that it has to be made available to the public in some easily accessible forum.

All right, 53. This is a recommendation that the Secretary of Defense direct the military services to release sentencing outcomes. And really that is different, obviously, than the subject matter in 52.

On a monthly basis to increase transparency and promote confidence in the system. All right.

I'm sorry. I can't hear you, Mai.

MS. FERNANDEZ: Should we direct that this be on the same site or the same place as 52? I mean that this would be done in conjunction -- just to make sure that all the data is in the same place.

COL COOK: One of your challenges may be, and anyone here with a criminal justice background can correct it within a month of what, the actual trial which is a medium -- I guess what I interpret this -- I thought again, all this information is available now through the Military Times, whether it is the Army Times, Navy Times, Air Force Times, whatever it is, all of the military times track the more sensational cases that are out there. They get the information. They publish their articles within 24 hours, sometimes of the case being over. They have got the access to this.

If the intent on this one was the same as the other one that you are trying to put it out in a forum where they don't sit in the courtroom but we are proactively just posting all the results, that is fine. I'm not sure how many people will be interested in every result because that is what you would get.

But the other challenge with that is, you can put out what comes out right after the court-martial but there is no action taken on that case until the clemency piece is out there and that could change. But if you are looking for the announced sentences, the only question I would have is on a monthly basis, how hard would that be to post all the court-martial results, opposed to services in some format? I don't know.

LT COL McGOVERN: The Navy has been doing it since November on a monthly basis.

COL COOK: The Navy doesn't have the same level of caseload that the Army does.

BRIG GEN DUNN: By the Army used to do it. I think it is just not a hard thing to do. They collect all the information, all the results of trial at a central point. It used to be done.

COL COOK: So if your request is that they put it out, the same way you are asking -- are you asking for the same type of FOIA exemption type thing that was just proactively posted, available for anyone to pull every case that was out there? Was that the intent?

CHAIR JONES: That's how I read it.

MR. BRYANT: And we weren't thinking beyond the actual sentence, where a clemency appeal, things and so on. Just like in the civilian world, what is in the newspaper is what the judge or the jury imposed. After that, it

becomes forgotten unless something spectacular --

Maybe we were concerned that there is not -- this information is not readily available and it may increase confidence of what is going on in our military justice system.

If it is the sentences are readily available, here is what Joe or Jane got at Fort Whatever --

LT COL McGOVERN: The way it is listed, it doesn't Jane or Joe. It says a larceny received a BCT, three months' confinement, forfeiture of pay. Next line, a sexual assault. And so you can see from that and make an assessment, okay, what is the level of crime, in general, what are people getting for that. How many sexual assaults are there versus other crimes?

BRIG GEN McGUIRE: And does it address, though, acquittals? And so that might be my concern as well is that in there, it says promotes confidence in the system. If I want to know confidence, it goes both ways.

And would that, in fact, promote confidence if I was a victim and I saw that there seems to be a lot of acquittals.

LT COL McGOVERN: No, it actually only shows convictions, ma'am.

BRIG GEN McGUIRE: Well, then and so now let's look at the other side as somebody that is being defended, I would want to have confidence in the system as well to know that it goes both ways.

CHAIR JONES: I think the results is really what we are talking about here.

COL COOK: I think it is interesting to say that. There is no objection to it. I mean the results are out there. They are public knowledge at that point. All of our courts-martial are open to the public or open to the press. The press is notified before high visibility type cases and stuff like that.

For me, there is nothing objectionable about the concept that is here. Would I, as a servicemember right now, in a time of downsizing, want to take the resources of a person or somebody to collect and put them in the format that you are now suggesting and just collect every single result to post it out there so that people might look at it at some point? I don't know that that is the best use of a person's time. It is not a question of wanting to validate. It is just a question of that is -- that will be a manpower issue that is out there. They already collect the statistics. You can go to the case.

BRIG GEN DUNN: Right, they already collect them.

COL COOK: They already collect them. There is nothing new here.

BRIG GEN DUNN: Many installations newspapers publish them at the installation level. Really we are talking about an hour of somebody's time to pull this for a service for a month. Because the data is that -- I mean, I just --

COL COOK: I think it would take them more than an hour.

LT COL McGOVERN: It is already all recorded with military justice.

BRIG GEN DUNN: It is already in one place for each service.

CHAIR JONES: But you don't know who the defendant was. Correct?

BRIG GEN DUNN: Correct. Well, some installation newspapers, they publish the guy's name or the woman's name.

CHAIR JONES: I'm not advocating one way or the other for that. But then suppose there is a clemency, do you match the outcome by case number and say in the next month or two months' or six months' later --

BRIG GEN DUNN: It's so far down the road. Installation newspapers that publish court-martial results will say Private So-and-so was convicted of such and such. And they just run through a list and that's it. And that is the last you ever hear of it.

CHAIR JONES: Well, this might be fine in terms of at installations and even within the military but I don't see the public looking at this or without -- I think the public would benefit more by capturing these statistics in the database we talked about earlier. But again, I don't know that it is worth the time.

BRIG GEN DUNN: Well, the Navy has started the trend by publishing it in the Navy Times.

COL COOK: Okay, then the only comment I would make is

that I would change it to increased transparency. People can already get it if it is already open.

I would suggest then that it is Secretary of Defense direct military services to release sentencing outcomes. Now, you want to say in all cases? Is this every court-martial? Is that what we are suggesting or all felony cases? Do you want every case released, that is up to you, on a monthly basis, not to increase transparency. I think that might be -- especially at the installation level is to improve awareness of acceptable and non-acceptable conduct and the potential consequences, thereby promoting confidence in the system.

BRIG GEN DUNN: Yes, but are not publishing it for good order and discipline purposes on the installation. So, that is what installation newspapers do. If we do this, we are publishing it for transparency reasons because those who are not associated with the military and have no idea how to get in and have no idea that it is published in the Camp Press every week, it is out there in a place where they can identify and these victims groups can identify and they can go and look at them.

So, that is transparency. It is just making the information that we already have, we already collect, we already -- it is easy to do and just put it out there. I do not see where --

CHAIR JONES: Where are we publishing it?

BRIG GEN DUNN: I don't know why we are talking about this as long as we are. The Navy is doing it. Why not have the Army and the Air Force,

and the Marine Corps do it as well?

CHAIR JONES: Who reads the Navy Times?

COL COOK: Whoever buys it.

CHAIR JONES: Well beyond the military?

VADM HOUCK: Well beyond, I don't know that it is well beyond.

CHAIR JONES: I'm just addressing transparency, that's all.

BRIG GEN DUNN: I mean all those Times are published by the same company, they get active duty, retirees, --

VADM HOUCK: Victims, potential victims.

BRIG GEN DUNN: -- yes, potential victims.

LT COL McGOVERN: It's all available on the internet.

BRIG GEN DUNN: It's available online, yes.

MR. BRYANT: I think you would find at the Norfolk area probably not very much beyond, I mean all the military bases, you will see merchants and so on because it is out there for them to purchase.

BRIG GEN DUNN: It's worldwide, though.

MR. BRYANT: I know it is worldwide but I am saying it is probably going -- in answer to Judge Jones' questions, it is probably most going to be circulated most outside the base or the post and beyond that, not a whole lot.

BRIG GEN DUNN: But it is online.

MR. BRYANT: It is.

CHAIR JONES: All right.

REP. HOLTZMAN: Madam Chair?

CHAIR JONES: Yes, I'm sorry.

REP. HOLTZMAN: I would like to make a couple points on this.

Number one, this applies, I take it, to all cases, not just sexual assault cases. Is that correct?

BRIG GEN DUNN: Exactly.

REP. HOLTZMAN: Do we have authority to deal with non-sexual assault cases and make recommendations?

LT COL McGOVERN: I think that, giving the big picture to see how many sexual assault cases there are compared to other types of crimes and what the general sentences for a comparative purpose does fall within the purview or at least CSS felt that fell within the purview of their tasking.

REP. HOLTZMAN: All right. And the second point is you know we focused in the last two items on sentencing, which is fine. I am all for transparency and I am all for publishing this information and I think it is really important for the public to have easy access to them. But why are we focusing -- I mean maybe I just forgot what we have already done, but what about all the other parts of the criminal justice system relating to sexual assault? Are we requiring any

combination of data with regard to that and not just sentencing?

So, I am not opposed to 53 but I hope our concern about publication would not be limited to sentencing.

PROFESSOR HILLMAN: Judge Jones, can I? Just to respond to that.

CHAIR JONES: Yes.

PROFESSOR HILLMAN: Also I think it was a point that you mentioned before. I think that what we sensed would help the most is to first get data that actually can be usefully compared and have it analyzed by experts and published and get that information out there through independent studies, through non-DoD experts.

So, I do think that is more, in part because the complexity of disposition is very difficult to capture in a way that would be easily translatable into a website, in part because of even the snapshot of the data you talk about with respect to sentencing. It is one point in time. This is the sentence. It is not what will be served, necessarily. You have to look at all the opportunities for reduction afterwards, et cetera.

REP. HOLTZMAN: Okay, so my point here is, though, if we haven't made recommendations on combinations of data in areas aside from sentencing, do we want -- well, maybe it is not the right time to raise it. I'll wait until we finish disposition of this recommendation.

I am going to recommend that we at least ask the Secretary of Defense to review other aspects of the handling of sexual assault cases and develop means of making statistical information in the same way.

LT COL McGOVERN: Representative Holtzman, ma'am, the services spent hours and hours compiling data for Congress in making these very transparent. Again, each case has a full synopsis in detailed Excel spreadsheets so that we can see whether chargers were deferred, whether it resulted in an Article 15. So, I think that information is all captured in the DoD SAPRO report.

CHAIR JONES: Which is public.

REP. HOLTZMAN: All right, so that is already done.

LT COL McGOVERN: Yes, ma'am.

PROFESSOR HILLMAN: You know easily accessible and sort of understandable are different things. The SAPRP report runs to 800 pages. It is hard to discern that. I think it would be a good decision to recommend ways to make this information more available, in part, so that the sensational cases don't dominate understanding of this process. And you also have the other information about the more ordinary cases to fill out the picture.

So, I would support that kind of proposal.

CHAIR JONES: All right. Are we going to leave 53 the way it is? Do we want to add how we want them to release the sentencing outcomes or is 53 sufficient? Okay, we accept 53.

Recommendation 54. All right, this takes us to the topic of the military judge in the recommendation that the Sec Def recommend amendments to the courts-martial manual and the UCMJ and service regulations to make them the sole sentencing authority in sexual assault and other cases in the military.

Let me see if this relates to VSS Recommendation 37. No. I mean, it certainly is part of the conversation but I think -- why don't we begin with the CSS recommendation?

BRIG GEN DUNN: Ma'am, may I put something on the table?

CHAIR JONES: Sure, go ahead.

BRIG GEN DUNN: And I have not discussed this with the rest of the CSS Committee members. But do you suppose it would be possible, given the discussion yesterday about the role of the military judge, for us to perhaps make a recommendation that has specific parts that the Secretary of Defense specifically direct a study of the following, and then capture Recommendation 54, Recommendation 55. And then going back to the discussion on the military judge yesterday, I mean from my perspective, I strongly support the concept of the military judge entering the process earlier, which is at the preferral stage rather than the referral stage. I kind of think that that is a no-brainer.

But the other concept we discussed yesterday about the military judge role Article 32 could also be put in with Recommendations 54 and 55, the specific issues that the panel has identified we think would -- are worth looking at in

terms of the efficiency and the openness of the military justice system. The military justice system has evolved over the many years since World War II and has, gradually, moved to a larger and larger and more significant role for military judges.

And I think all of this fits into that category and, quite frankly, I think it is time to take another look at it, at least to make a specific recommendation to be looked at.

CHAIR JONES: Well, I would not -- I would object to this recommendation, standalone as a recommendation that the Sec Def go ahead and amend and make military judges the sole sentencing authority, just because one, I think, some defendants want their jury and I think they have a right to ask for it. And so, I would be against this.

Am I against it if it is added to the list of things that the Role of the Commander suggests should be studied? I would be happy to discuss it.

I don't know how strongly CSS feels about their standalone recommendation here and we should discuss it further. I am not for accepting it.

Anyone? Yes.

PROFESSOR HILLMAN: Colonel Morris joined by Colonel Scholz wrote the dissent for this issue. General Cook talked about the balancing that he felt in this in our previous presentation on this. I think there are strong feelings in both directions on it.

We did have the -- this is the recommendation that the

subcommittee reached to recommend this, in part because of what we say in 56. There is great interest in sentencing guidelines and mandatory minimums, neither of which we opted to recommend. Instead, we recommended an adjustment in sentencing procedures, recognizing that we are coming at this from a comparative systems perspective and there is nothing like the military sentencing process in any civilian system that we found, nor could we find sufficient reasons to retain that in the history of the military justice system and the evolution that General Dunn just mentioned has been taking place in it.

That said, this is -- if we don't go to judge alone sentencing, then I fear that we are not looking at addressing some of these other issues, some of the issues related to sentencing and concerns about outcomes.

So, other recommendations go to the unitary sentence and practice, for instance, and the data collection piece.

So just to be clear, 56 says no sentencing guidelines but do three things: enhance the military judge's role by having them sentence; second, collect, data, and analyze it; and third, sentence for specific offenses, as has been the norm in the civil sector for a long time. It continues to be, rather than unitary sentences.

CHAIR JONES: Let me just -- I guess I have a general comment about this. There are a lot of suggestions, which may prove to be excellent. I don't feel, as the response panel to sexual assaults in the military that we have had the time, frankly, to get into recommendations that affect the entire military justice system in

very important ways.

They may be great recommendations and I would recommend that they be looked at but I would not feel comfortable in the context of what I have been able to do in the last 11 months, recommending these straight out right now.

BRIG GEN DUNN: But recommend a --

CHAIR JONES: Study?

BRIG GEN DUNN: -- review that studies them.

CHAIR JONES: I can see the strengths and weaknesses in each of these as well. But I would -- I am just not comfortable at this point, I don't think I know enough to recommend the changes. I am content and happy to recommend they be looked at as possible changes to the system.

I don't know how others feel.

VADM HOUCK: I agree.

BRIG GEN McGUIRE: Agree.

COL COOK: Colonel McGovern, how often do -- do you know the statistics of how often people even elect to have the panel -- elect a panel in the case that they actually do the sentencing? What percentage of military cases? Was that in your report someplace?

LT COL McGOVERN: I do not know that statistic.

COL COOK: Okay, it wasn't looked at.

CHAIR JONES: I think they rarely even select a panel for a trial,

which is something down around 10 or 15 percent. So who knows how many within that small subset? But I am still not comfortable. But I agree, it is a very small number.

COL COOK: It is a small number and part of the reasons -- it is kind of interesting that you are doing this in order to -- I think you are doing this in order to make it more equitable, give it a more -- well, definitely a different level.

I get the sense from what I am doing in the field that some of the reasons why people don't select panels is because they feel they get more hammered by a panel than they would be by the judge.

I would be against the recommendation outright. I don't know the value of studying it, but if somebody wants to look at it, that's fine.

BRIG GEN DUNN: I mean don't forget that part of our mandate was to compare military and civilian systems. And in the civilian world, there are what, six states left, only six states have jury sentencing, period.

COL COOK: Okay, but I don't know who the six states are. The military system, the way it has been, seems to work on that point. And I don't know whether we have given anything that says it has to be changed just because 44 jurisdictions have it as panels, isn't persuasive enough for me to say we need to change something.

There is a lot of other things in this process we needed to change.

BRIG GEN DUNN: Right. And I am with you 100 percent.

I, personally, am a fan of military sentencing and I think --

COL COOK: Or the option for the defense to let them choose. Which do you want.

BRIG GEN DUNN: Correct. But I think that saying no, no, no, we can't change. We can't change. We shouldn't look at anything. It works for us, we need to keep it the way it is is not a wise way to move forward. I mean the military justice system is always changing and I think that the beauty of this panel is that we brought together incredible numbers of witnesses and received mounds of testimony and we have very bright people on the panel who have worked very hard to come up with recommendations that I think are worth a serious look.

We are not going to make them straight out and I understand that. But I think that looking at the sentencing process from start to finish, I think we are all pretty clear we do not recommend sentencing guidelines. We do not recommend mandatory minimums. But looking at the whole process from the military judge's role to sentencing, I think is something that is valuable. And it is good for a system to examine itself periodically.

COL COOK: I don't have a problem with examining ourselves but there are pieces of our system I think we need to examine first. If this is not going to be a lengthy examination by itself, then just add it to the list. I have no objection to that.

If this is going to distract and become a separate big study by

itself, then I would rather put the resources to some of the other points that have been made during this panel.

BRIG GEN McGUIRE: Colonel Cook, what the CSS members found was at the start of the sentencing guideline discussion, they first had to review the process. And how would you do sentencing guidelines with panel sentencing versus how would you do it with a judge. So, it became part of the same conversation. And that is why with General Dunn's proposal of the study, that it would be part or possibly appropriate to have it, if you are going to continue to study sentencing guidelines, continue to study the sentencing process.

COL COOK: If you continue to study sentencing guidelines. Well, I know both in the civilian and the military system there are people pro and against on both sides. Whether it works or not in the civilian sector, they would rather some people not have them and others love them.

BRIG GEN DUNN: Yes, and from the perspective of public trust in the system, I mean unitary sentencing has some issues. You know because we don't separate out, you are not sentenced this much for the sexual assault and this much for the six AWOLs, and this much to the -- there are some issues.

COL COOK: How much does change the setting?

BRIG GEN DUNN: But there are issues that should be addressed, I think, under an umbrella. And it would be a good idea for a study that addresses these specific issues to go forward.

CHAIR JONES: Yes, Ms. Fernandez?

MS. FERNANDEZ: Just looking at Recommendation 37, that was the one that we had a dissent on by the defense counsel that was on our subcommittee.

I do believe that by eliminating panels and just having the judge sentence really eliminates a lot of his dissent. It was more the concern of new information coming forward that may affect the panel and, therefore, how they would sentence as compared to if he only had a judge. So, from that perspective, just having the judge works more for the victims.

COL COOK: But in reading the dissent to your panel discussion on page 155 of that report and the dissent, the person who wrote it, Cassara, thank you, his comments were just about not being able to have access to that victim but delays and things like that. He added protections in there that had nothing to do with the judge that still aren't in the recommendation for the final protections.

REP. HOLTZMAN: Well, I think the reason this should be studied, I think General Dunn raises a really important point and I think that is part of the reason we are here, which is not to upset the status quo. It is forever and it is a given commandments or whatever.

But you know I think that -- I just lost the train of my thought about the sentencing guidelines and the sentencing.

I think that -- well, I will stop and when I remember what I was going to say, I will say it again.

But I think that the point that was made by you, Mai, is that if we did away with the panel, if we do away with the panel, it allows much more flexibility in terms of sentencing. Because now you have got all these people on panel who really need to be fighting wars and doing other things instead of sitting on the panel, you have this very short time between sentencing and the trial, if you had -- if you didn't have the panel and you just had just sentencing, they might give you more options to do more examination, whether it is victim impact statements, whether it is other kinds of examination in terms of sentencing that could be done, which can't be done now because of the time constraints.

I am not saying that I am for it, necessarily but it does open up other options, in terms of dealing with the present system. So, I think that at the very least it should be studied. And maybe some of these reasons should be alluded to and why we think that the studies should be done. Because there are some benefits, clearly, not just because other states do it. But it may have good things that he doesn't. Maybe it is unfair to defend.

MR. BRYANT: Judge Jones?

CHAIR JONES: Yes, Mr. Bryant.

MR. BRYANT: I am I favor of the recommendation as it stands, as opposed to further study. And the reason that I am and I think the reason our

subcommittee made this recommendation is because we were looking for consistency in sentencing also. And we tried to address the fact that in military courts-martial, you remember that it is not required to have a panel. So, in some instances, you have people who didn't think this person was guilty of anything now being asked to sentence. And when you take that and give that to the judge, then that eliminates that.

And site visits, even military defense counsel admitted that yes, sentences would be more consistent if it were judge sentencing, although they were not in favor of it because they were, frankly, candid to say that the emotional appeals that they can make to panels in sentencings just like in the six states where there is jury sentencing -- they didn't say that. I am saying that part, coming from a state that has jury sentencing, that the emotional appeals weren't going to play over as well on a judge who is hearing this all the time, necessarily, as they do with a panel who has come in just for this one case and you may have two people on there or more who didn't want to -- didn't vote to guilty beyond a reasonable doubt to start with.

So, it was that consistency that we were trying to bring to the military justice system.

The trial counsel, of course, were all in favor of judge sentencing.

CHAIR JONES: I guess this is really almost not on point to the recommendation. I have never found consistency in sentencing to be a virtue. I just don't believe in it.

And so that would not be a reason why I would necessarily think that we should go right to the notion of getting rid of the panel.

But in any event, I think the real issue here is are we -- we should just take a vote. Understanding that I think, ultimately, these should be enumerated for a study because I couldn't agree more with Congresswoman Holtzman that change is something that should happen, does happen. And I think in this report, particularly now that we are focused on all of the work that the Comparative Systems Committee has done, it is a treasure trove for a study to start and take off from with respect to all of these issues. But all of these issues, to me, involve large chunks of the criminal -- the military justice system.

And so I think a study is good. I think we have probably advanced the ball here. I hope we have, with respect to these. But if we could vote, I would propose we not accept Recommendation 54.

COL COOK: I agree.

CHAIR JONES: All right, then we have -- are we missing somebody?

MS. FERNANDEZ: Yes, General Dunn.

VADM HOUCK: She did speak in favor of the study.

CHAIR JONES: She did. Here she comes.

Sorry, General, I took a vote in your absence and I'm going to --

(Laughter.)

CHAIR JONES: I would like to propose that we not accept Recommendation 54 with the understanding that we are going to enumerate it in a study. All in favor?

(Chorus of aye.)

CHAIR JONES: Okay, with two dissents, Professor Hillman and Mr. Bryant.

All right, 54 is not accepted.

This may be a good time to go to Victim Services Recommendation 37. I assume it is here because it was deferred. I apologize. I haven't looked at the --

CDR KING: Ma'am, it was deferred at the last meeting.

CHAIR JONES: Right, I recall.

CDR KING: It was deferred because we felt that the best time to discuss it when the panel was looking at the judge alone sentencing and other issues.

CHAIR JONES: All right. So, does everybody have the text of this recommendation? Okay.

MS. FERNANDEZ: Your Honor, as I think I stated before, on another panel, I do think that the victim's unsworn statement is very important part of the process in order to really gain a feeling of justice.

And I think that, given the three bullets that we have that the

victim needs to -- that they can't bring up any more information, any new information that they have to give a written statement to defense beforehand, my feeling is is that we have secured this as much as possible, while still providing the victim the opportunity to make a statement at sentencing.

CHAIR JONES: And this conforms to a right that victims now have under the federal system --

MS. FERNANDEZ: Correct.

CHAIR JONES: -- to make an unsworn statement?

MS. FERNANDEZ: Yes.

REP. HOLTZMAN: On that point, I don't think that victim statements now, I could be wrong here, are required to be in writing beforehand. Generally, they are just made in the courtroom.

CHAIR JONES: No, they're not. I don't believe they are required in writing in the federal system but I could be wrong about that. I would have to go back and look it up.

COL COOK: They are being done under oath right now in the military system. If they want to make a statement, they take an oath.

MR. BRYANT: My memory is, and I agree with you, they are not required to be in writing in the federal system and certainly not in the state systems. I am not familiar with them.

REP. HOLTZMAN: So, this is in response to the question you

asked. It says here, the unsworn statement should be in writing, available to defense counsel before sentencing.

CHAIR JONES: Right.

REP. HOLTZMAN: So, that would be a change from the existing state.

CHAIR JONES: Yes.

BRIG GEN DUNN: But that goes to accommodate the military sentencing process, which follows immediately after the trial.

MS. FERNANDEZ: Well, and it was to accommodate also any new information being put in front of a panel, maybe just to ward against that.

COL COOK: Maybe it should have an introductory phrase that says if a victim elects not to testify at the sentencing and chooses to submit a sworn statement. Because it is essentially the victim's choice. So, I understand the point that you are making. I don't think anyone has tried to take away -- if the victim wants to take the stand in a sentencing hearing, they can do that. The question here is, instead of taking the stand and having be subject to the --

BRIG GEN DUNN: Cross-examination.

COL COOK: -- cross-examination, the impact, the whole struggle of everything, can they put it in writing. And if they put it in writing, do they have to give it to the defense in advance? What rights does the accused have at that point? I thought that is what you were trying to get at, not to take away the right to

testify.

BRIG GEN DUNN: Correct. Oh, absolutely. Just if the victim chooses to make an unsworn statement.

COL COOK: That they can, just like the accused gets allocution rights.

BRIG GEN DUNN: Exactly.

REP. HOLTZMAN: Just to follow up on that, Meg Garvin was very concerned about that point. And I am a little concerned because there is an emotional quality to the statement that is made before the judge and it is not always possible to reduce it to writing. I mean, maybe instead of having the whole statement be in writing, the substance of the statement and the material fact should be -- that I don't object to. But the actual words enforcing, in essence, the victim to read a statement, as opposed to making it from his or her heart, I am concerned about that.

So, if you could somehow modify this, that would make me feel more comfortable.

BRIG GEN DUNN: Yes, I mean I think the concern is just the substance of it.

MS. FERNANDEZ: The substance and material facts. It just needs to be a verbatim statement.

BRIG GEN DUNN: Right. Just as long as the victim doesn't throw something new out there.

LT COL McGOVERN: General Dunn, would you like to explain how an unsworn statement by the accused is done in the military? That is it is written statement usually, right? It doesn't have to be? Okay.

COL COOK: I was going to say I don't think I have ever seen an accused make an unsworn statement that is written. I have only seen the sentences come up, the accused is allowed to take the stand. They sit there and say what they have to say, and they sit down.

And sometimes they are not allowed to take the stand. Sometimes they stand at the counsel's table, depending on what the judge does in their court.

BRIG GEN DUNN: I think the accused and counsel work that out in terms of what is best in the individual case. But I agree, that a victim should not have to read a statement but perhaps just deliver a --

CHAIR JONES: Quick question. Are we talking -- I guess I have been thinking about this as if a victim is going to provide a statement either in writing or orally, they have to first present, in writing, and I am certainly amenable to the amendment that it would be the substance of the statement and the material facts but it would be for both instances.

In other words, the minute you are not under oath, there has to be a preview in the written statement. Is that what everybody is thinking, here?

COL COOK: Yes.

CHAIR JONES: I just wanted to make sure. Okay, fine.

COL COOK: Then just as a reminder, in the military sentencing system when Representative Holtzman before when you had said it will avoid a delay if you do away with the panel, it may avoid a delay if you do away with the panel because the judge will have more latitude.

In the military system, the sentencing is -- anyone who is here, correct it -- 99 percent of the time, you finish with the findings portion of the panel, sentencing has happened. There is no pre-sentencing reports or anything like that.

BRIG GEN DUNN: Exactly.

COL COOK: The concern why I would agree more with the dissent to the Victim Services Panel is the concern here. Victims come in and they make their statements and 99 percent of the time, they are not cross-examined. In any case that I have ever seen I don't think that there is any accused out there or defense counsel that wins any points by doing that at that point.

However, I guess the concern that is out there is if you allow it to go to an unsworn statement, does that change anything? What if something does come out that they feel the need to address? The military system of taking a delay is not as conducive. You are stateside or whatever, bringing the witnesses in, taking a delay to figure it out is not as easy in the military as it is in a civilian sector. Allowing the defense the opportunity to review something in advance, are we now at this one, we are saying they don't get to review it in advance? Submit it to them. They get

to see it basically during the sentencing or right before it.

BRIG GEN DUNN: They did. It says before sentencing --

REP. HOLTZMAN: They get to see the substance and the material facts.

BRIG GEN DUNN: Yes.

COL COOK: But how much?

MS. FERNANDEZ: What you are saying is there is no time to write it out.

COL COOK: No, no, this says if there is a new matter that could have been for sentence, sentencing could be delayed so that that defense could respond.

CHAIR JONES: The other thing a judge might decide is to preclude the parts that were not part of the factual basis of the charge.

BRIG GEN DUNN: Right.

COL COOK: Then what recommendation am I reading that is different? Because I don't see that. The following safeguards. They will be instructed not to receive it. They could affect the sentence brought up in sentencing so it could be delayed. Could be delayed, which is where I have a problem with it.

The unsworn statement should be in writing available to the counsel before sentencing. But that could be after the findings right there, be subject to the same objections available to the government regarding the --

MS. FERNANDEZ: At sentencing, you can't bring up new matters. I think it is just we can't delay it. We can't do anything. You just if you have something, if you put in the substance of what you are going to say beforehand, there is no way you can bring up new matters so that there is no delay.

So, I would change that second bullet that says if there is new matters just to say no new matters can be brought up during sentencing.

COL COOK: Okay. Even thinking about the sentencing is findings, you know what were the relevant pieces of the crime. Sentencing in the military, it is mitigation and extenuation or aggravation. If you are the government, you are putting the victim out to talk about aggravation. Anything by the definition of how we use our sentencing proceedings would be a new matter because the aggravation, the financial impact, the devastating nature to their own emotional well-being, the breakup of relationship. Whatever those issues are, all of those are issues that are relevant on sentencing that are not relevant during the findings of a case. So, they are all arguably new matters.

And I think in the -- Mr. Cassara's comments in there, if they bring up budgetary things in this impact, how devastated they are, there is no way to respond to them. His comment would be give it to them. They can even have a pretrial interview but they should not be allowed to make an unsworn statement at sentencing. That protection you chose not to put into here. His comment is don't do it but if you do it, you would want the protection. If they refuse to provide a pretrial interview,

the victim should not be allowed to make an unsworn statement. The statement must be provided to the defense he puts five days. Whether it is five days a day, whatever it is, sometime the advance of trial to allow the defense the opportunity to provide a meaningful rebuttal, should they choose to do that. And then the other ones you did put in those protections.

I think if we add the additional protections about if they refuse to provide a pretrial interview, they shouldn't be allowed to make a statement. I don't necessarily think it has to be five days. We don't even require five days for --

BRIG GEN DUNN: The victim is interviewed by the defense counsel five days' --

COL COOK: No, no, no, they are not interviewed five days. But it is if they don't want to give an interview, they have to give a statement in advance.

I would say even a day in advance. One or two days' in advance. Not necessarily the day of the trial at the sentencing hearing, where there is no -- that requires a delay in the case. I think five days is too much.

BRIG GEN DUNN: Okay, the victim can get on the stand and make a sworn statement during sentencing.

COL COOK: Yes.

BRIG GEN DUNN: As you might imagine, I think, I think we all imagine that that is an intimidating process for some victims.

COL COOK: Absolutely.

BRIG GEN DUNN: And they might prefer just to get up and make a statement, knowing that they can't be cross-examined. Clearly, there are some potential issues were they to raise, not new matters on sentencing, because they are allowed to address this matter on sentencing, we are talking about if a victim says something that potentially --

MS. FERNANDEZ: Pertaining to the fact --

BRIG GEN DUNN: Yes, it goes back to the findings portion of the case. It goes off on some separate version of the facts or something that was not previously in evidence on the findings. That is where the issue is going to arise.

The protection for that is the substance of the information is available to the defense counsel before the victim makes an unsworn statement and to the military judge, obviously if he can exercise some control.

COL COOK: Yes, I just don't think surprises -- there will be surprises but as long as there is a surprise and they are testifying, the can cross-examine. They are there. It is just the question of do they get the right to get the surprise during -- I'm not saying they would, in most cases.

CHAIR JONES: Part of the problem here is we should reorder these. And I think when we say if there is a new matter that could affect the sentence, we are talking about a new matter that wasn't revealed in the substance of the statement.

And all this is saying, really, is that first of all the government or the prosecution is going to be able to object, once they have seen the written substance of the statement and get rulings from the judge before the victim witness gives her statement orally.

And also, there is a basic statement that everybody has vetted, if the judge is asked to make rulings. And then, if something new comes out, the prosecutor, at that point, new meaning additional, different from what was said in the statement, the written statement ahead of time that we have now meant it to be one of substance, again, the prosecutor can object. And the judge can decide whether they need a delay or it is not material.

COL COOK: Defense counsel.

CHAIR JONES: I'm sorry. The defense counsel. So, I think it works.

You're right everything a witness might say isn't going to be in that statement. So, some of it could be categorized as new but I think --

COL COOK: But it is the intent on the second one, it says if there is a new matter that could affect the sentence.

CHAIR JONES: Right.

COL COOK: Again, in sentencing, anything that is said is intended to affect the sentence. You are supposed to say it is intended to affect -- that could affect the findings.

CHAIR JONES: Maybe we are usurping the judges' authority there and just say if there is a new matter, it can be delayed. A new matter not revealed in the written statement.

REP. HOLTZMAN: I think really what we are trying to do is avoid prejudice. So, the judge can take various measures to minimize the prejudice, whether it is delay or whether it is precluding the panel from considering the new statements.

I think that what Mr. Cassara was referring to was actually a trial that he had where the witness made some statements in connection with sentencing that will reveal new information that allowed him then to -- the facts of the case and then allowed him to prepare a different defense under the raised new issues. So that is what concerned him.

But I think that you know you can't have perfect but I think that allowing a victim to make an unsworn statement, give the defense whatever notice -- the judge, again, could rule on this how much time is necessary.

It depends on the facts of the case. If it is a very complicated case and there is a lot of money involved or whatever, then maybe you need more time. If it is a very simple case maybe you need one day. But I would leave that to the judge.

But giving that information beforehand and the material facts beforehand, I think that is sufficient. And allow the judge, if there is prejudice to the

defendant, to take corrective measures because they have powers we haven't probably even thought of.

CHAIR JONES: He could declare a mistrial, I assume.

MR. BRYANT: I'm concerned about the timing of the providing the statement to defense counsel. Because if the victim is going to testify at the trial and if we are saying in here defense, you can't use the unsworn statement, you can't cross-examine them on that, I see issues coming up during the actual testimony on the guilt phase and the defense counsel is sitting here with this. And there is going to be objection. He is using the unsworn statement, Your Honor, to cross-examine.

So, it just seems to me, realistically, and this is the way it is in my experience in federal court and in civilian court, those victim impact statements don't go to defense counsel until after the guilt phase.

So, I hope that is what you were --

CHAIR JONES: I don't think this is suggesting that they -- it would be after the guilt phase.

MR. BRYANT: All right.

REP. HOLTZMAN: How much time is it going to be after the guilt phase?

COL COOK: That depends on the case?

BRIG GEN DUNN: Four seconds?

COL COOK: It depends on the case. It could be four

seconds. It always depends on the case. The judge on the bench will just say okay, let's move into the sentencing portion of this. Or, if it is at the end of a day they may say you have until tomorrow morning. We will come into court. And that is what I find.

So, at the end of the guilt phase, I understand the reasons for doing it there before sentencing. My concern is I just don't take lightly the concept of just saying we can delay. Putting servicemembers on the road, depending on where that court-martial is, is dangerous. And it is logistically difficult and we are writing rules that apply in courts-martial, regardless of where they are going. That is where my concern is. It is anything that -- do I have a problem with the victim making an unsworn statement? No. My heart goes out to him or her, if they have got to stand there. I can't imagine how difficult it is. I am not sure I would want to face it and I am not sure I would want to just do a statement. But depending on what is in there, just the concept of something that can avoid the delay is where my concern comes in. That is my only concern.

MS. FERNANDEZ: This is training for the Special Victims Counsel. They would have to have the victim prepared to make the statement when they know sentencing is coming up. So, that really goes to Special Victims Counsel training up, getting the victim prepared to make a statement.

BRIG GEN DUNN: Just like the defense counsel prepares the accused not to say anything too wild in his or her unsworn statement, should he

choose or should they choose to make one.

MS. FERNANDEZ: So, I would agree to take out the part about delay. But maybe the reference to Special Victims Counsel then to say that the Special Victims Counsel has to prepare the victim --

BRIG GEN DUNN: I think we are telling them how to suck eggs. The military judge has the authority to grant a delay. I mean if the victim says something that is out there, the military judge right this very moment has the authority to say, whoa, whoa, at the defense counsel's objection and grant a delay for the defense to rebut whatever the victim has raised in her unsworn statement. He has the authority now.

COL COOK: The one of the questions would be, in conjunction with this, if this recommendation is done, it is a panel case and an accused makes an unsworn statement. There is an instruction that goes to the panel but this is an unsworn statement.

BRIG GEN DUNN: Right.

COL COOK: Could we put a recommendation that includes a similar kind of instruction? If it is to the judge, it doesn't matter.

REP. HOLTZMAN: Well, they should be instructed similarly to the instructions they receive when the accused makes an unsworn statement.

COL COOK: Okay.

BRIG GEN DUNN: You know and part of the SVC's job is going

to be to talk to the victim about a sworn versus an unsworn statement and the fact that a sworn statement may have more impact. But allow the victim to --

COL HAM: Remember, this is going to apply to all victims, not just sexual assault victims.

BRIG GEN DUNN: Right.

COL HAM: So, there will be no SVC for --

BRIG GEN DUNN: Oh, for the other victims.

COL HAM: -- other victims. So you can foresee, those of you who know the military process, foresee the judge advising the victim similar to how the judge is required to advise the accused now, they have the right to make an unsworn. You can make it in writing. You can make it -- a question, you can make it through your attorney. Is that intended? You can sit somewhere, wherever you want to make it. It can be question and answer if you have an attorney. It can be a narrative if you want. I mean there is all kinds of -- and then the instruction to the members, if there are members, is that it is not evidence. And unsworn statement is not evidence.

COL COOK: But maybe since there isn't an SVC in all those cases, if there is a victim of a crime in the military, there is still supposed to be a victim with its liaison. So, is that going to be a victim witness liaison that now tells the victim you might, at the end of this, have the right to make that statement. Here are the parameters which you could put into it.

REP. HOLTZMAN: Well, I guess the other question is do we want to limit this to sexual assault cases, where there is a victim -- Special Victims Counsel?

COL HAM: But it is not evidence. It is not evidence in aggravation. I mean, it is splitting hairs maybe for the members but the instruction is it is not evidence. It is an authorized means to bring matters to your attention.

MS. FERNANDEZ: You know, I think that we were trying for most of adopting the civil law and the military law to be the same. So, I wouldn't want to carve out an exception for this just for sexual assault victims. I think we were trying to basically embed the civil law and the military law.

CHAIR JONES: Although, the arguments for doing this are most compelling in the sexual assault area.

MS. FERNANDEZ: Yes.

BRIG GEN DUNN: Because victims of other crimes probably are not so aware of them, too. But this is victim-specific right, not a family right. It is a victim right.

LT COL McGOVERN: Based on the statistics CSS gathered, a lot of the sexual assault cases result in a conviction on the other offenses but not the sexual assault offense. So, if you do limit it to sexual assault, that may be a complication in a whether or not you call the victim.

COL COOK: Judge Jones, did you say in the last discussion we

had on this that in a federal court you would never have, a victim would be able to make an unsworn statement where you didn't know what they were going to say beforehand?

CHAIR JONES: Well, I said that because we have a probation office that interviews everybody and there is almost always a statement in there of victim impact, after interviewing the victims. And a full, I mean the information is mind-boggling but of course they have lots of time to do their investigation and put it into a report so you know what is coming.

COL COOK: So, if we go to something like this, I understand that we are looking at the VCRA, which makes the opportunity for the victim to be reasonably heard making it sworn or unsworn. And the military takes on a system that is even more generous than even anybody else's.

I'm not saying it is wrong. I'm just --

CHAIR JONES: Yes, yes, yes.

BRIG GEN DUNN: Well, I don't think it is more generous.

CHAIR JONES: I think the civilian system now permits an unsworn victim impact statement.

COL COOK: Yes, it does, but with the opportunity to review what is in it in advance.

Mr. Bryant, I appreciate the comments you made about never having it put out there before the findings because that part is persuasive to me. But

the difference is, there is usually a gap in the other system. So, I am just still concerned about just that concept of we delay what is almost an immediate process afterward.

BRIG GEN DUNN: But the victim providing the substance prior to taking the standing and making the unsworn statement is designed to prevent that because the judge could look at that --

COL COOK: Redact pieces of it.

BRIG GEN DUNN: -- and say you can't talk to this piece.

I would provide the same protection that Judge Jones is talking about or the process.

CHAIR JONES: I would propose that we accept this. I would, after the first bullet, the members should be instructed similarly where it is. Then I would say, I would move the third one to the middle, the unsworn statement -- there should be an unsworn statement in writing available to the defense before sentencing and it would be subject to the same objections available to the government.

And for the third one, I would take the middle and say if there is a new matter brought up in the victim's unsworn statement, a judge may take whatever action he or she believes is appropriate because there may be no action appropriate. It may be new but irrelevant.

REP. HOLTZMAN: Aren't we going to put in, instead of --

CHAIR JONES: Yes, you want some substance. I'm sorry,

yes. It would read the unsworn statement should be in writing, available to the defense counsel before sentencing.

REP. HOLTZMAN: Well, the substance of the unsworn statement.

CHAIR JONES: Right, that is where it goes. Sorry. Substance.

REP. HOLTZMAN: Of the material facts or all the material facts it should be.

CHAIR JONES: Okay. So that will read the substance in the unsworn statement, including all of the material facts.

All in favor of that?

(Chorus of aye.)

CHAIR JONES: Okay, then 37 is accepted, with modifications.

All right, 55, I believe. Yes, CSS recommendation 55.

PROFESSOR HILLMAN: Your Honor, this is to end unitary sentencing and enumerate specific sentencing for specific offenses.

In practice, actually, this wouldn't really change all that much the instructions they get. Right now the instructions are for nothing to the maximum authorized punishment for each sentence. But it would mean that there would be something that we could actually compare to other military sentences, as well as to civilian sentences for comparable crimes. And it is an important element to building

a rational understanding of the sentencing system we currently have.

CHAIR JONES: Anyone want to speak to this one? Obviously, we can't know what the panel is doing in terms of each specific case. I assume judges do sentence in a non-unitary fashion in the military justice system.

PROFESSOR HILLMAN: It is not revealed in that way.

CHAIR JONES: Pardon me?

PROFESSOR HILLMAN: It's not revealed in that way.

CHAIR JONES: Only a single judge -- So unitary is used throughout, whether it is panel --

COL COOK: Just so we all understand, unitary just means there is one final sentence that is put out there but they don't list what it is for. Is that what we are talking about?

Yes, just one sentence regardless there is 15 charges and how it is broken down.

REP. HOLTZMAN: Well, what happens on appeal if on appeal some of the charges are thrown out and some of them are preserved? What is the sentence?

COL COOK: The appellate court may set the sentence or send it back for a new sentencing hearing.

REP. HOLTZMAN: Oh, the appellate court resentences.

COL COOK: Yes, the appellant court can, depending upon

whatever it is that is found. They can determine whether that error would have caused some change in the decision -- in the sentence that was out there or they will take it and they will actually send it back down to the trial judge and the trial judge will have a new sentencing hearing, affirm the findings and order a resentencing hearing.

MR. BRYANT: But it's a less complicated process all the way up and down the line if we know what the sentence is for each offense.

COL COOK: Is that what happens in the civilian?

MR. BRYANT: Yes.

COL COOK: So you get zero for some things and you get --

CHAIR JONES: You get your guilty verdicts on each crime charged and then you sentence on each crime charged. Now, some can be consecutive and some just not -- concurrent.

COL COOK: So you write consecutive and concurrent?

CHAIR JONES: When you announced it, you have to say 15 years to run concurrent with the sentence I imposed on A and B. Or, if you are not so inclined, 15 years to run consecutively to what I gave you on A and consecutive to B, and A and B consecutive to each other. So, it is very clear what everybody is -- what the defendant is being sentenced for in each case -- for each crime.

MR. BRYANT: And in the civilian system, the courts can find error to have been committed on one charge without having to throw the whole thing back. Just that one charge either is reversed, remanded, or sent back to resentencing,

rehearing. But in the military system what we heard was -- we heard from people from the Clemency Board. They have a problem and an issue with a lot of this also because they don't know what was the intent of the sentence. You have got six to eight charges here and just one sentence.

COL COOK: On the appeal in the civilian sector, then, in the military they appeal the process was a sum error that was done as part of the process. When people appeal in the civilians, they appeal then for each charge if there was an error on that charge or there was insufficient evidence on the charge?

CHAIR JONES: You would argue there was insufficient evidence on a particular charge, yes. And that charge could then get thrown out or win or lose.

REP. HOLTZMAN: Then you subtract that. Whatever was the sentence for that, you subtract it from the total and you don't have to go through a resentencing.

CHAIR JONES: Does the military appellate system review sentences?

PROFESSOR HILLMAN: Yes.

CHAIR JONES: And they review them do novo? In other words, do they go back on the record and decide for themselves, based on --

PROFESSOR HILLMAN: The initial appeal, the Court of Criminal Appeals has tremendous authority to alter the findings at sentencing, yes.

CHAIR JONES: So that may mean that that accommodates some of the lack of information about what was actually -- what the actual sentencing thoughts were of the panel.

PROFESSOR HILLMAN: So, our recommendation is not based on saying that the military is unfair as it exists. It is based on the fact that we can't actually compare anything and we don't have what is a rational system which has generally been what we have been aiming for in modern criminal law because of the way they happen to sentence right now. So, this is a move towards helping us build and understand what we are doing and also have a system that more echoes what modern criminal justice systems look like in terms of sentencing.

MR. BRYANT: We have heard some testimony, too, that prosecutors and defense attorneys believe that the panel members are confused. They were unsure what to do when it comes to sentencing because they have to come up with this one unitary affect as opposed to what are we --

CHAIR JONES: Well, I will tell you, at the end of the day, the judges confronted with convictions on three different crimes, you do sit there and figure out what is a just sentence. But we are still obligated to divide it up and announce it.

PROFESSOR HILLMAN: Madam Chair, one point on another recommendation that is coming up, too. Part of our problem here is that the clemency changes that Congress has implemented are difficult to actually enact in the

military sentencing system if you don't specify sentences attached to particular offenses.

So, as Lieutenant Colonel McGovern just said, there are -- Colonel Ham was saying, too, there is often multiple offenses, different things people are convicted on, if clemency is denied on that one charge, in the aggregate, then what does it mean to bar clemency on that one charge, when you can't actually see which part of the sentence belongs to that one charge.

And that is why, actually, Congressman Holtzman raised a question of delay the recommendation, what do we mean here, it changes in Article 60, the clemency power of convening authorities is perhaps impossible to implement effectively without changing the sentencing practices.

REP. HOLTZMAN: It sounds like a reasonable recommendation.

COL COOK: Yes, it sounds like we would like to implement the NDAA without doing the recommendation.

CHAIR JONES: All right. Then, Recommendation 55, all in favor of accepting it?

(Chorus of aye.)

CHAIR JONES: All right, 55 is accepted.

Recommendation 56, essentially it is the CSS's recommendation, the subcommittee's recommendation that you do not recommend that the military

adopts sentencing guidelines in sexual assault or any other cases, at this time. Does anyone want to discuss that?

PROFESSOR HILLMAN: Your Honor, I will just say that second sentence should be stricken now, based on our earlier discussion.

And I actually dissent from this now, despite it being my subcommittee's recommendation because we are not going to judge alone on sentencing. I am concerned about having no guidelines for the panel members for sentencing. I recognize it is a small case. But I think that just the first sentence there --

CHAIR JONES: So, the recommendation will be just that the committee does not recommend the military adopt sentencing guidelines at this time.

REP. HOLTZMAN: Point here.

CHAIR JONES: Yes.

REP. HOLTZMAN: Why are we referring to the subcommittee?

CHAIR JONES: Oh.

REP. HOLTZMAN: Because this thing is going to come down as the recommendation of the panel.

CHAIR JONES: Yes, good catch.

So, we will rephrase that.

PROFESSOR HILLMAN: This is in specific response to we were supposed to look at this. That is -- the language should be fixed.

CHAIR JONES: Right. So it would be the panel does not recommend.

PROFESSOR HILLMAN: Correct.

CHAIR JONES: Great. Okay, 56 is accepted.

Recommendation 57, similarly, the recommendation is that Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

Everybody in agreement on that one? All right, 57 then is also accepted.

Okay, 58. I wouldn't mind somebody just explaining this recommendation. I have read it. I think I understand it but I would like to hear it.

PROFESSOR HILLMAN: The NDAA revokes clemency powers, based on concerns about clemency being granted in some cases. And here, we recommend that there be a restoration of convening authorities' power to grant clemency for one specific reason, to protect dependents of servicemembers who are convicted from the burden of automatic and immediate forfeitures, essentially. And this is because of the different position of military families and the fact that they are effected.

CHAIR JONES: Right, that they actually be affected in this manner.

Anybody object? All right, thank you, 58 is accepted.

All right, you know maybe we should take a break at this point and figure out what we have left. So, we will take a 15-minute break. Thank you.

(Whereupon, the foregoing proceeding went off the record at 10:49 a.m. and went back on the record at 11:10 a.m.)

CHAIR JONES: The staff has brought to my attention that they are not sure we finalized our recommendation in Comparative Services -- I'm sorry -- Comparative Systems Recommendation 8. Now, I do recall a lot of conversation about it but it may be true that we didn't.

PROFESSOR HILLMAN: Madam Chair, we have some revised language --

CHAIR JONES: Oh, okay.

PROFESSOR HILLMAN: -- that was tracking our discussions.

CHAIR JONES: Okay, give me one second, Professor Hillman, and I will be with you. Okay, thank you.

PROFESSOR HILLMAN: So, the concern was after the whenever possible clause in the second sentence -- so the first part of that remains the same. The Secretary direct MCIO commanders and directors to carefully select trained military investigators assigned as investigators for SVUs and, whenever possible, utilize civilians to provide specialized investigative oversight for sexual assault investigations.

CHAIR JONES: I'm sorry. Say that again, to provide what?

PROFESSOR HILLMAN: Specialized investigative oversight. Because there was a concern about --

CHAIR JONES: About supervisory -- I like that.

PROFESSOR HILLMAN: There was discontent with the supervisory language. So that is what we substituted there. So, specialized investigative oversight.

CHAIR JONES: So it simply says whenever possible, utilize civilians in that capacity. Yes, my concern is alleviated with that. Anybody else?

Okay, then with that modification, 8 is accepted. Thank you.

Admiral Houck would like us to revisit, which I promised him we would, Recommendation 26.

VADM HOUCK: So, thank you. So, understanding that the panel wants to be on record, specifically in support of two year tours for defense counsel, I wanted to point out what I believe are going to be what I would recommend be some issues that are embedded in this that we look at in the drafting stage of this.

The first one -- and I think that they are important because, given the membership of this panel, I think if this comes out as a recommendation, it is conceivable that some, either -- particularly in Congress at some point, might look at this and just adopt it lock, stock, and barrel, without refining it any further. So, I think it does need to be precise and anticipate as many of the issues as we can.

The first one is simply administrative. I think that when you

look at recommendation 36(b), this could be included in 36(b) or it could be a 36(c). But I think that it fits much better in that batch of recommendations under 36 than it does as a standalone under 27, sort of hanging out there by itself.

So, I would just kind of walk through these and you all can do what you want.

CHAIR JONES: You are talking about 26.

VADM HOUCK: Right.

CHAIR JONES: You just said 27, which actually also talks about defense counsel training.

VADM HOUCK: If I said 27, I was mistaken.

CHAIR JONES: You meant 26.

VADM HOUCK: I meant 26.

CHAIR JONES: Okay, great.

VADM HOUCK: Yes, so I think 26 could be subsumed in some way in 36. It is more appropriately placed there.

Secondly, yesterday, Representative Holtzman I think helpfully mentioned the idea of something to do with exigent circumstances. Because I do think that if this were to be adopted in its literal form, I have a pretty good sense of the personnel management challenges this kind of thing creates and it will be problematic.

So, if there is a safety valve of some kind for personnel reasons, then I think that would be an important thing to include in this.

LT COL McGOVERN: Sir, would you like that language inserted directly after at two years? Would that be appropriate?

VADM HOUCK: I don't know yet. I just kind of wanted to get some of the concepts out there.

The third one is, in a way, more substantive and in a way the most challenging. The way it is currently drafted, I think what it does is it will require a change which, by my experience, at least in one service would be fairly dramatic and maybe in the other services as well, which it would mandate now that you may not start your career as a military judge advocate as a defense counsel.

It will mean, for most judge advocates that you will have to begin as a prosecutor and then it will place the least experienced judge advocates in the role as prosecutors, trial counsel, starting off in the first place. That is one issue.

The second issue would be that I know in the service with which I am most familiar there has been -- and I was involved in it on active duty as a response to the reduction in courts-martial overall, that we had adopted, after a lot of thought, a very comprehensive new program in which we were taking junior counsel under the supervision of more senior counsel and rotating them through a variety of stations. This would stop that. This would prevent that from happening because it would require anybody who does defense work to serve in a minimum two-year tour. And I think that it would be counterproductive that way.

For example, today, young judge advocates under the

supervision -- well junior judge advocates under the supervision or senior judge advocates will not do a two-year tour. They are also not being charged with a defense in a particular sexual assault case would not be permitted. But this would prevent that and stop it.

And so, I understand and completely support, as I said yesterday, the notion of it as a general proposition to the people invading the defense of these cases and that have experience in all of that. But I think there are some nuances and fine points here that this broad brush good idea is going to make it more complicated.

CHAIR JONES: So, let me ask you this, Admiral. Do you think 36(b) does the trick or are you suggesting that we might add some things from 26?

VADM HOUCK: First, personally, my personal belief is that 36(b) does the trick. But you tell a judge advocate this is your job. You hold them accountable to do their job and then you hold them accountable for doing it.

So, I don't agree at all with recommendation 26 as a legislative kind of recommendation. My sense was that I was in the minority that way with the panel and I wanted to be on record with the specific two-year thing.

CHAIR JONES: But we didn't have the information you gave us this morning to consider. Does that change anyone's thinking about recommendation 26? I mean, it makes me --

BRIG GEN DUNN: I mean I think maybe we could capture it as

an insofar as possible or sort of capture the general idea.

I know the Army tries very hard but again, it is done within the personnel system. It is not mandated. The Army tries very hard to never have a first term captain as defense counsel and also to make sure that defense counsel has some litigation experience, other than -- you know, before they become defense counsel. But it is not an iron clad rule and there are defense counsel who do so during their first tour and the Army also tries to move people in 18 months to two years but it doesn't mean that people don't get moved because they need to be moved.

And maybe we could make it more aspirational. Does that make sense?

BRIG GEN McGUIRE: Or it could be defined more that concept in a finding that would support number 36(b) because we recognize that but I mean just to mandate the two-year doesn't necessarily mean it would have the quality nor the kind of person as well.

BRIG GEN DUNN: Well maybe we could say something like insofar as possible, comma, military defense counsel should have prior litigation experience before being assigned as defense counsel and should serve tours of sufficient length, perhaps two years in order to develop their expertise. Something like that.

LT COL McGOVERN: If you could look on page 134 of the CSS report, the finding is 26-1 and 26-2.

CHAIR JONES: What page?

LT COL McGOVERN: 134, ma'am are the findings that you may want to keep if you were to move it to be included just with the discussion of number 36.

CHAIR JONES: 26-1 and 2?

LT COL McGOVERN: Yes, ma'am.

BRIG GEN DUNN: To move them over to 36, that makes sense, yes.

PROFESSOR HILLMAN: Madam Chair?

CHAIR JONES: Yes, Professor?

PROFESSOR HILLMAN: I will just point out that the reason we made this recommendation is because although we heard from everyone who testified before us that defense counsel were well-prepared and that they generally had trial experience before they were defense counsel, what we saw when we talked to defense counsel was that that was not the case. So, this was a recommendation that runs to something that is already actually an aspiration that services don't intend, of course, to leave people in this situation. But we drafted the recommendation to try to shore up that floor because the sexual assault response is -- to make it better, we need defense counsel experience and we just don't have that right now across the board.

VADM HOUCK: I would say that I mean the thing yesterday

that was compelling to me in support of the recommendation was the notion that there is a service right now that may or may not be routinely assigning people to one-year tours as defense counsel, which I personally think is wrong.

So for me the dilemma here is how to get at this without overcompensating for it.

COL COOK: Can I make a suggestion? If we do away with 26 but again understanding the panel's the subcommittee's concern, do we leave 36(a) the way it is, what we just suggested is they assure defense organizations be resourced in funding resources in personnel, including defense supervisory personnel with training and experience, comparable to the prosecution counterparts and direct services to assess whether that is the case.

But then they add a sentence that I agree with Admiral Houck on the more junior people. There is only going to be a certain number that are out there. The best way to get that experience is maybe to put them under a mentor. But maybe we put in a sentence there that says, combining with what you had, supervisory defense attorneys must have litigation experience and should be assigned for two-year tour lengths whenever possible. So, at least putting -- guaranteeing that at least that supervisor defense attorney, whether you are at a regional office, whether you are senior defense counsel in a local office for an installation, but you are guaranteeing that that person that is in charge, we don't put a new attorney into that position. The person has got the oversight, has the experience necessary to have the

position and, whenever we can, we leave them there for those two years as the supervisor or as the defense attorney. Does that help or not?

BRIG GEN DUNN: Or maybe supervisory or single --

COL COOK: More standalone?

BRIG GEN DUNN: Standalone defense counsel.

COL COOK: Standalone defense offices.

BRIG GEN DUNN: Yes, standalone defense counsel.

COL COOK: Some of the standalone defense counsel are at your Podunk small installations and do you want that most -- I mean it just depends on the workload in that case. I don't want to put a standalone defense counsel who has got that mandatory litigation experience in a two-year tour but they are only going to do three cases in the two years. That doesn't necessarily help them or the services either would be the only concern I have. When there is a standalone office, there is usually a reason. It is either a deployed environment.

BRIG GEN DUNN: Yes, but you shouldn't put somebody inexperienced out in standalone.

COL COOK: You shouldn't.

BRIG GEN DUNN: I mean the way you just characterized the language, it was.

VADM HOUCK: So, I don't have a drafting proposal right now for this. I am sympathetic to what Dean Hillman is saying. I think there is an

element to some extent with all young counsel that none of them ever feel like they have got enough experience to do what they are doing and they will say this at every opportunity. I mean, given the choice, I would be open to try to work on a different formulation of this because I do think the principle experience is really important. And I don't think any service should just say business as usual is good enough for sexual assault and just rotate people in and out as we want to.

But I do think we may be hitting with a really big hammer here where we need something a little more tailored to get out.

REP. HOLTZMAN: This is just a thought, I mean since one of your real concerns is that there is at least one service that limits the tour of duty to one year, I mean specifically address that in the recommendation and say that that is inappropriate and we recommend that that one-year limit be changed because it is insufficient.

VADM HOUCK: I have heard this anecdotally. I don't know personally whether this is a fact or not.

BRIG GEN DUNN: It is not a policy. It is just something that has occurred.

LT COL McGOVERN: It is finding 26-1 and it is basically the Marine Corps.

REP. HOLTZMAN: Okay, so why can't we just, as a panel, say we think that that is insufficient and that that should be changed? I mean that is one

way of getting at one of the problems. It is part of whatever solution you have.

PROFESSOR HILLMAN: I would be fine with putting that in the negative saying, maximum tour lengths of one year or less are insufficient, which isn't really saying you have to do more. I mean the Marine Corps has completely overhauled the way it organizes its legal services operation in these last years. I mean, it is not clear that they won't continue to make changes in any case but we are not tinkering with something that is sort of the Corps' preset.

I am also worried about drafting on the fly. I'm not sure we will fix the personnel issues that you are actually raising as the reason not to adopt this recommendation.

CHAIR JONES: I guess I would be happier if we said that we are recommending them to, the TJAGs, the staff judge advocates to review again other defense counsel has the necessary litigation experience and specifically review the length of tours of duty and have the findings support what we are looking for. It is less specific. It doesn't tell anybody to do one year or two years. And maybe the findings will pinpoint it. I don't know. And it draws attention to the need.

And we can put in there, I think we can put in there because of our concern about experience, we recommend that TJAGs and staff judge advocates would make it less numerical.

VADM HOUCK: And I think it might have been Ms. Fernandez that made the point that -- somebody made the point that there is a distinction

between the people that are really responsible for trying an individual case and those that are in training and mentoring roles with them somehow.

BRIG GEN DUNN: Well, that's true because defense counsel could be either the person who is there mentoring or it could be the junior person and you don't know who they are talking about.

I think this could accommodate things, especially since there is a difference in the services.

REP. HOLTZMAN: Well, I like the idea since everyone here seems to agree that one year at the Marine Corps has proved sufficient. I am just saying that we recommend that that be changed.

COL COOK: But the one thing just to understand from being in the Marine Corps is the service, they are the only service that where their lawyers don't just serve as lawyers. They are also commanders of line officers that are out there. Their operational requirements are different from the other services. There may be a reason that while we might think that is inappropriate to gain the amount of experience, it is not the only experience they get as a defense attorney. They may have a second tour. So ultimately, they will continue to gain information.

CHAIR JONES: That is a whole different framework.

COL COOK: Right. That is exactly right. But I don't know that saying it is inappropriate -- I like the way Dean Hillman said it that the mandatory like maximum lengths of one year appear insufficient, let them look at them and say

hey, -- that they are different.

CHAIR JONES: But that would be in the findings, to pinpoint what we are talking about in terms of -- and we can also discuss the difference between a supervisor, a defense counsel, and a regular.

So if we leave the drafting to Colonel McGovern for the moment, we can come back and review it and make a decision on approving it once we see it.

All right.

COL COOK: Is that the same thing that we are doing -- there were two other --

CHAIR JONES: I think we are doing it with -- we agreed on 8, right? Eight, we have accepted.

COL COOK: Eight we accepted.

CHAIR JONES: Right.

COL COOK: I think 10 and 13 from yesterday were also ones that were going to be redrafted and we would look at them. Are we just going to leave them to be looked at at another time?

CHAIR JONES: No, we should try to do them today.

COL COOK: CSS 10 and CSS 13, they were accepted -- 13 was accepted but the language was to be decided. Number 10, I have a note that says it was deferred until the staff does a new draft. Sorry guys.

LT COL McGOVERN: Colonel Cook, I have the RSP adopted

the VSS recommendation 18 instead of 10(a) and 10(b) with modifications.

COL COOK: I have VSS 18 was accepted with expedited study included into it. But does that mean we were not doing anything with 10 at all at this point?

LT COL McGOVERN: Well, 10(c) said that Congress --

COL COOK: We are going to incorporate pieces of it.

LT COL McGOVERN: And then for 10(a), there was a little bit of conflict which by the way, the collateral misconduct should the RSP tell them to follow the law. And the proposal was the victim services collateral misconduct will be up in the reporting section but when you get down to protocols and you are talking about the investigators, you point out that the NCIS is not currently following the requirements to read people their rights. And that means as long as it is the law, they need to follow the law. Basically, adopting 10(a) within the investigative protocol section of the final report. Is that acceptable?

CHAIR JONES: I think we did all agree that we had to standardize the policy on --

COL COOK: We do have to standardize the policy, I agree.

CHAIR JONES: And I think -- I know we accepted VSS 18.

COL COOK: Yes.

LT COL McGOVERN: Right, and rejected 10(a).

COL COOK: I don't know why I have just a note that says and

highlighted that it is just defer.

CHAIR JONES: My notes were not at all clear until I had my recollection refreshed by Colonel McGovern.

COL COOK: All right.

CHAIR JONES: So, are we straight on 10(c)?

MS. FERNANDEZ: What are we doing on 10(c)?

CHAIR JONES: What was the other one? I'm sorry, Mai.

MS. FERNANDEZ: What are we doing on 10(c)? I'm confused.

PROFESSOR HILLMAN: 10(c) is largely integrated into VSS 18, adding specificity to the Victims Services Subcommittee recommendation.

LT COL McGOVERN: Study A, what constitutes the level of conduct be whether they should implement a policy in B and C, whether Article 31(b) of UCMJ should be amended.

CHAIR JONES: All right. Did you mention another one?

COL COOK: I did, number 13. I had the note that just said CSS Recommendation 13 I have accepted but the language was to be decided. So, I am not sure. Was that decided? And that is the recommendation about your concern. Again, it is standardization.

CHAIR JONES: Let me see because I appear to have new language here. Let me see what I have. Colonel, do you have this, the Secretary of

Defense?

LT COL McGOVERN: I have a box around the second sentence, --

CHAIR JONES: Right.

LT COL McGOVERN: -- where Admiral Houck was not sure that it should be shifted to the MICOs. But it was accepted yesterday as far as agreeing and it needs to be standardized.

VADM HOUCK: My notes reflected that the recommendation was accepted but there was going to be new language to address the issue of shifting the description from the Commander to MCIOs. And in some way to make this clear that the commander was not being divested of authority.

BRIG GEN DUNN: I think we just took that sentence, right? So the Secretary of Defense to Service Secretaries to standardize the process for determining cases unfounded. Only those reports determined to be false or baseless should be unfounded, period. I think that is where we went with it.

CHAIR JONES: That's acceptable to me.

COL COOK: That's acceptable to me.

CHAIR JONES: Professor, is there a problem?

PROFESSOR HILLMAN: I thought we would be drafting language to make sure we had a standardized process but we are not removing authority that had been other placed. But may I request that we just defer this and

look at the transcript of where we were yesterday and then see.

LT COL McGOVERN: My concern is we just don't have that much time, ma'am by the next meeting June 16th. We really need to have a lot of these --

CHAIR JONES: So what you are concerned about in the middle section, the fact that it does say that decision to unfound reports should apply to uniform crime reporting standard. Is that what is missing?

BRIG GEN DUNN: Yes, we do need to say that.

CHAIR JONES: Yes, we need to say that part.

BRIG GEN DUNN: Yes, we do need to say that part.

CHAIR JONES: Okay, because that is the part I still have in as what we accepted yesterday. Okay.

COL HAM: Lieutenant Colonel Green also has been typing as you have been talking, trying to fill in all the language.

PROFESSOR HILLMAN: Colonel McGovern, do we lose much by not making that the MCIO, in coordination with trial counsel.

LT COL McGOVERN: Pardon?

PROFESSOR HILLMAN: Do we lose much? Because really if we take that phrase out, then we are eliminating the decision-maker in this process but we are setting up the definition.

LT COL McGOVERN: We are allowing the Secretary of

Defense then to direct the Service Secretaries to either all accept the Navy writing or all accept the Army way. The services would have to figure out how to standardize that.

PROFESSOR HILLMAN: I'm fine with that. Then let's just strike that clause about the decision to unfounded reports should shift from the commander to the MCIOs in coordination with trial counsel. So, we will just cut the decision-makers out of the recommendation and leave the substantive piece in about standardization.

CHAIR JONES: So we say that the first sentence remains the same. Sec Def direct the service secretaries to standardize the process for determining a case is unfounded. The decision to unfound reports should apply to uniformed crime. Okay?

And then, obviously, the last sentence remains. Is that clear now?

LT COL McGOVERN: Yes, ma'am.

CHAIR JONES: Okay, great. So, 13, as amended is accepted. Thank you very much, Colonel.

I think that, unless there is anything else on that, the 43(a) through (f) is where we need to go now, which involves military judges. Recommendation 43 and it is (a) through (f).

PROFESSOR HILLMAN: So, I think we want to change -- well, I have two quickly through the changes in the Article 32 with our part of the

recommendations on 43(e), which was a recommendation for the subcommittee to increase the authority of the military judge advocate in the Article 32 and make a binding decision as to probable cause.

I think that the sentiment yesterday is not in support of that. So, I think that we should back up and look more carefully at the first proposal, which is whether we can concur on the way the military judge can be involved in the process prior to the referral.

And the question yesterday became how much different is this from a civilian system when a trial judge is available at referral. And I think the emphasis in our discussion here, both 43(a) and (b), which is really a process by which this would happen, then 43(c) and (b), which are tasks that would be performed by the military judge's role, that is dealing with defense counsel requests which currently go through trial judge advocate convening authorities prior to referral, and second, the motions practice essentially, and then (d) which involves subpoenas and the military judge issuing subpoena on behalf of defense counsel.

I think we should focus on the fact that the reason for this recommendation was a deficit in the way defense counsel operates because referral sometimes at a relatively late point in the process. And because of that, there actually there are many times that come in the course of defense counsel's preparation in the case that they are left without guidance, without a decision-maker that is the ultimate decision-maker. They go to trial counsel revealing their case to the

convening authority. If that is rejected, they can eventually get to the judge.

And then the second piece I want to put out on this is the question about resolution of issues related to victim's rights because we also don't have a military judge available to decide on those issues. And the one that we didn't get to talking about yesterday, 43(f) is actually a recommendation for further study that runs to how depositions, particularly of victims, may be used in the new Article 32 process. And we recommend there that the judicial proceedings panel consider whether the military judge should be deposition officers to control that process, should it become, to track all its changes, which is changes in Article 32.

But this initial piece about having a military judge involved is about managing the new emphasis on victim's rights in sexual assault cases and the challenges of defense counsel prior to referral.

CHAIR JONES: Did we accept any of these in 43 yesterday? We did not.

PROFESSOR HILLMAN: No, we said rewrite and vet it tomorrow.

CHAIR JONES: Okay. All right, you teed us off and now we have silence.

PROFESSOR HILLMAN: I move we adopt Recommendations 43(a), (b), and (c), and (d), and that we not adopt 43(e), which is the Article 32 issue and that we adopt 43(f), which is the study one.

Maybe we could start with the last one. Actually, we want to go in the order of ease here, which is (f). The Judicial Proceedings Panel, we recommend that they assess the use of depositions in light of the impending changes to the Article 32.

CHAIR JONES: Anyone opposed to that? No. Okay, then 43(f) --

REP. HOLTZMAN: 43(e) we don't want to adopt.

PROFESSOR HILLMAN: 43(e) I think we don't have support for. I think the Article 32, being a decision-maker, a binding decision-maker in Article 32 sitting as --

CHAIR JONES: All right. Well, we have just accepted 43(f). We are asking JPP to assess the use of depositions.

We are going to 43(e) now. I thought that is what you suggested.

PROFESSOR HILLMAN: I think that one is easy to reject, actually. I think yesterday's discussion was not in favor of making the military judge's decision to make probable cause binding. Colonel McGovern, am I wrong on that?

LT COL McGOVERN: I think the debate was whether it should be studied. It wasn't an all-out rejection, which is also the dissent to the CSS report recommended all of these be studied, rather than disproving them. So, it would still

keep it on the services' radar screen as a possible --

BRIG GEN McGUIRE: Right. From the notes I have written before on the Role of the Commander Recommendation 16, the panel recommendation, because weren't going to say the Secretary of Defense should direct, and whether to increase the use of the military judge and we were just going to add aspects of 43(a) through (f) to that.

LT COL McGOVERN: The findings.

PROFESSOR HILLMAN: So, that dispenses with 43(e).

REP. HOLTZMAN: Can I ask a question? I don't recall the discussion of this, actually. But what is the reason if the military just is going to preside over the preliminary hearing? What is the reason not to allow the judge to act as a judge?

PROFESSOR HILLMAN: They are not, now presiding as necessarily as -- judge advocates are --

REP. HOLTZMAN: But I understood under the new rules. Am I wrong?

CHAIR JONES: I think it is just it has to be a judge advocate.

BRIG GEN DUNN: It is a lawyer, not necessarily a judge.

CHAIR JONES: Not a military judge under the new rules.

You know, look, I am actually not opposed to the notion that if you do have a military judge and that judge says there is not probable cause and you

know that in all instances everywhere, the civilian system, you get more evidence you can come back. I don't think that is a bad thing. But again, I just don't know, in terms of whether there are enough military judges, how would this work, that sort of thing.

So, I would put it in a study category but I would say it doesn't offend me. I don't remember a lengthy discussion on this yesterday.

BRIG GEN DUNN: Right. Well the concept was if a military judge makes that probable cause determination, then it removes that difficulty from that convening authority of feeling like they must refer all sexual assault cases because now you have got a judge who said there is no probable cause here and that means the convening authority then is not in this position that many of them apparently are in at the moment, where they feel that these cases have got to be pushed forward no matter what, because of the climate, so to speak.

REP. HOLTZMAN: But do you anticipate under the new Rule 32 that there will be military judges sitting in --

CHAIR JONES: No.

BRIG GEN DUNN: No, they are lawyers but not -- military lawyers but not military judges.

REP. HOLTZMAN: Okay.

VADM HOUCK: Who will be, who are empowered to make a probable cause recommendation --

REP. HOLTZMAN: Okay, fine.

BRIG GEN DUNN: Yes.

VADM HOUCK: -- to a convening authority.

BRIG GEN DUNN: Yes.

REP. HOLTZMAN: I was just confused by the second sentence, which said they should preside over preliminary hearings in their capacity of military judges, not as hearing officers, though. I don't know what that meant. So, that means they were sitting --

PROFESSOR HILLMAN: They do sometimes now --

BRIG GEN DUNN: They can.

PROFESSOR HILLMAN: -- but they are not as military judges.

REP. HOLTZMAN: That's what I am saying. So, if a military judge is sitting, is allowed to sit, happens to sit, comes down, there is Judge Mackinaw, and sits in the chair at the preliminary hearing and makes that probable cause determination.

I mean, isn't it kind of absurd to say that we don't treat this person as a judge?

BRIG GEN DUNN: But we don't at the moment. They are just another judge advocate at that point.

REP. HOLTZMAN: But would there be a reason not to?

VADM HOUCK: Well, I can think of two reasons. Well, I can

think of at least one reason, which is to say that unless you are going to have a military judge sitting in every single Article 32 hearing acting as a judge, then you would have a disparity. You would have some Article 32s with judges that are judges, others are lawyers, not advocates judges. And it would seem to be a pretty big disconnect.

REP. HOLTZMAN: Well you also have a disconnect having a judge who is not a judge and being treated not as a judge.

VADM HOUCK: This happens. I mean this happens. I don't know that it happens frequently but military judges play other roles in other circumstances. They are hearing officers.

MS. FERNANDEZ: Can we draft 43(e) in terms of the study?

COL COOK: Well I think that is where we were. My notes are the same as General McGuire's that said what we were looking at yesterday. And Kyle, I thought you were working, you have a draft of this, because he was using some of the language from yesterday.

LT COL GREEN: Actually, 16 is different; 16 involves pretrials rules and the military judge. But I was going to point out that the panel has already adopted the Role of the Commander 17, which says that the Secretary of Defense should direct Military Justice Review or the Joint Services Committee to evaluate the circumstances, when a general court-marital convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial.

LT COL McGOVERN: To me, it sounds like recommend overruling the recommendation not to go to a court-martial. Judge Jones and Rep Holtzman it needs new Article 32s where there is a probable cause determination. Now, how does the case go forward? Is that my understanding?

It seems like more than being concerned with just who is doing it is that there is a probable cause determination being made and yet, commanders still, it is not a binding decision.

CHAIR JONES: Well, we are dealing with something that doesn't exist yet in 43(e), where military judges are in the position of making that decision. I would put into the study as something that could be thought about.

Admiral does that concern you if we put it up for study?

VADM HOUCK: No.

CHAIR JONES: Okay. So, it is rejected as a standalone. And I think we said this about a number of the others but we will go through them.

This one we will propose should be a subject of study. So, we have taken care of (e) and (f). Where would you like to go next, Professor? Did you want to start with (a) and (b) or (c) and (d)?

PROFESSOR HILLMAN: I think (a), (b), (c), and (d) go together. I said (a) and (b) are the means by which this would happen and we are recommending that military judges are involved in the process from referral through the charges and recommendation of pretrial confinement; (b) recognizes the potential for additional

resources being there; (c) explains that they would manage defense requests; and (d) --

LT COL McGOVERN: And Special Victim Counsel.

PROFESSOR HILLMAN: And Special Victim Counsel, both of those pieces. And then (d) is on the subpoena issue, that they would specifically be able to issue subpoenas.

COL COOK: Okay. My notes from yesterday on those said the Role of the Commander, when we were talking about it, the Role of Commander 16, what we did was reword that. So, and mine says the Secretary of Defense should direct the Military Judge Review or Joint Services Committee to evaluate specific military justice responsibilities currently assigned to convening authorities, including discovery oversight, search authorization and magistrate duties, appointment of funding for expert witnesses and expert consultants, enforcement of victim rights, subpoena authority, and the procurement of witnesses.

So what we did, I thought, was take some of those things that were in (a) through (c) and Kyle has got a draft of it, pending review up on the Board right now where he tried to incorporate that discussion.

BRIG GEN DUNN: But then what happened next was that I said that I didn't like the negative -- the implication that we were removing authority from the convening authority.

And then we voted --

MS. FERNANDEZ: And we were split.

BRIG GEN DUNN: -- and we were split. Exactly.

MS. FERNANDEZ: I can't see how you preserve victims' rights without having the military judge there from the beginning. Because, otherwise, you do not have a forum to go to. There just isn't any.

So, if you don't have anybody to preserve your rights, then you may as well not have them.

COL HAM: Ma'am, some of the rights exist, regardless of whether there is charges and a court-martial proceeding. So, there was some discussion, if I recall, going to a judge in those instances and I don't know would be available in any event. So, I recall some of the members discussing you go through the chain of command to enforce those rights. I don't know if you want to reopen that discussion.

MS. FERNANDEZ: I mean I think by going through the chain of command, you get into the same problem we keep on talking about.

Let's say it is an order of protection and you have to go to the commanding officer. But then that commanding officer, for some reason, is prejudiced against you, you may not get your order of protection.

CHAIR JONES: Well, that's a decision of the -- I mean you have the right to try to get an order of protection but I don't know where you go from there. I don't know what the appeal process is from a commander.

BRIG GEN DUNN: Well, yes, that is actually a much used,

much used and relatively simple process in the military. It is called a no-contact order. And it is issued as an order. It can be issued at any level in chain of command. So, if the company commander doesn't want to do it, the battalion commander can do it, the brigade commander can do it. For heaven's sakes, the general court-martial convening authority can do it.

And they do do it. And they are very clear. And they delineate specifically that you, Private Joshua Smith, will have absolutely no contact with Specialist Mary Jane and blah, blah, blah. And violation of this order subjects you to prosecution under the Uniform Code of Military Justice.

MS. FERNANDEZ: That is notice.

BRIG GEN DUNN: That is an easy process.

MS. FERNANDEZ: That is notice. That is a very easy victim right. You know you have notice of a particular proceeding and you don't receive notice.

BRIG GEN DUNN: I don't think that is a military judge issue. I am fully supportive of putting the military judge in the process at the preferral stage. But I think that that does not negate the convening authority and chain of command ability to act in some of these issues as well. I mean I think it is the convening authority wants to approve a witness request and pay for it, that is fine. You don't need to go to the military judge with it, unless there is an issue. And then it just allows that to be resolved earlier than it is resolved now.

MS. FERNANDEZ: Yes, you have an arbitrator.

BRIG GEN DUNN: Exactly. You have somebody. It doesn't mean the military judge necessarily takes over those functions, it just means the military judge is available, as he or she is now but just an earlier point in the process.

COL COOK: I could still be an appellate type level that at the convening authority preferral convening authority says no right now. Then you have to wait until the judge is actually assigned to the case and has an arraignment before you get there.

BRIG GEN DUNN: Yes, right.

COL COOK: Even with this, if it is clarified currently assigned to convening authorities, it is not that you are taking it away from the convening authority, the convening authority is the first bite. If they don't say yes, you can take it to the judge at preferral. That's fine.

But how to do that, what tweaks would need to be made to the system, I am more comfortable with saying that is going to affect some changes that are out there. I am comfortable with saying okay, let's do a conscious review. Can you get the judge earlier into the process, which I think this achieves.

BRIG GEN DUNN: Yes, it has been a pleasure taking stuff away from it.

COL COOK: Then take out the words currently assigned to

convening authorities. Just say evaluate whether to introduce the use of a military judge prior to referral to specific military justice responsibilities, including discovery oversight. It doesn't say currently -- take out the currently assigned so you can still go to the convening authority and you get to a judge right away if the convening authority says no.

BRIG GEN DUNN: But I don't think it should be studied. I think it should be recommended. But it shouldn't be studied but it should be a recommendation of the panel, is my perspective and some others' perspective.

CHAIR JONES: I agree.

BRIG GEN DUNN: I mean the military will still have to figure out how to do the process but I think we should recommend the military judge come earlier in the system and that the system be properly resourced to support that.

COL COOK: Then use those words, to evaluate how to introduce the military judges prior to referral.

LT COL McGOVERN: Can you flip back to 43(a), please? So I think that is where General Dunn was focusing on, the military judge involvement.

PROFESSOR HILLMAN: And there is a second sentence.

BRIG GEN DUNN: And I, quite frankly, could live without the imposition of pretrial confinement because you have to prefer charges within a very short time after someone is in pretrial confinement. What happens?

COL HAM: It normally happens, ma'am, but there is no

requirements to prefer charges. No.

BRIG GEN DUNN: Is there a self-imposed requirement?

COL HAM: There is Article 33, which requires a forwarding of charges within eight days but case law has rendered that meaningless. So, there is no current requirement to prefer charges within any certain period of time.

LT COL McGOVERN: The CSS report does outline the potential changes which would have to occur based on the previous study of this topic.

CHAIR JONES: And where are those?

BRIG GEN DUNN: I did think it is instructive, that the Army didn't look at this ten years' ago and that the Army Judge Advocate General approved it ten years' ago.

PROFESSOR HILLMAN: Page 182 is the page in the CSS report that actually uses the -- explains the supervisory committee of the military judge and the changes. Lieutenant Colonel McGovern took you to the right place.

LT COL McGOVERN: Yes, ma'am, 183 shows you a table real quickly to inform the services and Congress of what articles in regard to court-martial would be affected.

Judge Henley, who proposed this idea, has been working on this for 15 years, he said.

COL COOK: And it hasn't been implemented.

BRIG GEN DUNN: Yes, but it was approved. The Army

approved it and the other services did not. You know, it didn't come onboard. But the Army TJAG approved it, which is some indication to me that there was a relatively thorough review, at least in the Army, which is the highest court-martial load of all in the services.

COL COOK: Do we know if the Joint Services Panel ever considered it holistically, in light all the input from all the services?

BRIG GEN DUNN: I do not.

CHAIR JONES: Go ahead.

VADM HOUCK: I am not impressed that the Army Judge Advocate General endorsed this ten years' ago. And I am not being flip. I am entirely serious. That means nothing to me.

In the context of I don't know why it never made it out of the Army, I don't know what the other services thought of this, I don't know what the Joint Services Committee thought of it.

I am puzzled by when we have a body like the Joint Services Committee available to opine and make recommendations on something like that this and something that will implicate the resources of the services, as we acknowledge in 43(b) that it will, why we won't ask the services and why we won't ask the Joint Services Committee for their opinion.

The answer to that is inescapable to me. It means that this panel believes it is smarter than the services and smarter than the Joint Services

Committee.

I don't feel that way. I would like to know what the Joint Services Committee thinks about it. I would like to know what the services think about it. They may well come back and say we agree with all of this, at which point I would say, I endorse it.

They might come back and say we disagree with all of it, at which point I would say well, I want to know why you disagree with it and I want to see what your opinions are about it.

But I still remain really confused at a basic level about why we will not ask them for their reviews and did not ask them during this process. It is a big change to the system.

PROFESSOR HILLMAN: Ma'am?

CHAIR JONES: Yes.

PROFESSOR HILLMAN: We are proposing the other changes that will affect more than just sexual assault. We recognize that this is a change that would have broad ramifications. But our goal is to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault crimes. And given the rise in victims' rights and the impact of other changes on what is happening with defense counsel's ability to work within the system, these seem appropriate to us.

The Joint Service Committee has looked at many different things

over the years and doesn't hasten to make recommendations. But it is not -- we are not heedless of the advice. We know many who are more experienced in each of the different military justice systems.

So, Admiral Houck makes a good point. We shouldn't do this heedlessly. But we are not. The subcommittee talked.

VADM HOUCK: I don't suggest that the subcommittee acted heedlessly. I think the subcommittee acted with great diligence and care but we did not -- the subcommittee did not ask, nor has this panel asked, simply asked the services or the joint services committee for its view on these pretty fundamental questions.

COL COOK: I'm not sure that each member of the subcommittee, because I know for part of it -- I know the 32 piece is out. But when I had asked one member of the subcommittee on that panel and the other one what the understanding was, there were two different answers.

And it is just interesting. I doubt that we -- I agree with Admiral Houck. I am not ready for some of these things, such as the magistrate process, I don't know that there needs to be a change and I don't necessarily need the judge involved in all. Do I agree that the Judge needs to be involved earlier in some cases of this? Absolutely, especially in enforcement of rights.

Not to take away from the convening authority, let them get that bite of the apple earlier. How to do that, I don't know and for which pieces, I am not confident. So, giving it back to them to actually do a hard look at that piece, I agree

with. Just taking away or recommending this needs to be done outright, I disagree with.

BRIG GEN DUNN: See, I guess my concern is or maybe we could make the recommendation that they study how to bring the military judge into the process earlier and then let them sort through the difficulties. Because I think if we couch it in terms of whether to do it, that then we are right back to where we are.

LT COL McGOVERN: Won't they have to study it in order to recommend to Congress to enact, in the second sentence of 43(a)? I mean they are going to have to go through this mental exercise and address some of the things you all are concerned. I mean, implicit in this task is for them to study all the possible consequences.

REP. HOLTZMAN: With respect, I don't agree with that. I mean, we are directing the Secretary of Defense to recommend to Congress. We are not asking him or her someday to think this through. We are just saying, you just tell Congress. You be our mouthpiece.

I guess I mean I am very torn about this because I think Admiral Houck was very truthful that some of the key players were not questioned as to their reactions, the members of the military service.

On the other hand, the fact that the Joint Services Committee didn't act on this since 2004, I mean, we could sit here and list all of the laws that have been changed since 2004 that shouldn't affect, I mean a change in the last year or

two or any change prior to that because, frankly, the issue of sexual assault was not front and center. And the issue that I think Mai spoke to yesterday and that I am concerned about is we are now placing victims' rights front and center here. We don't have a mechanism to enforce them for a certain period of time and you can't really ignore that. So, what are we going to do?

I mean that didn't exist. I mean we didn't have a Special Victims Counsel there hadn't been all this focus on victims' rights before.

MS. FERNANDEZ: Victims' rights were not incorporated into the UCMJ.

REP. HOLTZMAN: Right. So that was just a recent -- that was just recently done. I mean, in fact, one of our charges is did the military do a good enough job last year or the year before when they incorporated it? Should there be more additions?.

So, the military is now quite alert to the issue of victims' rights. And yet, here we have a gap. We have a gap, where no one is enforcing. There is no one charged with enforcing.

CHAIR JONES: Could I get a specific example of where a victim would need to enforce a right at an earlier stage that referral?

COL COOK: Access to evidence, maybe.

LT COL McGOVERN: Mental health records.

CHAIR JONES: Access to evidence?

COL COOK: Right. But again my question is -- it is not a question of there is no enforcement. It is just a question of there is no appeal from it. You can go to the convening authority and the Special Victims Counsel now today can say I want access to, whether it is mental health records, whether it is allegations about the crime, whatever it is, and ask for access to it. They could be told no.

If they are told no preferral, there is no -- from the convening authority, not the commander, not the trial counsel, but to the convening authority and that can go straight to the Special Victims Counsel is my assumption that that is how that would work in the system right now, somebody who is working with it, we need to answer that.

But then from the convening authority, you have no appeal right now until the judge is appointed. And when the judge is appointed, you can take it to the judge.

So, there is an enforcement method. It is just a question of, it is not a military judge that is the enforcement method before referral. That is the issue.

REP. HOLTZMAN: What about for example, if you go to the convening authority for some special kind of protection -- I am just making up an example. You go to the convening authority for a certain kind of protective order or a transfer or you want to be heard vis-a-vis an issue with regard to a plea. Or you want to be heard with regard to the decision whether or not to prefer or not to prefer. So, the convening authority said you know something, I am not listening to you. I

made up my mind and I am not listening to you. And he decides not to refer the case. Then what happens?

BRIG GEN DUNN: Some of those I think would not be -- I think some of that would not be within the military judge's purview under any circumstances like a transfer. I'm not a military judge. I can't envision the circumstances under which they would --

Yes, I mean that is all in command channels and there are higher levels of command that you can appeal to.

LT COL McGOVERN: The circumstances which would be more likely, ma'am, would be that the convening authority does authorize release of certain evidence or documents and then the victim and the victim counsel do not have any recourse to go to a judge and say no, this is wrong and it shouldn't have been released.

Or on the flip side for the defense counsel, defense counsel has to go through they are denied something they have to wait until after referral.

So, those are the two circumstances where a military judge could, if they were available earlier, be of benefit to either the victim or defense.

COL COOK: The other thing, just to clarify, Representative Holtzman, the convening authority and the commander. The protective orders themselves, as in a preliminary matter, if somebody wants a protective order, you usually go to your company commander. It is the lower -- it is not the convening authority on any sexual assault or other cases. It is usually about lower level

commander that is there day to day. If that person does not give you that protective order, whether it is the next higher commander or the one before that, until you get to that third level of command, usually you are not at the convening authority.

So, the protective order is done as a matter of course at the lower level. If a company commander or somebody is biased against the victim or somebody else, the trial counsel, or the SJA, or somebody is going to get that order from somebody else if it is appropriate.

The same thing on the plea input and the referral -- and the preferral of the case. I'm sorry. Go back to the preferral, the initial charge. Anyone subject to the code can prefer that case, as long as they have got a basis for believing that the offense occurred. So that again, is a lot of times it is the company commander in the Army or a lower level commander in any of the services.

The referral decision, whether you are actually sending it into the court, whether you are taking -- once that case is being decided, we are going to send this to a general court-martial or to the Article 32. That is all at that general court-martial convening authority. The referral, the plea, those are the pieces I think we have already agreed that the input of the victim would go into that and it would be --

REP. HOLTZMAN: Right, it calls for victim's input is not -- well, somehow a victim feels that his or her rights be heard at these stages --

COL COOK: Have been violated.

REP. HOLTZMAN: Have been violated. I don't know how that could happen. Maybe it can't. I mean, maybe that is just not something that could happen, as a practical matter. But if they are violated, and it is a convening authority who makes that decision, they have no recourse until -- well, you have no recourse if the decision is final. I don't know what would happen.

PROFESSOR HILLMAN: You would have no recourse if the information is released. I mean, that is really what --

REP. HOLTZMAN: That's true. Okay.

COL COOK: The information is released is the issue. You can't put it back in.

PROFESSOR HILLMAN: Yes, it is the victim's mental health records that would be the most --

CHAIR JONES: And what is the actual victim's right there to be able to be heard on that?

LT COL McGOVERN: File a motion with the judge to have those --

COL COOK: That's if it has been referred.

LT COL McGOVERN: Right.

COL COOK: Before referral, if it has not been done, then you file an Article 138 complaint, yes.

LT COL McGOVERN: Right now, with this proposal, it would

be going to a military judge with a motion for those to be withheld or reviewed in-camera or then to only be partially released.

COL COOK: We could carve this out. I mean if we want to go back and say that judges should be involved at least in victims' rights, you could carve that out and then say send it back to them to determine how to get the judges involved in victims' rights.

The challenge would be okay, now you are involving them in the decisions dealing with the victims' rights but we don't do anything with the accused. And the accused is the one that has got --

So you can't do one without the other. And that was my concern. I agree it would be nice to have a judge to consider some of these or some protections being there so the information is not released that you can't put back in the box at the expense of the victim.

But I don't think that we are equipped enough to set those out here. I would still rather -- the Joint Services Committee, the question is they have had the opportunity. They could review it from 2004. I think that was an assumption. I don't know that the issue of whether or not --

I know the Army has considered it. I don't know whether the issue of whether to bring military judges earlier into the process was ever considered by the Joint Services Committee and I don't know that they turned it down or they didn't. And we didn't have any evidence through here to do that. And I don't

know whether it is appropriate that we just ask them while we are sitting here but they may not know either.

LT COL McGOVERN: As Dean Hillman said, a lot of decisions are being made based on your opinion. A unitary sentencing wasn't asked of the services and that was decided today.

COL COOK: And on this one, it is supposed to -- you have got your list of all the pieces that would be affected and stuff like that, I would be more comfortable with saying somebody take a holistic view. If you do this to all of these, what are the secondary consequences and effects?

Having a finding that says the panel believes that it would be appropriate to get judges involved earlier in the process and letting the services define the what and how and let them actually come up with a conscious decision instead of we think it should be all of this. Because I don't think they have to be involved at all in the magistrate piece. They already oversee the military magistrates and supervise them. If a judge advocate is not in the system, then that is something we need to do.

COL HAM: The Army is the only service that has a military magistrate program, I believe. The other services do not use them.

COL COOK: Who does the magistrate duties in the other services?

LT COL GREEN: The military commanders.

COL HAM: The commander makes all of those decisions in the

other services.

COL COOK: Okay.

PROFESSOR HILLMAN: The FYNDA, this Section 1701 as I am looking at the Victims Services Subcommittee Report, it directs the Secretary to already consider this, to consider mechanisms for affording rights to victims. I mean this is -- and we are a part of this. Right? So, we are making a recommendation for a way within the response systems that we see, where the rights could be protected.

You know, without a remedy, it is hard to say that there is a right that we are making cognizable.

CHAIR JONES: Yes, actually, we have already directed him. Is that what you are saying in the victim's --

We didn't specify it was through the military.

PROFESSOR HILLMAN: No, I think we would be doing the Secretary a service to provide this. I also, Admiral Houck may think that our recommendations will have more weight than I think. I don't know. But I wouldn't recommend it if I think it would cause harm here.

And this is one way to do what many of the services have to do, try to find the right people to enforce rights that victims have here.

And that piece needs to dovetail with the issue with defense counsel currently have to run through and around to get the resources they need.

REP. HOLTZMAN: Is there some way to combine this stuff

together? Like say something we are very concerned that there is no mechanism at present to protect victims' rights. The instant the alleged assault and preferral of the case or referral.

And we are also concerned that the present system, whereby defense counsel, the accused has to go through the trial counsel.

On the other hand, we have not been able to ascertain the impact. We believe that, in theory, it sounds good but we prefer to see a trial involved at an earlier stage to handle this but we don't know what negative impact there could be.

And so we call on the Secretary, recommend the Secretary of Defense determine whether doing this would create any negative impact such that it shouldn't be done and just sort of spell it out in a more concrete way.

I mean you would be still asking for a study but you would kind of spell out what the problem and why it needs to be addressed and what our concerns were.

VADM HOUCK: That's more appealing to me than what we are working with right now. Because I think that the specific example of a victim who may have records released and the door to the barn is open and then they are out, there is really a bothersome situation.

But I go back to the impacts piece of this. I don't think it is the same as deciding on unitary sentencing. I mean that is a very specific thing is in the

province of lawyers to understand and make a recommendation on. And while we have eight lawyers on this group, I think what you are saying is very reasonable.

COL COOK: I agree with what you are saying. I would clarify the first sentence, though, when you said there are no protections for the victims' rights at this point. I think we are concerned that there may be inadequate protections, if you want to say it that way.

But I think that there are rights now. If they go to commander, they go to the convening authority, whoever it is, I get the sense that the concern is more of that, it has got to go to a judge and we are choosing who that person would be, but there are some protections that are out there right now that they can--

CHAIR JONES: Well, are we also -- I apologize. Are we also suggesting that even before preferral there are victims' rights? So, there is no case at all yet and no judge would be available from a real case-specific assignment. Right? So there may need to be -- I mean I don't know how you would implement.

COL HAM: There is no case at all.

CHAIR JONES: Well to an investigation, perhaps.

COL HAM: There could be a no-contact order with no case. There could be restitution with no case.

CHAIR JONES: I don't know. Do you need a military -- I honestly don't know how you implement. Would you have the same military judge requirement for each of these rights? How do they get assigned? Those are the

kinds of things that concern me. And I don't know the answer, which is why I would like to see what makes sense.

I agree that maybe we could say something. I agree with both what Representative Holtzman said and Admiral Houck. I am all for saying that.

And I think really we have a sense that the military judge should be brought in earlier in the process but I don't know how early or for what. And I guess that is what we have all been saying.

PROFESSOR HILLMAN: Your Honor, we did spend a lot of time going over exactly when that should be from preferral of charges and imposition of pretrial confinement. It would not resolve every possible issue with respect to victims' rights but sure would resolve a lot.

CHAIR JONES: So we are not talking about preferral of charges.

PROFESSOR HILLMAN: Well it is an early point. I mean there is not really anything much. I mean there could be there are issues that maybe some criminal at that point but there is not something that constitutes a case really that is moving forward.

We are weighing here, essentially, the impact on the system versus the rights of victims. And I put my thumb on the side of victims' rights here.

COL HAM: There was a VSS recommendation which is on page 25 of your chart number 33, which also attempted to address this that was --

CHAIR JONES: Where is it?

COL HAM: That was VSS number 33 on page 25 of the chart.

CHAIR JONES: All right.

COL HAM: Which was substantially modified before acceptance. But it attempted to deal with the same issue from the victims' rights angle to provide a mechanism to get into the trial court and then an appellate mechanism.

CHAIR JONES: Here it is. If you go to the -- oh, I don't know about where it is there. It is 33.

BRIG GEN DUNN: Is this the standing one you are talking about? The victims have standing. I think that was the issue though.

CHAIR JONES: Right. And then the question is all right, so you have standing. Who do you go to? I guess that is the question.

REP. HOLTZMAN: Right. To go to your point, Judge Jones, remember especially the Special Victim Counsel gets appointed they want access.

COL COOK: And they know the chain of command. They know the convening authorities. They know the Article 138 process, which is an administration process.

You give the opportunity to those commanders to change their minds, and you sent it back to the DA for an expedited review.

The challenge is, and I go back to what you said before, the

premature release of information. Once it is out, you can't put it back in the box.

I'm not sure how you adequately safeguard any of those processes, whether it is a judge, whether it is a convening authority, if it is released before somebody has got the authority to release. And in most cases I would say there is probably not a lot of authority to release, especially if there is health records.

LT COL McGOVERN: A judge is accustomed to doing in-camera reviews to see what information may be discoverable with a little more expertise than the convening authority.

COL COOK: And carving something out -- I don't know. Carving something out to protect victims' rights when there is also huge rights in there is where my challenge comes in about balance. I don't disagree that I would rather have a judge do an in-camera review on some of that. You just don't know where you do you draw that line between giving more right to a victim than you do to an accused in a justice system. I don't know how to balance that.

MS. FERNANDEZ: I like General Dunn's suggestion that we say you need to figure out how we bring in a military judge. We don't dictate how or when. We give it back to the services to figure that one out. But we acknowledge the need for it for both defense and victims' rights to be preserved.

We acknowledge that there are instances when in early stages of the case the victim's rights and defendant's rights can't be preserved or aren't preserved and that there is a need for an arbitrator beyond convening authority. I don't know.

I don't have the words. But it is -- we know that there is a problem but we are not going to say exactly how we are going to fix it but we think it is with a judge.

REP. HOLTZMAN: What about something that goes to the other side? I don't know how to say this. But we direct the Secretary of Defense review how -- in order to protect victims' rights and the rights of the accused, that the Secretary of Defense is directed to determine how to involve military judges at an earlier stage than they are now.

MS. FERNANDEZ: I would like that.

REP. HOLTZMAN: Something like that.

MS. FERNANDEZ: I would like that.

VADM HOUCK: I don't not like that.

(Laughter.)

MS. FERNANDEZ: Wow, you almost moved on that one.

VADM HOUCK: I mean from a technical standpoint, we don't have the authority to direct the Secretary of Defense to do this. But I think that it could be appropriate to recommend that the Secretary of Defense consider some of these very specific things.

I think people have an aversion to the word study at this point but whatever verb we are talking about, the notion that we have identified this potential gap and that we would like the Secretary of Defense, with some intentionality, to look at this potential gap to figure out how to address the rights, the

potentially unaddressed rights of victims and accused in this process seems okay to me.

BRIG GEN DUNN: And I guess my piece is I want the concept of bringing the military judge into the process earlier to be specifically considered in conjunction with that.

CHAIR JONES: I would agree with that. I think we need to say military judge.

BRIG GEN DUNN: Earlier in the process.

COL COOK: I agree that they should be specifically considered. I'm just not -- and I am going to say there is a problem. I think that we all agree, at least on this point, that the military judge may be better equipped on certain of these issues there going to be a preference. It doesn't mean that there is a problem with how the convening authority is doing it already, with the advice of the legal counsel.

BRIG GEN DUNN: I mean I am much more specifically on the defense side. I am much more looking at the military judge entering early in the process to speed the darn process along so that when, on those rare occasions that the convening authority does deny a defense request for an expert witness in a significant case, you know, you don't have to wait until referral to have the judge made a determination.

And we don't need to add all that.

COL COOK: I'm going to back to the joint services --

BRIG GEN DUNN: Pardon me?

LT COL McGOVERN: Those issues are part of the findings that would go along with --

BRIG GEN DUNN: Right. Right, they are laid out in findings and we certainly don't need to put it in the record today. I am just saying we agree in terms of not limiting the convening authority's authority to act in the process.

REP. HOLTZMAN: So, saying something like consider, the Secretary of Defense should consider how to involve military judges in earlier stages in the process in order to address ensuring victims' rights that are indicated.

BRIG GEN DUNN: Protected, something. And then the findings are way out there.

MS. FERNANDEZ: Give it a shot.

COL COOK: Well, language that was just used to consider the -- that I could agree with.

REP. HOLTZMAN: Consider how to.

COL COOK: To consider how to?

REP. HOLTZMAN: Engage military judges at an earlier stage in the process, in order to protect the rights of victims and the accused.

VADM HOUCK: So, to put a fine point on it, we now then agree, we know that there is at least one specific problem that we can say with a certainty is a problem that requires a military judge to be involved to fix it. What is

that problem? Because we have to have that as a predicate if we are going to say to the Secretary of Defense, you need to do this. All we are asking you to do is to figure out how to do it. But we have already determined that it must be done.

So, I am just asking what is that one example of a specific problem that we know is not addressed right now. I am asking it with an open mind.

LT COL McGOVERN: And the CSS, again, driven by balancing the system, that problem was stated in finding 43-3. So, we may look at different services in number 3 and come up with an additional finding as to another problem being the premature release of victim information and then having no recourse.

But we do state the problem in Finding 43-3.

VADM HOUCK: So, sentence number one. Defense counsel are currently required to submit requests for witnesses, experts, and resources, through the trial counsel and staff judge advocate to the convening court. And that has always been the case.

Sentence number two. Depending on service practice, the trial counsel may determine whether to grant or deny witness requests, et cetera. That has always been the case.

Where in 43-3 is there reference to victims?

LT COL McGOVERN: Oh, no, sir. I'm wasn't that there was victims. You said is there a problem with the judge not being involved in the system. And this is the problem CSS identified is that there is not a neutral mechanism for

defense counsel to go through.

So, I think that would be one finding that would be supporting this recommendation for a consideration how to.

And then another finding as to the release of victim information prior to referral would require a military judge's involvement.

COL COOK: Then you could also -- then you make an assumption that it has to be a judge at that point. We could expand the magistrate parcel. We could at least look at what the Army has in terms of a magistrate process for the release of those things. I just I don't know --

VADM HOUCK: Slow --

COL COOK: The biggest concern I would even say is do we have a problem with the victim's -- and I don't know that -- the victim's medical file or personal --

CHAIR JONES: I am more concerned about the right the ability of victims to be able to enforce their rights and having somewhere to go. I am not as concerned in terms of us recommending something as opposed to asking for a study.

With what has existed for a long time in terms of the way the defense is being hobbled here. So, I think that that is where I am coming at and it is a good question.

And I go back to my old song, which is who is going to be disclosing these records and in what context. That is just what I am unclear about.

I mean, look, I think the Victims' Rights Act, it is hard sometimes to compare it to the military justice system and figure out how to plug it in. But I would like a little more concrete notion of what it is that could be occurring at this very, very early stage. Who is giving out mental health records?

PROFESSOR HILLMAN: Lieutenant Colonel McGovern.

CHAIR JONES: Oh, yes?

LT COL McGOVERN: There is a very open discovery prior to referral and if a trial counsel had obtained records and released them to defense counsel, there could be a violation of a victim's right prior to referral.

CHAIR JONES: Well, this is a perfect example of my ignorance. I don't understand what a whole bunch of discovery prior to referral is. I thought that was largely going to go away with turning the Article 32 into --

LT COL McGOVERN: The Article 32 is only one discovery tool.

CHAIR JONES: Okay.

LT COL McGOVERN: You are actually engaging quite a bit of discovery back and forth.

CHAIR JONES: And the UCMJ has rules about discovery?

LT COL McGOVERN: It is pretty much open-ended discovery.

CHAIR JONES: So anyone can ask -- either side can ask the other for discovery?

LT COL McGOVERN: Yes.

CHAIR JONES: Before referral.

LT COL McGOVERN: No, ma'am. There are several --

VADM HOUCK: There are charges referred. And defense counsel can say to the government give me the -- there are no charges yet but give me the records of the victim. Can that happen today?

BRIG GEN DUNN: They can ask but I wouldn't give it to them.

COL COOK: The premise still applies that protection of persons --

COL HAM: There is a number of discovery provisions. Of course due process and the constitution, which would be the same in the military as in the civilian system. There is Article 46 of the UCMJ which requires equal access to evidence, which was recently amended by congress to put an exception for interviews of victims, which you are all familiar with.

Then there are rules for courts-martial, which executive order which prescribe discovery, some of which must be turned over with the charges and some of which is not triggered until referral, although the practice is that it is exchanged prior to referral in many locations, although the rule does not require it until referral.

VADM HOUCK: Does that information include the health records of victims?

COL COOK: Colonel Ham?

COL HAM: I'm sorry, ma'am.

COL COOK: Does any of the things you just said include the release of health records where there is no mandatory training in --

COL HAM: If it was part of the file required to be turned over with the charges, I am trying to think of an instance where I have ever seen that and I can't think of one. But that is only anecdotal and I am only one person. They are mostly discovery requests.

COL COOK: Maybe the recommendation needs to be something that protects those records and a specific recommendation that would -- if it is not in the rules now that protects those health records, I mean that is --

COL HAM: For your further information, that may be an additional item for the judicial proceedings panel to discuss it in either the Senate or House Armed Services Commission version of the NDAA so the judicial proceedings panel may be directed to examine that particular issue, the release of medical or psychiatric records.

VADM HOUCK: In my personal opinion, if I believed that there was a chance today under the current rules that the defense could say give me those records and the trial counsel would give them the records with no oversight of the process, I would be very supportive of a specific thing that said no, don't. Figure out a way to stop that.

And then if there are other examples of that that protect victims'

rights and, in addition --

BRIG GEN DUNN: And the rights of the accused.

VADM HOUCK: -- and then in addition to say okay, then Mr. Secretary of Defense, we also recommend that you consider more broadly how to involve judges or whether to involve judges. I would say whether.

So, as a member of the response systems panel, protecting victims of adult sexual crimes, I want to be concerned about gaps in the system right now that would protect the rights of victims. But that is a very specific thing.

There is a lot of this. It is just an awfully broad net that is being thrown out there.

BRIG GEN DUNN: But we have gone from it being an outright recommendation to it being a consider how to do this and leaving it to the Secretary of Defense and the services to sort through how to do it.

VADM HOUCK: Consider how --

BRIG GEN DUNN: And we only make recommendations. We are not binding. Our recommendations are not binding.

VADM HOUCK: But it expresses what we believe and how to suggests that you need to get a judge involved in this. And that comes full circle back to my question, which is, show me a place Y that is new. To Judge Jones' point, show me where victims are disadvantaged right now by not having a judge involved before referral. If we can, then I support it.

LT COL McGOVERN: The other difficulty, sir, is that the Special Victims Counsel and the victim are not entitled to discovery because they are not a third party. And so, these exchanges are going on and they may not even aware of what is being exchanged. And when they do learn about it, if they think -- I mean that is another situation where it is hard to predict every specific circumstance that may arise.

But if it does, then at least there would be a mechanism of rights.

VADM HOUCK: Those are my concerns. I don't want to stand in the way of a sensible agreement.

CHAIR JONES: Well, I've always been on the side of not directing the Secretary of Defense to do anything but directing them specifically to look at the issue. And I wouldn't mind saying something like the panel has a sense that military judges should be included earlier in the process and direct whoever it is, I guess we wouldn't be directing the Secretary of Defense -- is it the Military Justice Review Group -- to go through and determine the how -- the who, the how, and the why, frankly.

I would say in the beginning -- it seems quite clear to me that for most of this, a military judge is doing it already and it would be a military judge that would be coming into the system earlier to do what he is already doing later.

So, I have no problem saying that the panel recommends a study of -- has a sense that a military judge should be brought into the system sooner and

asked for a study of how that can be done and then specify exactly the areas where we think it would be helpful.

I'm not sure that that is -- I think that violates your concern, though, Admiral Houck.

BRIG GEN McGUIRE: I'm seeing two sides.

CHAIR JONES: Right.

LT COL McGOVERN: Either way, isn't it still just a study?

CHAIR JONES: Well, no, if you are telling them the study had to do something, you have assumed that they are going to do it.

BRIG GEN DUNN: Well, I like the way you started out this time, Judge Jones. The sense of the panel is the military judge should be involved earlier in the system.

CHAIR JONES: Like a sense of Congress.

BRIG GEN DUNN: Yes.

CHAIR JONES: Well, if we say it is our sense that they should be brought in earlier, I think then we would direct or recommend that a study be made on. And then I would say whether to bring them in on X, Y, Z, et cetera.

BRIG GEN DUNN: In all the areas.

CHAIR JONES: So, there may be a compromise here. And it is extraordinarily important and more germane to anything else we are talking about to try to protect victims' rights because we know who most of the victims are and they are

victims of sexual assaults.

But I am worried about when and where and who. So, I don't know. I know that is a little vague but with that, it is our sense that a military judge should be brought in earlier and we could add to protect the rights of victims, as well as accused, because we had a dual purpose here.

And so we then go to the verbiage in the role of the commander that says so, we would ask the secretary of defense to direct the military justice review group to look at. And then we would go back to that original notion of the list of things that we want them to look at.

That would be my suggestion. Who is for it, so we can move along here? Yes, I am. Okay, well, that is not getting a majority.

Okay, well maybe we need to write these down, if that would make it easier. Oh, I must have missed somebody's hand. Well, all right. Well, then we do have it. But I will need some drafting.

COL COOK: You changed your second -- it is our sense they should be brought into something that says it may be appropriate to bring them in earlier for certain issues. I would agree with it then.

But make the determination from the beginning that they should be brought in earlier. I would still rather -- I would be more comfortable with the holistic look.

CHAIR JONES: I think it is our sense is kind of --

COL COOK: Well you know it is the should versus --

CHAIR JONES: No, I know you were. I was sort of saying, in my view, when you say it is our sense, I am not sure it is a very hard conclusion.

VADM HOUCK: But we'll get a chance to see the language.

CHAIR JONES: Yes, why don't we do that and then we can go at it again. Okay.

Are there any other recommendations that we have overlooked?

PROFESSOR HILLMAN: Your Honor, Congresswoman Holtzman and I did a little bit of drafting that Kyle just typed up for us on that general recommendation about publishing information.

CHAIR JONES: Well we could take it up now, then.

PROFESSOR HILLMAN: We could, and here it is.

CHAIR JONES: It looks good to me.

REP. HOLTZMAN: Well the other information that wasn't in there. I think we can strike that because it says including.

CHAIR JONES: Do we want to say forums as opposed to forma?

BRIG GEN DUNN: Fora or forums?

CHAIR JONES: It has to be forums, even if we are wrong.

(Laughter.)

REP. HOLTZMAN: Well we thought format because were

considering the --

BRIG GEN DUNN: Easily understandable and easily accessible.

All right, so formats. Okay, formats. Makes sense to me.

CHAIR JONES: You know, didn't this start out as trying to give the public the results of courts-martial proceedings pretty much, sentencings? I wouldn't know what to do with this if I had to -- I was saying let's -- are we saying let's make the 800-page SAPRO report, put that in a more accessible and easier format? I mean that is an awful lot of as much information as possible. I don't know. We are letting him figure that out?

Well, maybe I am the only one. Does everyone --

MS. FERNANDEZ: We could say information regarding military -- just instead of as much information as possible because nobody knows what that is. Just information.

CHAIR JONES: This is high tech.

REP. HOLTZMAN: Should we say on a regular basis?

LT COL McGOVERN: Is this additional to or in replacement of the recommendation?

(Laughter.)

LT COL McGOVERN: When we submitted RFIs to the services, the common response was this information is currently available in the DoD SAPRO report. And if this fixes the easily accessible issue, but I know the services are

required to produce so much information right now that is dictated by congress, I thought that the CSS approach was not to require new additional reporting requirements as much as if the information is already gathered, make it easily accessible.

PROFESSOR HILLMAN: Correct. That is our intent. That definitely is still the intent here. Just this is catch-all that would go with the other transparency recommendations.

REP. HOLTZMAN: You can say that information that has already gathered.

PROFESSOR HILLMAN: Yes, information already gathered or already collected.

CHAIR JONES: My only problem with this is I mean isn't the SAPRO report on the internet?

PROFESSOR HILLMAN: It is.

CHAIR JONES: And it is huge because it has all of the possible information you could imagine to ask for. Right?

LT COL McGOVERN: It has a 200-page narrative by DoD and each service has about a 100-page EMX. There is actually more than 700 pages, ma'am. And within there, there is a table that details each of these cases from start to finish in table format. But from that you have to work very hard to compile information. And again when you want to say stuff that is already available, we also

note that the services don't often collect the same information from the field.

CHAIR JONES: All right but this is going to require a whole new production of information in order to fulfill this goal.

VADM HOUCK: Maybe an easier format.

CHAIR JONES: I think we are already telling them to let's standardize, let's fix this up, let's make it readable and understandable but I think this is going to, if it is taken seriously, which I assume it will be, I think somebody is going to have sit down now and start compiling. I don't know what they are doing.

I mean you could search. If you are looking for a specific statistic, you can go into SAPRO and look for each of the military services statistics. Are we now asking that even before they have implemented the recommendation to try to standardize it that we make those available? I mean I just think this is -- I think it is premature.

VADM HOUCK: If we have to go south of the report, do we even need this?

CHAIR JONES: Well, that is another question.

Well I have actually no problem in the world saying that if this where this started, that results, as they occur in the courts-martial system should be routinely, regularly, whatever it is, publicized.

But this, I think is too all-inclusive. I don't know where we start. I mean, if I were the Secretary of Defense, he might know where to start but I

don't. I don't know.

We can vote. Who is for this?

COL COOK: Before we vote, can I ask for one clarification. This is an additional recommendation. Are you trying to put this in the CSS report or in our overarching comments?

CHAIR JONES: This is an additional panel recommendation, right, not a subcommittee. Which, by the way, anyone else who has an additional panel recommendation, speak now.

VADM HOUCK: So, the point of -- I am confused by what I think you were asking. Is the point of this -- is this originating from the thing where it said the Navy releases them and every so often a court-martial results?

BRIG GEN McGUIRE: Well, no, there was a separate one --

LT COL McGOVERN: One is gathering the sentencing data and then the other one is releasing results on a monthly basis.

BRIG GEN McGUIRE: I think that is the data one.

VADM HOUCK: So, isn't the data thing supposed to be addressed in the SAPRO report?

BRIG GEN McGUIRE: Right, which is 800 pages.

LT COL McGOVERN: No, sir. It was not. The data that CSS proposed is not collected specifically in the DoD SAPRO report. And that is why you couldn't make the comparisons of sentencing because they don't say whether it is

a court-martial by panels or by judge alone. You don't break down the offense types necessarily. Whether it was -- they will count a conviction as a conviction but you don't necessarily know sexual assault conviction or just an Article 92 conviction.

VADM HOUCK: But if you have a report that purports to be the authoritative source on sexual assault in the military, the sexual assault program, whatever the rest of it stands for, shouldn't that report refer to things to tighten it up?

LT COL McGOVERN: That would be one way to present the information, yes, sir. But in general, I think what CSS had asked did someone take an independent review of sentencing data gathered over time. Because right now you can ask clerk of court for some and other.

CHAIR JONES: If we can figure out specifically what we want publicized here, that is fine. But to say make publicly available on a regular basis information regarding military response systems to sexual assault, that is everything.

PROFESSOR HILLMAN: That was our intent.

CHAIR JONES: That was your intent?

COL COOK: When we're discussing -- I guess what I thought we were going to do was in some kind of in our final report that we make as a panel an overarching comment that just recognizes transparency is important to public confidence in both the military and the military justice process. I don't care whether you are the parents trying to put your kids in the military, the people that are in the military. With that in mind, whenever possible, the Secretary of Defense should

make efforts to make information that it -- make military response to sexual assault information available to the public in the easiest format as possible.

I didn't think it would be an initial recommendation or a finding or anything. I just thought it would be an overarching comment that look guys, people don't trust you right now. Tell them what is going on.

CHAIR JONES: Well, I don't have any problem touting transparency.

REP. HOLTZMAN: So then, we don't need the recommendation.

PROFESSOR HILLMAN: That's fine. I think an acknowledgment in the executive summary that the data that is collected in current forms is not only difficult to understand but also difficult to access and that we encourage continued release of that. And we are making many specific recommendations along those lines, so it is in accord with what we are all going to consent.

CHAIR JONES: All right.

PROFESSOR HILLMAN: Withdrawn.

CHAIR JONES: The unnumbered proposed additional recommendation, then, is withdrawn. Okay.

Anything else, in terms of other recommendations that we may have missed?

COL COOK: I thought there were some in the back. Behind number 58, I thought that there was some victim services. It says deferred pending. So, I don't know if these were all addressed.

LT COL McGOVERN: Yes, ma'am.

COL COOK: They were?

BRIG GEN DUNN: Yes, they were underneath.

COL COOK: Awesome. Okay.

CHAIR JONES: We think.

REP. HOLTZMAN: Is the last one that Role of the Commander that was done?

CHAIR JONES: Yes.

COL COOK: That's the one that had to do with -- that is the one about doing language that we were just talking about, number 10.

CHAIR JONES: All right. Then, one additional agenda item is to look at the draft --

LT COL GREEN: Judge Jones?

CHAIR JONES: Yes?

LT COL GREEN: Can I just clarify this? Recommendation 43(a), (b), (c), and (d), did we --

CHAIR JONES: We have people trying to draft what I said, which the sense.

LT COL GREEN: So, are those -- we drafted a finding for Recommendation 16 --

CHAIR JONES: We took out the panel member language.

LT COL GREEN: Are we incorporated language into 43(a),(b), (c), (d) into that recommendation?

CHAIR JONES: I thought 16 was about the studying where military judges, where the study would be as that. Let me just look. What is your question, though?

LT COL GREEN: Well, I guess the status on those four, just finalize the panel's final status on all the recommendations.

CHAIR JONES: Right.

LT COL GREEN: Judge, if I could make a suggestion.

CHAIR JONES: Yes.

LT COL GREEN: It says in the panel that the military judge should be involved in the process at the preferral of charges. We can take that first sentence in 43(a) and add it to the beginning of 16 so that 16 can say well he is supposed to be involved from preferral of charges --

CHAIR JONES: My suggestion was that we say it is a sense of the -- it is the sense of the panel that military judges should be involved in the military justice process at an earlier stage. I did not say -- I did not intend to say from preferral of charges. And that would be in order to protect the rights of victims and

the accused, I think we all agreed we would put there.

Then, now, this is not -- I am looking at -- now we have to go to 16.

Then we would go to the ROC 16 recommendation, which would be that the Secretary of Defense should direct the Military Justice Review Group or Joint Services Committee. And the way this reads now is to evaluate when we said the feasibility and consequences of modifying authority. And we wanted this, we wanted the notion of modifying the authority currently assigned to convening authorities removed, if we all agreed on that.

LT COL McGOVERN: Is that the way we would like to put consider how to?

CHAIR JONES: Yes, I put that into what my language was. I think we're all talking about and we wanted to -- I think at least one panel member wanted to review whether we say whether and/or how to. And we didn't actually talk about feasibility and consequences but I think those are --

LT COL McGOVERN: Yesterday --

CHAIR JONES: You know, I'm looking at my wrong set of notes here. I'm sorry. So, I have to go back and find where I wrote it.

Okay, the Secretary of Defense should direct the Military Justice Review Group or Joint Services Committee to evaluate the feasibility and consequences. Right?

LT COL McGOVERN: Yesterday, you also recommended deleting feasibility and consequences.

CHAIR JONES: I know.

BRIG GEN DUNN: Where is it is the sense of the panel?

LT COL McGOVERN: Yesterday, my understanding was it would just read that JASC to evaluate modifying not the feasibility and consequences.

CHAIR JONES: Well evaluate modifying would include that. So, I don't care if that is in.

LT COL McGOVERN: And then delete clarifying.

BRIG GEN DUNN: That is not what we are talking about now. Because in Recommendation 16, we haven't used the language you just used. It is the sense of --

COL COOK: This was drafted --

CHAIR JONES: Yesterday.

COL COOK: This was drafted today. So, this is the one that I thought. The one that is out there was compiled before we came in today. So that is not --

BRIG GEN DUNN: You know if it is not feasible --

COL COOK: He is editing it now.

BRIG GEN DUNN: -- then they don't have to do it.

It helps to say it again because I don't think he got it. It is the

sense of the panel.

CHAIR JONES: Okay. Let me go back to 16 again. It is the sense of the panel that military judges should be involved in the military justice process at an earlier stage. I think that is what I said five minutes ago.

COL COOK: In order to protect.

CHAIR JONES: In order to protect the rights of the victim and the accused or the rights of victims and the accused, either way. The victims and the accused.

And then we go to the Secretary of Defense should direct the Military Justice Review Group or Joint Service. Is that there now? The Joint Services Committee. I can't see.

COL COOK: It has to get bigger to see what she is working on. Just make it bigger. Thank you.

CHAIR JONES: Okay. That will be fine.

COL COOK: And then you just combine the two sentences into one.

CHAIR JONES: Yes, it will be all one recommendation, one paragraph. Okay, good?

BRIG GEN DUNN: And then we will have findings up under this, right?

CHAIR JONES: And then all the findings go in. No one

objected to the findings.

Okay.

COL HAM: All the findings came from ROC 16 and CSS 43.

CHAIR JONES: This is it.

COL COOK: This is it.

CHAIR JONES: Well, actually we made some -- this covers (a) through (d); (e) and (f) were separately made decisions.

Okay, did everybody get a copy of what is a draft of the -- it is the outline for the proposed outline for what our final report should look like.

And I don't know if you have had a chance to look through it or not.

MR. BRYANT: Are you taking comments on the outline?

CHAIR JONES: Yes, I will. And I would also, if we want to employ this method, if people have comments they would like to make on this to Colonel Ham in writing, not to each other, so we are not violating the Federal Advisory Committee Act, we could also proceed in that fashion. If anyone has questions, comments now, I would be happy to -- but I would also like to give everyone the opportunity to make, within the next couple of days, hopefully, any other comments that you might not think about this afternoon.

MR. BRYANT: This is relatively moderate but on the second page, under 5(b)(4), if the Comparative Systems Subcommittee has also addressed

comparisons by jurisdictions report of sexual assault victims, we had several presenters on that both federally and from state localities.

CHAIR JONES: So, we make sure that we gather those pieces --

MR. BRYANT: I'm not --

CHAIR JONES: No, no, this should be a map to where we are finding our information. So, I appreciate that. Thank you.

COL COOK: The only thing I don't understand about what is in here, what is it when you talk about the overview, you go down to 4(g). What is Part 4 Panel Recommendations and Findings? And then the same thing is 5(e), it says Part 5 Panel Recommendations and Findings. What is the intent of what is going on?

CHAIR JONES: It is like we are repeating them at the end of every section.

COL COOK: So we are taking the abstracted recommendations and we are listing them in here?

LT COL GREEN: This is structured the same way we have structured the Role of the Commander and Victim Services Reports for each of the remainder sections to include a summary of the recommendation and the findings that were made within that section, just for use of ease.

COL COOK: Okay, so is Part 4 then VSS? I mean I just can't tell. So Part 4 of the report is what you are referring to?

LT COL GREEN: Right.

COL COOK: So Part 4 of the report would be?

LT COL GREEN: Part 4 is that part.

COL COOK: Sexual assaults in the military. Oh, so you are just saying whatever we are talking about in here of all of these people, you are going to put a summary of all of the recommendations for each of these groups in this part and then the same thing underneath it.

LT COL GREEN: Right.

COL COOK: Thank you. That's all. I just needed a clarification on what meant.

CHAIR JONES: I have a question. The abstract of recommendations, which is going to be right up front, which I think makes sense because we had no idea how far into this report people will read. So, we start with an executive summary. Then, we had the abstract of recommendations. There will or will not be findings with those recommendations?

LT COL GREEN: The intent there, ma'am, was not to put the findings.

CHAIR JONES: Okay.

LT COL GREEN: We only put the recommendations organized based on who the panel had tasked the recommendations to.

CHAIR JONES: Oh, that's right.

VADM HOUCK: Could you talk about -- I mean I think it is -- in

that we have spent -- and I am not disagreeing at all. If we spent a year largely in these stovepipes of three different subcommittees. And now it is integrated throughout. So, could you just say a couple of words about your thinking in terms of organizing it that way? And I am not disagreeing with it. I just sort of want to understand your thoughts about it.

CHAIR JONES: Well, we thought we would start with what the problem was, which I think is what we try to capture in overview, the policy developments, the statistics, and primarily, the very important work of the Comparative Systems group with respect to how we can better understand this problem if we fix our work on the surveys and statistics.

Then, from there, our thinking was to try to do this in a fashion that would be as chronological as possible for the mind. We start with reporting, which is sort of where their response starts. And there, of course, we talk about, and again there, we use primarily the fine work of the Victims Services Subcommittee, about exactly how victims are helped, hopefully, by all of the victim services that the military now produces.

We go to investigation next. And then basically (d), which is a section near and dear to my heart, is meant to be for the reader who doesn't know anything about the military justice process, a section that takes them through the process in not 100 pages but maybe 10, so that they have some sense of how it moves.

Then, we have sexual assault prevention last. I think

prevention is extraordinarily important and maybe ultimately more important than how we even respond in the system but it didn't seem to be the right way to start the report.

Now, honestly, once we see the large chunks of this report actually getting written, I suppose things might be moved around. But I think we have to write before we can figure out an approach or at least I couldn't come up with any different way to do this. That is why we are showing this to you. If there is anything that jumps out at you or any different methodology that you think would be better.

BRIG GEN McGUIRE: I kind of see your overview was kind of defining the problem, getting the information out there, defining the problem where the next is then this is how it currently is, just an education piece.

CHAIR JONES: Right.

BRIG GEN McGUIRE: And then some of the preventative going forward.

CHAIR JONES: Once we write it, things may stick out because they just don't follow. We can't be sure this is exactly the right way to do it.

COL COOK: And that executive summary up front, --

CHAIR JONES: That is key.

COL COOK: Yes, that is what I was going to say. That would be key to me. Because you are right, the prevention, it doesn't seem to fit if you

move it. But I think as an overarching statement upfront you know like mention it before the prioritization of resources, funding and that stuff is important in all of these things. But the main effort should be on the prevention of this from the beginning.

The reality is, there is a problem. And because there is a problem, we need to make sure that the response mechanisms that we have are as appropriate or as close to appropriate as we can get.

CHAIR JONES: I will bring up this. I asked, when I was first shown this, suggested outline what was the introduction and what was that for, as opposed to what is the executive summary.

And I think what you are talking about, which is the notion of what are our overall basic thoughts here about what we found, that is probably going in the introduction. Whereas, the executive summary, I think is going to be a little more faithful to the report itself.

So, when we start our introduction, it may be something like there is nothing more important here than culture and that will prevent sexual assault, which may be -- and that is not what we are going to see in the executive summary.

I don't know if anybody agrees with those distinctions I am making but that is how I view the difference between the executive summary, which is obviously going to be much longer and more detailed and is meant to give the reader a lot of information and make them fully familiar with our recommendations, as opposed to our introduction, which is meant to be much more global in terms of our

conclusions and ideas.

Does that make any sense?

REP. HOLTZMAN: Maybe. I think you have to see what it looks like.

CHAIR JONES: I agree.

REP. HOLTZMAN: But I do think when you get to the introduction, you are probably going to break it into sections to deal with these issues, prevention and so forth. So, you may be able to say these overarching things --

CHAIR JONES: Yes, that is possible.

REP. HOLTZMAN: -- in the executive summary, so that you don't really need -- I am more worried that two statements are overarching.

CHAIR JONES: Right. Well, my initial reaction was maybe we could -- I didn't really know the purpose of the introduction.

BRIG GEN McGUIRE: Well, the introduction normally gives you a roadmap of what you are going to be seeing in here.

REP. HOLTZMAN: But won't the executive summary give you that roadmap?

BRIG GEN McGUIRE: Not necessarily.

LT COL McGOVERN: With the CSS report, we found the introduction was included in our executive summary.

VADM HOUCK: Yes, it seems like the introduction would be

part of, have its own little place in the executive summary.

COL COOK: And I would assume for all of us that most people, when they look at something like this, they are going to pull just the executive summary. They may never get to the introduction.

CHAIR JONES: So, we'll write an introduction and then see where we are going to put it. How about that?

Any other comments or questions?

COL HAM: So, ma'am, your plan for the 16th of June would be -- am I correct, the members will receive parts of the report, you will make all your comments back to me or Kyle, Lieutenant Colonel Green.

CHAIR JONES: Right.

COL HAM: We will consolidate all those comments and that is what you will review on the 16th of June.

So, you should leave on the 16th of June knowing what the final version of your report looks like. Is that the intent, ma'am?

CHAIR JONES: I think it has to be, yes, because we have to be done.

We might have more than one round of comments. I mean I could imagine getting a round of comments, making some proposed changes, sending it out. And there might be a second round to refine it. I don't know but it will all have to go through Colonel Ham and Colonel Green. And we will do it much the

way we did the subcommittee interim reports and assessments.

REP. HOLTZMAN: Can I ask a question about this particularly about experts? If everybody is cc'd on email to Colonel Ham, does that violate the rules?

MS. FRIED: I think it does.

REP. HOLTZMAN: What?

MS. FRIED: Yes.

REP. HOLTZMAN: But Colonel Ham could send those comments around to everybody?

MS. FRIED: Yes. Well, I think the comments have to go to Colonel Ham.

REP. HOLTZMAN: That's what I mean but then she can send them around so that we can be aware of what other people are thinking, too.

PROFESSOR HILLMAN: Sorry, but what is the difference?

CHAIR JONES: Well, I don't think there is but we have observed this from the beginning for some reason.

PROFESSOR HILLMAN: Can I just -- just because we are in the ending here, what we need to avoid is cross-talk but we could actually simply post and not respond to any, wouldn't that be possible?

Because what we are not supposed to do, I am not supposed to draft with Judge Jones. So, but if I sent a response to everybody and then Judge Jones

responded to everybody, how is that actually any different than Colonel Ham sending my comment to everybody and then Judge Jones' comment to everybody?

COL HAM: What you have to watch is having a meeting. And you can have an electronic meeting. Because your meetings have to be held in public.

PROFESSOR HILLMAN: But so long as we don't actually at the same time actually respond, it is not a meeting. Correct?

VADM HOUCK: Does it make sense to change our process now at this stage of the game?

PROFESSOR HILLMAN: We had a very hard time completing this at the beginning with the CSS with the report being this big. And I am not sure what we envisioned for the final report but if we do, in these meetings, we spent a lot of time with a lot of emphasis in the drafting. If you all have that much -- if we all have that much input, it is going to be rough.

MS. FRIED: Well I think, actually, I can go back and ask again about what you are proposing and see if there is any way to modify that somewhat.

BRIG GEN DUNN: Because those emails, they are all journals, then for posterity. Right? They become part of the record.

COL HAM: All the versions are archived. Every version, separate version is archived. Yes. It actually goes to the National Archives and it is accessible to the public. So, we have to keep track of the versions.

REP. HOLTZMAN: Because I think it is really important for everybody to be able to see other people's comments that it helps our own thinking and allows us to comment on what other people are doing so that we can get our work finished. I mean there is no way we can sit down at 8:30 in the morning on the 16th and go through I don't if it is going to be 100 pages or 150 pages.

VADM HOUCK: I'm thinking that there is going to be a report, right? There is going to be a draft report, which we will all get and we will submit comments to them. Those will be incorporated. Another version comes out to us and we talk about that on the 16th.

BRIG GEN DUNN: But six of us might submit the same comment, slightly different language. If we can all see what they are submitting, so Professor Hillman, who I will use as a shining example of superb articulation because if she were to suggest something, we could all say yes, yes, yes, and then we can move on to something else.

MS. FRIED: I think that is what the problem is if the public is privy to that.

BRIG GEN DUNN: Well, they will be because it is journaled forever for posterity.

MS. FRIED: But they need to have input in that process. And it precludes them from participating.

REP. HOLTZMAN: Well, why won't they have input? We'll

be making our final decisions at a meeting. I mean this is --

MS. FERNANDEZ: Because that is the process.

BRIG GEN DUNN: Which is why we should add a recommendation or comment to this report about that ridiculous aspect of FACA.

CHAIR JONES: We were just discussing that privately.

Look, I don't know --

BRIG GEN DUNN: Well, we can all put our own emails on the table here.

CHAIR JONES: I don't know how this will be resolved but it is conceivable that once there is a final report -- I watched the emails in the terms of the Comparative Systems, we are going to set hard deadlines to get your comments back. And then we may -- I don't know. Maybe we can have one telephone meeting to get closer to a final draft.

PROFESSOR HILLMAN: Probably at 5:00 a.m. Pacific Time.

CHAIR JONES: At 5:00 a.m. Pacific.

CHAIR JONES: We could do it at 12:00 p.m. Eastern Standard Time, when you day is almost done.

Anyway, I don't know. Let's see how things go. I hate to ask this question but what is your goal, Colonel Green, about having a draft to us of this?

(Laughter.)

LT COL GREEN: Thank you for asking this question. Judge

Jones, we have been working on something of a preliminary draft. Our goal is to send the sections to you, not just wait until we have a final report but the major sections, we will get those to you.

We have been working on it. I would expect early next week you may see an initial draft of Section 4. We have some releases of Section 5 that just went out. So, in the next week --

CHAIR JONES: Then we will just start seeing it. Okay.

LT COL GREEN: Can I make one other comment, ma'am?

CHAIR JONES: Please.

LT COL GREEN: There is a section at the end for additional view. I have, over the course of the meetings and deliberations, that you all accepted 130 recommendations. But if you did not agree with those or want to present any additional views as part of the report, obviously, the staff will assist you with reporting those as well.

And if you would just let me know or lets us know so we are tracking that, we can make sure that those are incorporated.

CHAIR JONES: Where are the separate dissents going to be?

LT COL GREEN: In Part A.

CHAIR JONES: All right. And those are already written.

LT COL GREEN: No. Well, they were for the subcommittee report.

CHAIR JONES: That's right.

LT COL GREEN: But if anybody wants to write as panel members, obviously --

CHAIR JONES: So, those still need to be submitted, now that we have finalized our reports. All right.

PROFESSOR HILLMAN: As a frequent author, can you send a list of what all the recommendations -- as soon as you get that, if you could send that first, that would help.

Actually, we need to do that anyway, to make sure.

So, when you can, just the list of what the recommendations are in the new numbering format of whatever, that would be great.

CHAIR JONES: Does anybody need anything else? Lunch, right.

All right, am I forgetting anything, Colonel Ham?

COL HAM: No, ma'am. Just you mentioned you might want to have perhaps a phone conference. Remember we have to do a *Federal Register* notice for all of that and allow for public comment, if anyone desires to make any.

CHAIR JONES: Can't we claim an exigent circumstance?

COL HAM: We cannot make it easy for you. I'm sorry.

CHAIR JONES: How many days in advance?

COL HAM: Fifteen days but we can obtain a waiver.

COL COOK: If we can decide then what that date might be by today.

COL HAM: We can obtain a waiver, if possible. You all have the flexibility that you all had in the subcommittee. The FACA god. The FACA attorney is Ms. Crowley, Elaine.

CHAIR JONES: All right, I think we should adjourn now for lunch.

If we have concluded our business, I think we are just adjourned. Is there anything else?

Okay. Adjourned.

(Whereupon, at 1:20 p.m., the foregoing proceeding was adjourned.)