UNITED STATES DEPARTMENT OF DEFENSE

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

DELIBERATION SESSION

TUESDAY
MARCH 25, 2014

The Panel convened in the
Teleconference Room of Suite 150 in 875
North Randolph Street, Arlington, Virginia
at 12:30 p.m., Elizabeth Hillman, Chair, presiding.

PRESENT

Elizabeth Hillman, Chair
Harvey Bryant
BG (Ret.) Malinda Dunn
COL (Ret.) Stephen Henley
Russell Strand

Neal R. Gross and Co., Inc.
202-234-4433
ALSO PRESENT

Maria Fried, Designated Federal Official

Janice Chayt
Dillon Fishman
Colonel Patricia Ham
Lieutenant Colonel Kelly McGovern
Terri Saunders
MS. FRIED: This meeting is open.

CHAIR HILLMAN: Okay. I'm grateful for all the hard work everybody already did this morning. And I'm glad that we can hear everything.

So let's -- I'm grateful to Kelly and her team for pulling everything together for us ahead of time too. I know it's a huge help to me in trying to review the volume of information that we've already looked at.

So just before we start, just to set the schedule. So we meet again on April 11th and we're going to hear from the Bureau of Justice folks who are experts on the statistical piece of this, because we want to make sure we get that part right.

That's important to the framing of all this comparative piece, understanding relative numbers that we have to do and don't illuminate what's really happening in the
military as compared to civilian jurisdictions.

That's April 11th. We'll also have final deliberations then. And then the report is due April 18th. So that's our report out to the RSP at the Subcommittee.

So this afternoon we want to talk through as many of the recommendations as we can in each of the sessions we talked about this morning as we did last time. Although you'll have a chance to look as it goes through, we really should try to be as clear as we can on what we're going to recommend today.

We'll wrap up the rest of that on April 11th and then we'll get the report out to the RSP then on the 18th. So and then the RSP meets twice in May with the first time to review, to have the Subcommittee's report out. And then the second time to adopt a final report.

Kelly, should we talk about any
other logistical or administrative pieces before we begin?

LTC McGOVERN: I just wanted -- I don't want anyone to be surprised when you receive the drafts which we'll be trying to generate. The process is we take the transcripts findings and recommendations. We develop those. We submit our drafts through Colonel Ham and Maria, then to you all for your track-changes, and you each individually send them to us and we build in that.

And Dean Hillman will have the final say for what the report actually contains, but it will be a combination. Within each finding and recommendation, we can have dissenting or alternate views proposed. So if in your edits you feel strongly about something, please let us know. We can help you develop that as an alternate recommendation or dissenting opinion.

The general format of the report, again, don't want you to be surprised. At
this point we're not looking at a long
narrative with just findings and
recommendations at the end.

It will be built off of these
tables with a finding, recommendation, bottom
line up front, we want people to read. If
they want to continue to explore the topic,
they'll read the discussion paragraph where we
will cite your deliberations and the authority
where you came up with those findings and
recommendations.

So it will actually be an
executive summary with an overall methodology.
And then one thing if we can do today as well,
we'll have the list of recommendations that we
want Congress to take action on. And the list
of recommendations that we want DoD or the
Services to take action on.

And as we go back and revise
these, we will -- it may do that in DTF-SAMS,
we will charge those agencies or entities with
that responsibility rather than just saying
this needs further study. Really try to hit it home who needs to take action.

Then our findings and recommendations will be split up among these outlines. And again we may not cover everything in the prosecution of a court martial. We're going to cover those findings and recommendations that we think are relevant -- or that you think are relevant and are really pressing.

Then have a complete table of findings, recommendations that people can refer to and emphases. So I'm not sure if people were expecting a long drawn out report, but we don't think would be as effective at this point or doable.

So we hope that you can help us further develop these drafts which we'll be submitting to you. But I hope to be getting them to you next week for initial input.

So ambitious, but by April 1st we need to be having you all reading these
materials for us.

CHAIR HILLMAN: And just to understand that process, than you'll send out a copy of the section of the report -- I mean I think we'll likely do it section by section.

LTC McGOVERN: Yes please.

CHAIR HILLMAN: And everybody will have a chance to -- will we have a call when we all talk about that? Or how will we provide comments to you on the draft?

LTC McGOVERN: Colonel Ham you -- I would think you all provide your written comments and then we would have a conference call.

COLONEL HAM: If you all provide your written comments to Lieutenant Colonel McGovern, then she'll reflect everybody's comments on a document that is sent back out to you. But then Dean Hillman can use it to facilitate a teleconference or meeting, whichever you decide. And you can go through everybody's comments and asides.
CHAIR HILLMAN: It will be a teleconference.

COLONEL HAM: And decide which to adopt, which draft would modify, whatever the consensus of the Subcommittee is. And that will then flesh out where there may be alternative opinions on things that we can then help whoever that Subcommittee member is, present those in written form, if there are any.

LTC McGOVERN: Right. And April 11th then will be a time for us to do a little of that in person, but I think that will primarily be tying up the statistical and survey analysis because we have not deliberated on that a lot as a group.

COLONEL HAM: If I can make one logistical point ma'am. Dean Hillman, on the 5th and 6th of May, that's the next full RSP meeting. That's going to be held at George Washington University School of Law. Same location as the meeting on January 30th for
those of you who were there.

And Dean Hillman, it's up to you

and the other Subcommittee Chairs on how you
determine to present your Subcommittee's
report to the full panel.

Whether by you briefing it by

having -- I mean whatever options you think of

having some of your Subcommittee members

there. However you determine to do it is up
to you.

MS. FRIED: And if I might add, on

April 18th when the Panel gets the report,

that's for purposes of the individual Panel

members to read it. But the deliberation

happens on May 5th and 6th.

LTC McGOVERN: Right.

MS. FRIED: Right. And you'll be

setting. Thank you.

COLONEL HAM: We're just trying to
give a couple of weekends for the full Panel

members to be able to digest all three

Subcommittee reports.
CHAIR HILLMAN: While we have everybody, we should take comments on that process. Or while we have those of us who are here, because we don't have everybody now. Any comments on that process?

MR. STRAND: No, we're getting the report and then we're going to do track-changes and then we'll send them back to Kelly.

CHAIR HILLMAN: And you should anticipate a call or two after we -- as they coordinate those before the 18th. So actually probably up until the 11th. Maybe we'll do a call a couple of days before the 11th. Pick up what we can an on the 11th.

But we want to give you all time to make the changes. So we need to close out our comments probably around the 11th I'd guess. Don't you think?

LTC McGOVERN: Right. And a few members will be traveling and may not be as available.
BRIGADIER GENERAL DUNN: Yes, I'm out of the country until the 4th of April. I leave on Saturday, so basically all of next week. And then I won't be here on the 11th, I'll be in Hawaii.

CHAIR HILLMAN: That's fine. If you could comment on that time in there, that should be fine. And I would think in terms of how we might report out, that seems significant. Maybe we should take a moment just to talk about that.

I think we need to build some slides to present. This is going to be a large set of findings for like what we did. We need to communicate how we went about this.

So the methodology piece that will be in the report, I think that we should have you know, members of the Subcommittee, if you can be there on May 5th and 6th, help present the findings for the parts of the report that you worked on. Because that's how we set this up.
So if you're available on the 5th or 6th, if you could let Kelly know. And we'll -- and we'll try to have people support those parts of the briefing, because I'd like for the Panel to hear from the people who have been working on this throughout, because of all the experiences that you've had and the expertise that you bring to it. That's the point of the Subcommittee is to have some outside experts help the Panel with figuring out what to recommend here.

COLONEL HAM: We have coordinated with the Chair, Judge Jones on how she foresees, because we have to do the Federal Register notice shortly. And she wanted to hear the Subcommittee report, then full Panel deliberate on those matters. Then another Subcommittee report, full Panel deliberate on those matters.

Instead of Subcommittee report, Subcommittee report, Subcommittee report, deliberate. She thought that would make more
sense if the full Panel could deliberate immediately after hearing from the Subcommittee.

MR. BRYANT: By deliberations, does that mean questions from the full Panel, for members of the Subcommittee before -- okay, yes.

COLONEL HAM: Yes, and I think discussions amongst the full Panel.

LTC McGOVERN: Approximately four hours per Subcommittee.

MR. BRYANT: Four per?

LTC McGOVERN: Four hours per, yes sir.

MR. BRYANT: Okay. So they'll --

CHAIR HILLMAN: Ours is bigger, so.

COLONEL HAM: And we do have public comment already received.

MS. SAUNDERS: There's an extra four hours work in there.

LTC McGOVERN: Right. So if we
recalls 6 May.

COLONEL HAM: We have how many?

We have received some commentary, so there will be public comment presents both on the 5th and the 6th.

CHAIR HILLMAN: Actually, can we propose that -- I feel like what we're doing is sort of a baseline for the other two in some respects, right? Because we're looking at the sort of process start to finish. And we're making recommendations that are related actually to some of what they're doing. Should we do the first day?

BRIGADIER GENERAL DUNN: But, if they're going into more detail on some of the things that we have hit at a lesser level maybe, but would cause us on the last day to just drop whole sections out because they've been addressed and cover our perspective. And -- I mean just some of the stuff we've got here is victim, victim, victim, which I suspect the Victims Subcommittee is going to
cover in great detail.

   COLONEL HAM: You know, there are a couple of members of the staff that, Staff Director included, that have sat through everything. So depending on your deliberations over the next few days, there -- I can say thus far there really is not that much overlap. And we can identify areas I think for all the Subcommittees where there is overlap. I think that would be permitted.

   But it's really -- everything's fallen into the three Subcommittee lanes, for lack of a better word. And if you're addressing the same sort of topic area, you're addressing it through the prism of your subject matter of your Subcommittee if that makes sense.

   There really is at this point not too much overlap.

   CHAIR HILLMAN: Okay. So we're good to go. Investigations. General Dunn? Mr. Strand?
MR. STRAND: I'd like to thank the Gentlelady from California for yielding the remainder of the time for today for investigation topics.

Real quickly, we're going to highlight some of these things. We haven't really fleshed out a lot of them. Jan has some good notes on our discussions. So I'm going to run through some of these, and General Dunn if you have any input along the way.

Patrol response, patrol officer response, we believe that DoD has this right. Basically we limit the response to responding MPs, security forces, to just basically providing basic services to the victim. Protecting property, protecting the evidence. And then referring it immediately to a military criminal investigative organization. So the model of limiting patrol officers, we are recommending that we retain that and sustain it.
The next one, the next area is DoD policy requires all sexual assaults be investigated by an MCIO. During some of our visits and some of the information we received from the field, particularly from some of the MCIOs, they have some difficulty you know doing that with the significant increase in reports of things, cases they weren't working before the change.

So our recommendation is that they utilize other resources within their offices, outside their offices. For example NCIS could bring the Marine CID into their offices, much like we do with drug suppression teams. Have them work some of these other cases. And they provide investigative oversight.

Air Force could do the same thing. And then if need be, the Army could do that as well.

Special victims capability response teams --

CHAIR HILLMAN: Sorry, Russ, just
one second there. So you're not recommending
a change in the requirement that the MCIO
investigate, but you're recommending
supplementing their resources by bringing in
agents from other units, is that right?

MR. STRAND: Correct. Or
investigators from other units.

CHAIR HILLMAN: Okay, or
investigators, okay.

MR. STRAND: Or even in some
cases, other law enforcement.

BRIGADIER GENERAL DUNN: But our
collection is there -- these are sort of one tier
down investigators. But since sexual assault
cases run the gamut from non-penetrative to
penetrative, that you know, perhaps there
could be some -- under the supervision of the
MCIO that there could be some split of abusing
them.

MR. STRAND: And we think that
would still maintain the spirit of the
requirement that they have a serious -- that
they have the MCIO oversight. Because in some of those cases, in the grabbing and the touching cases, you know as well know with sex offenders, they might have other cases, there might be other difficulties. And we want to make sure that we have one agency meet service oversees that and can look for those potential other issues.

CHAIR HILLMAN: Thank you.

MR. STRAND: You're welcome ma'am.

Special victims capability response team. The multi-disciplinary approach that civilians and many civilian agencies take, we want to -- basically our recommendation is, we think we're doing it well. But we want the DoD to monitor what works well for each service in each location. That DoD be required to monitor and ensure sharing of services best practices and ongoing working groups. And consider recommendation of changing the SVC requirement to a SARC requirement.
LTC McGOVERN: I just want to pose for the group that some of these recommendations may already be things being done. Such as ongoing working groups. And that we might want to make -- and we know that installations have SARC's and special victim capabilities in the testimony that we've heard.

So I just ask for a little more clarification on what you want to differently then is already being done.

MR. STRAND: Well as you said, some services and some organizations in some locations are doing it and some aren't. So what we're looking for is some uniformity in that.

So as we look at language, as we look at acronyms, as we look -- so for example, you know the services have all established some sort of a review board for sexual assault cases to see what the system response is. And they all call them different
things. And then eventually they morph into
different things.

    Even what we're calling our

special victim counsels in the different
services are called different things, and may
be morphing different things. Our victim
advocates are called different things and
morphing into different things.

    Like most services have a victim
advocate and a SARC. The Army has SHARPs.
And they're different things. And there's
some confusion amongst what that really means.

    And so just basically looking at --
-- makings sure we have working groups in the
services dealing with and talking through some
of these issues so we have a uni -- especially
with joint basis and you know, Pentagon units,
and you know when you deploy, there appears to
be some confusion among service members about
what this does and what this means. So just
looking for some uniformity in that.

    BRIGADIER GENERAL DUNN: I know to
me that's sort of a victim focused, so that
victims understand then in a deployed
environment on a joint base, you know what is
available and they understand the terminology
across the board. Because in a joint
environment you may not understand other
service acronyms or designations.

LTC McGOVERN: Let me, I just
wanted to make sure we're recommending
something new rather than things that might
already be done. Such as DoD IG working
groups continuing to make sure MCIOs are doing
their jobs. I think that's already going on.
So I just want to --

MR. STRAND: That is going on.

CHAIR HILLMAN: What do you think
about us though go ahead and stating actually,
we could state that this is what should
happen. We recognize some of it already is
and then cite specifically to that.

Because I feel like putting our
imprimatur on existing practices helps improve
the likelihood that they'll continue to be
effective and would get the attention they
deserve. Where as if we say you really need
to do these other things, and we don't mention
the things that are currently working, then
the attention could swing away from them.
Does that makes sense?

LTC McGOVERN: That would be good.
We just, as the staff, need to make sure that
we do our part in making sure that you all are
informed of what the current programs already
are, so it doesn't look like you're
recommending something that the services are
already doing.

CHAIR HILLMAN: That's an
important credibility issue for us. We'd be
grateful if you'd keep us from doing that so.

LTC McGOVERN: We'll work on that.

MR. STRAND: Okay. Special agent
selection and assignment. In both military
and civilian agencies, their response to
sexual assault can be impaired by prejudices
and biases potentially, especially if a person
doesn't want to be doing that job
particularly. They don't feel that they are
well suited for the job. They are even
against the job.

We heard some recommendations
during our visits and in the field where you
know, most civilian practices, when you're
working a special victim capability type
mission, they take volunteers, they request
volunteers, they screen for volunteers. And
in the military, largely due to military
requirements, many people are volen-told, many
people are forced to do it. We heard some
folks say that they really don't want to --
they'd rather be doing this mission and not
this mission.

And so not to say that they're
couldn't do it well, and they're not doing it
well, but we know that people that are wanting
to do the job do it better.

So we're recommending that MCIOs

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ensure those assigned to an SVU or a special victim unit, are screened before assignment to an SVU, specifically for that role. Once an agent is assigned, they should be trained and monitored before being allowed to take the lead on any sexual assault investigation or team. And then further remove any agents if they demonstrate negative biases.

I think that's a missing piece right now. So not to say that you know, we have a problem there, although I suspect we do in some instances. But we want to make sure that there's a positive movement towards making sure we've got the right people doing the right job for the right reasons.

And if we do have people doing those jobs, which are impacting negatively on those investigations, that there is a process in place to monitor. And then take action, either corrective action or removal from those particular positions.

MS. CHAYT: And the supervisory
MR. STRAND: Oh, and the supervisory issue. If somebody is a supervisor and they're trained as a special agent supervisor specifically for sexual assault, they need to either maintain that position as a supervisor instead of being relegated to a team member and having somebody with less experience, less training put over them, which has become somewhat of an issue.

We want to make sure that if you're a sexual assault investigative supervisor, that you're already selected, you're trained for that. You have that responsibility, as opposed to somebody else coming in behind you and saying well, we don't really like what you're doing here. We don't like what you're saying because it might supersede with whatever we think might be going on in the office per se.

And so we just want to make sure that those positions are seen as not
protected, but if you're in that supervisory position, you should be supervising those sexual assault investigations.

BRIGADIER GENERAL DUNN: I think this is related to a specific issue. And so I think honestly we should be a little more clear in our recommendation which has -- which is if a service has hired civilians specifically to oversee and monitor sexual assault investigations on their installation, then the -- you know the MCIO commander needs to ensure that those individuals have a -- either a direct line to the commander or -- that they retain their supervisory position.

That they are not permitted at the whim of other lower level management to be you know, subsumed into a different role shall we say.

CHAIR HILLMAN: I'm just not sure of the mechanism here.

MR. STRAND: Yes, I'm --

BRIGADIER GENERAL DUNN: It's kind
of a -- it's kind of an issue that arose and
there's really no -- I mean it's more calling
attention to the issue. That you --

LTC McGOVERN: Which site visit
did you see that on ma'am?

BRIGADIER GENERAL DUNN: Where did
you see that Russ?

MR. STRAND: It came up a little
bit at Hood.

BRIGADIER GENERAL DUNN: Okay, so.

MR. STRAND: And I'm trying to
remember. There was another, I'd have to look
for it, or Jan can look for it.

BRIGADIER GENERAL DUNN: Okay.

MR. STRAND: Basically it's a --
where some of the teams have established a
supervisor agent, and that's what the position
is.

BRIGADIER GENERAL DUNN: As a
civilian hire.

MR. STRAND: As a civilian hire,
some of them are being relegated to being a
team member with another person being put in charge of them that doesn't have this special training and special -- well the specialized training and experience.

BRIGADIER GENERAL DUNN: And may therefore may not take the sexual assault investigations with the same degree of seriousness.

CHAIR HILLMAN: So what about if we say supervisory agents should only be removed for cause, or something like that, right. And then explain in the background. I'm just trying to --

BRIGADIER GENERAL DUNN: Well they're not really being removed. It's kind of like they're shifting their utilizations.

MR. STRAND: Right, but they're being taken out of supervisor role without any supporting documentation in some cases.

BRIGADIER GENERAL DUNN: Well we don't want to say they shouldn't be removed. Because I mean there could be cause to.
LTC McGOVERN: Are we talking about a person in the service?

BRIGADIER GENERAL DUNN: Are we making an issue where we -- where we --

LTC McGOVERN: Right. I mean this is a pretty -- I mean if they're civilians, don't they have a statement of work and they would be following that.

MR. STRAND: They do.

LTC McGOVERN: So is this in --

MR. STRAND: It may be just a service specific issue. So we could remove it. We could just kind of deal with the service on it.

MR. BRYANT: Well maybe I -- I guess I'm missing. Is it -- I'm trying to come up with an analogy. Maybe you all have come up with one to let us know the extent of the problem.

Are we saying like, okay we bring in the civilian to supervise all the traffic control people. And then one day because
we're short of traffic control, we take that person and say, now you go out and direct traffic. And then we pair them up -- is that what's happening? Is sort of we need for you to actually be on the ground investigating these things as opposed to supervising? Is that it? Is that the problem? Because I'm not seeing the problem.

BRIGADIER GENERAL DUNN: The way Russ explained it to me, so let me see if I can explain. The way Russ explained it, the way I understood it from Russ' explanation is that we hire 34 civilians who have the right background and training to manage sexual assault investigations within a certain installation MCIO, okay.

MR. BRYANT: Okay.

BRIGADIER GENERAL DUNN: And then the military personnel, who are maybe senior and maybe warrant officers, rotate and a new person comes in, doesn't like that independent over -- you know, that independence. And is
somehow concerned about their own responsibility for you know, all the investigations on the installation.

And essentially pulls that civilian out of the leadership position and then perhaps is not as -- not trained in sexual assault investigations. Doesn't have a deep understanding of sexual assault investigations. And that then degrades that installation's --

LTC McGOVERN: Is this a systemic problem? Is this a service-systemic problem? I just don't know where we've heard the evidence or if it's you know, your knowledge of it. I just want to make sure we're specific and not throwing out accusations.

MR. BRYANT: Don't we run the risk here if we just put this all in your Subcommittee recommendation that the ultimate readers and actors on this are going where the heck is this going on? I want somebody's head. This shouldn't be happening. It makes
it sound like it's a major problem and it's not really a major problem.

MR. STRAND: It is a service specific systemic issue. I don't know if it's happening in the other services -- in other services. So I guess for the point of clarity, and I don't want to become more clear and you know, basically throw a particular installation or particular service under the bus right now.

It is a problem that we're starting to see more and more. Especially when we conduct training and those types of things, where we have trained some of these specialized people and now they are removed from those positions and relegated to just basically a working agent. And having somebody put over them that doesn't have the same knowledge or experience.

But that's maybe not something for the broader view of DoD, so we can remove that recommendation. But I'd like to keep the...
recommendation on assignment for voluntariness and removal from you know, those positions if they demonstrate negative biases and those types of things.

CHAIR HILLMAN: That's fine. Can you -- I mean in that, could you maybe embed this recommendation in that previous one about special agent training and selection. And mention that civilian expertise in supervision investigations ought to be respected and maintained. Or just some sort of statement along those lines.

And then we're actually setting out at least an aspiration without throwing an accusation.

BRIGADIER GENERAL DUNN: Russ, how about this. How about if we say something along the lines of MCIO commanders, so that puts it up there at the MCIO commander level, you know -- and I don't want to say will, but should generally utilize investigators who have -- you know with the appropriate training
in the positions for which they're trained or something like that.

MR. STRAND: Right.

BRIGADIER GENERAL DUNN: I can't -- it takes me a while to think through things. But something along those lines. Is that you know, generally you should use the people who are trained to do positions in them.

MR. STRAND: Right.

BRIGADIER GENERAL DUNN: Or something like that.

MR. STRAND: Colocation of agencies. Consolidated facilities have been one model used in civilian jurisdictions and in a few locations of the services. Consolidated facilities with investigators, prosecutors and advocates may create issues as to independence and privilege.

Our findings are basically that there's a combination of things being used and ways that these collocated facilities are set up. Our recommendation is to establish
assessment to see what works well for each
service and each location.

Use colocation based on structure
and size of installation as potential models
for places where resources are available, but
a requirement at a small installation.
Consolidation should be effective and is
encouraged.

LTC McGOVERN: Colocation may be
one issue that you want to pull up to a
greater issue or at least address in the
executive summary. Because the prosecution
will be touching on it as well.

MR. STRAND: Okay.

LTC McGOVERN: So we've approached
it from both perspectives. So that's one we
may need to merge.

MR. STRAND: Okay.

COLONEL HAM: Do you have any best
practices Mr. Strand? Or I'm not sure if it
would be a recommendation or a finding on the
-- your initial finding recognized it's
possible issues with privilege. Based upon that finding, do you have any best practices for entities that should or should not be colocated? Or no?

MR. STRAND: Well a lot of it has to do with perception. For example at Joint Base Lewis-McChord, they're colocated. And it seems like they're separated enough to where there is not a problem with privilege as far as you know, the lawyers are overhearing what the victim advocates are doing.

But it's the perception perhaps of the victims. Where, I'm going to go there, everybody's colocated. I may not have the same privacy that I would normally get.

And at those locations, we would certainly recommend that if they understand that that might be a problem, then you've got to make sure that there's alternate locations that they can meet in. That the public knows about that. Potential victims know about that, to mitigate those.
I think it's more of a perception.
I don't think it's -- I didn't see anything.
I don't know if anybody else did on any of the
site visits, where it was an actual problem.

LTC McGOVERN: Do you have a --
from an investigative standpoint, or an
investigator view, did you see a model that
worked really well from the invest -- like
PSARC? Did that appear to be a good model for
investigators?

MR. STRAND: It certainly was a
good model for investigators. It was a good
model because -- also for the lawyer, for the
prosecutor, because that prosecutor came in,
reviewed the cases.

Certainly a good model for the
medical folks because they were right there
with the examination. You know they were
colocated right next door to the child abuse
folks as well, so if there was any cross over,
you know it really works well there.

The problem is you would have the
same concerns. You know, you had the victim advocates that were seeing people there. But the victim advocate was also seeing people primarily in another location.

So in answer to your other question Colonel Ham, are there problems with putting prosecutors and investigators in with victim advocates? Yes, potentially.

As far as perception? I don't know about the reality. But the perception is really important. Based on what you might have seen at other locations -- we think in some ways it works well. And in some ways it might not work well.

Unfortunately it also depends on personalities. And emphasis on certain areas at certain times. Resourcing. I think our basic conclusion on this, subject to your input is it can work. And it can be helpful. And it can really send a good strong message. But it can also send a potentially negative message as well.
CHAIR HILLMAN: I think so long as you flag that this raises issues which you said first of privilege and independence, I think that's what we need to do. Because we're not prepared to say that colocation creates unresolvable conflicts.

But I think we realize that there's the potential of that perception. But there's also I think the reality of some of that blurring that it can happen too. So I think that's fine with me.

BRIGADIER GENERAL DUNN: And we did see at least at Quantico, the colocation of victim -- all the victim services in one area. Which keeps you away from the possible privilege issues. And it gives victims a place where they know it's focused on them and they aren't going to be running into the law enforcement side of the house when they go in there. So that's an op, that's all.

MR. STRAND: Well again, it depends on the installation resources as well
too. Some installations are actually grouping
a lot of victim services together like
Quantico, to where even if the victim -- so if
the victim goes in for help, they're not seen
going into a sexual assault place, which can
also be a problem.

BRIGADIER GENERAL DUNN: Right.

MR. STRAND: Especially on smaller
installations. So we've got to be careful on
that. And we basically -- we're recommending
that the services look at that and do what
they believe is best. We don't want to
discourage it. But we want to say you know,
do this if it seems to work for you as long as
you keep these other concerns in mind.

LTC McGOVERN: I think that is
consistent with what the prosecution raises.

BRIGADIER GENERAL DUNN: I think
this issue and recommendation actually gets it
pretty well.

MR. STRAND: We left the approval
for agents using pretext calls as was. The
DoD should review and standardize electronic intercept requirements. We discussed this during our last meeting. We left that as is.

Collateral misconduct. The requirement to read a victim of their rights for collateral misconduct has a chilling effect on interview and damages the ability of investigator to build rapport. We have two recommendations on that.

One is follow on -- the follow on judicial proceeding panel further study the advisability of creating a procedural limited waiver for specific acts of minor misconduct, which were uncovered as a result of the victim's voluntary reporting of the sexual assault.

The second recommendation is --

COLONEL HAM: On what? I'm sorry Mr. Strand, a -- I just didn't hear the words.

Procedural limited waiver?

MR. STRAND: Procedural limited waiver.
COLONEL HAM: Oh, procedural for limited waiver.

MR. STRAND: For specified -- right.

CHAIR HILLMAN: So just a pause. So you're not recommending a change in the way collateral misconduct is handled right now. But you're recommending further study of whether you want a waiver?

MR. STRAND: Correct.

BRIGADIER GENERAL DUNN: This is just for the investigative side.

COLONEL HAM: A waive of reading Article 31 rights, or?

MR. STRAND: Correct.

BRIGADIER GENERAL DUNN: Right, exactly. Exactly.

MR. STRAND: Correct. So if I'm an agent and I'm sitting across from somebody who's obviously been underage drinking, my first step you know, needs to be looked at. Should my first step be an Article 31
advisement?

CHAIR HILLMAN: Right. My

question is, what additional information do

you need to make the decision about what

should happen there?

MR. STRAND: That's a great

question Dean Hillman. I don't have a good

answer for that.

LTC McGOVERN: My question from

the last meeting was your finding was -- and

we were going to get more clarification. That

some NCIS agents are not reading their rights.

BRIGADIER GENERAL DUNN: That's

the second --

MR. STRAND: That's our second

finding that we're going to get into.

LTC McGOVERN: Okay. Okay.

MR. STRAND: So we have two

different findings. One is that it's not

being done, you know -- well the first finding

is we're reading rights to people who come in

to report a sexual assault for collateral
misconduct on a regular routine basis.

BRIGADIER GENERAL DUNN: And that has a chilling effect.

MR. STRAND: And that has a chilling effect on victims. And it has a chilling effect on the type of information we're able to obtain.

The second find is not all the services are reading rights the same.

CHAIR HILLMAN: The problem is we're doing it. The problem is we're not doing it.

MR. STRAND: Yes.

CHAIR HILLMAN: And we need to study it further.

MR. STRAND: All right, well I'll just --

BRIGADIER GENERAL DUNN: No, no, the recommendation is that the other Panel look at -- look at devising some kind of limited waiver or something. It gets around. I mean Article 31(b) is statutory. You know,
so.

CHAIR HILLMAN: Well should we
tell Congress to fix it? I mean if we need a
-- I mean one of our -- this is a -- I don't
want us to -- you know we know a lot about
this compared to what -- who else has --
you're in a better position to make
suggestions on what we ought to do going
forward.

If we know what we should do. If
we can tell what would be the best path
forward rather than just kicking it for
further study can we say, recommend Article 31
be modified to permit a limited waiver? I
mean just what would you say?

MR. STRAND: I would go even
further to say basically just follow civilian
standard practice. I know the military's
different than civilians on collateral
misconduct because most prosecuting agencies
aren't going to prosecute. They're not going
to take action on collateral misconduct. It
doesn't effect -- or affect clearances and
other things.

But I would see the -- personally
and professionally, I would feel very
confident to say it has a chilling effect. It
is not helpful to the investigative process.
I think we lose substantial evidence by doing
that as a normal practice.

My recommendation would be to, in
conjunction with maybe the prosecutor, not
necessarily getting clemency, because that
takes a little longer. But in consultation
with the prosecutor on a case by case basis.
After consulting with the local JAG on this
particular case.

LTC McGOVERN: But don't they
already -- can't they already do that. Where
you think there might be an issue, let me run
to the prosecutor and see if we can get you
immunity?

BRIGADIER GENERAL DUNN:
Impossible. That's not going to happen. Like
not at 2:00 in the morning, that's the issue.

MR. STRAND: Right.

LTC McGOVERN: Have you considered

--

BRIGADIER GENERAL DUNN: There has
to be some method other than what NCIS does.
There's got to be some way to do it.

MR. STRAND: Even stopping the
interviews and saying wait a minute and then
making the victim sit there while you're doing
all this machinations and everything else. I
would recommend that we be allowed to
interview victims of serious sexual assault.
You know, penetrative crimes.

And if they bring up collateral
misconduct, we do not advise rights for minor
collateral misconduct. And we would probably
have to identify what that would be. And then
we proceed with the investigation.

LTC McGOVERN: I guess I am just
conscemed right now because we're -- today we
want to clarify and update our
recommendations. And based on reading the
previous transcripts, have gone through this
and down the line to say it would be very
difficult to articulate what the minor
misconduct was versus major. Military versus
non-military.

And it seemed like a conclusion
was almost reached that there really -- it was
difficult for the group to decide how you
could do that. And I think that's probably
why you guys came up with further study.

And it isn't done in writing in
civilian jurisdictions. They just have
stated, they have a general unwritten policy
that they won't pursue what they deem to be
minor misconduct. But Ms. Jaus has clarified
if there is significant conduct.

If it's prostitution. If there
are some other things. In her jurisdiction
they would have prosecuted. So --

MR. STRAND: Who would they have
advised of their rights at that -- well sorry,
LTC MCGOVERN: Well you have to advise of their rights because then -- I mean Philadelphia I think at PSARC informed you all that they generally take it as a policy to not pursue collateral misconduct for the exact reasons you're saying. They want -- Captain Darby has stated that in newspapers articles that you all have.

But it just seemed like you had reached a finding that this was in the hard to do category to specify specific acts of misconduct which would have automatic type of immunity.

MR. STRAND: Well maybe then instead of specifying specific misconduct, just provide agents discretion. Make it a policy that agents have discretion in what they deem minor misconduct that they don't advise rights.

Because the remedy -- so first of all rights advisement is not a punitive
requirement as far as -- if an agent doesn't advise right, it's not an impunitive regulation that you have to provide you know rights advisement. Article 31 is a UCMJ.

But what's the punitive -- what's the punishment for not reading somebody their rights? Is there a punishment?

COLONEL HAM: There are professional responsibility repercussions for an attorney who would advise you to violate the law. And I would imagine there are professional responsibility consequents for anyone who violates it.

BRIGADIER GENERAL DUNN: This requires -- for the military, this requires a statutory change.

MR. STRAND: Or we could take the informal route of the civilian prosecutors and have a statement that says this -- you know that col -- that minor collateral misconduct will not be prosecuted.

You know we could have that --
that could accompany the rights advisement.

So I think that -- I just to me this is like a circuit split.

We are in a position of trying to standardize what should be happening across the services here. And there's a big disconnect between what's happening. And somebody's getting it wrong. Maybe both are getting it partway wrong.

But what if we did the rights advisement as the statute requires and we added collateral misconduct you know, this command has a practice of not whatever, not prosecuting minor collateral misconduct, so.

BRIGADIER GENERAL DUNN: Yes but only a convening authority can give that. It can only give it --

CHAIR HILLMAN: And all it is is an advisement.

COLONEL HENLEY: That's a true --

that's a true statement.

CHAIR HILLMAN: That's a true
statement.

BRIGADIER GENERAL DUNN: It is a true statement. But the thing is though, imagine yourself at the age of 19 and you've -- something's happened to you and you've screwed up the courage to go in and report it. And now they're reading you your rights because you were drinking.

CHAIR HILLMAN: And they're reading you that this is not going to be prosecuted. That it's a policy not to prosecute. Which is authority that still vests in the convening authority, because that's where prosecutorial discretion resides.

It can't actually devolve to the investigating agent. I think that's a -- not an authority that they legally have, although they're exercising it right now. That's the -- to me the --

MR. STRAND: Well can the Secretary of Defense give that same authority?

LTC McGOVERN: Currently the
service regulations say that the commander
will wait until the prosecution to dispose of
those.

MR. STRAND: Well it's
recommended. Yes, it's up to the discretion
of the commander.

BRIGADIER GENERAL DUNN: But in
the meantime the victim is having her rights
read to her. We could say that's in the too
hard to do box. So in addition to what ever
the service procedure is, in terms of reading
victims their rights. The agent will also
inform them of the current service regulation
which says that you know, this won't be
handled until the end of the entire process.

I don't know if that helps with
the chilling effect, which is what we're
trying to get to.

COLONEL HAM: But they're going to
have a special victim counsel as well, which
could -- it's a possibility of intervening
even before the investigator speaks to the
complainant. There's a -- I don't know.

I mean there already is a procedure in the military to report your own misconduct with no repercussions in the alcohol drug abuse field. Is there any analogy there?

MR. BRYANT: That seemed like a really good analogy. I mean the punishment in the civilian world, I'm not familiar enough with the actual procedures military is that the punishment or the consequences of not advising of rights is you can't use any inculpatory statements that they made.

MR. STRAND: That's the remedy.

MR. BRYANT: Yes, that's the remedy. So if they come and say I was -- you know I shot back six shots and not that it's in the civilian world obviously is not even something that requires the advisement of rights, that particular issue.

BRIGADIER GENERAL DUNN: That's the issue though.
COLONEL HENLEY: That's the distinction though, in the military it's not arrest or custody determination, it's whether you suspect someone of criminal offense. That's an issue with whether or not you know that you should advise someone of their rights, but choose not to. It does raise ethical -- significant ethical concerns.

But you're right, in the civilian scenario you would read their Fifth Amendment rights if they come in and want to make a complaint. But if you come in in the military, I think that's the scenario we're talking about.

BRIGADIER GENERAL DUNN: Yes, right. That is exactly right.

COLONEL HENLEY: Typical scenario where the CID agent believes that some misconduct occurred and you're under an obligation to advise of rights.

MR. BRYANT: A statutory obligation.
COLONEL HENLEY: Yes, 31(b).

BRIGADIER GENERAL DUNN: Yes,

Article 31(b) --

COLONEL HENLEY: And that's not --

that's the impasse, there's no custody --

CHAIR HILLMAN: Anybody in a

position of authority.

MR. STRAND: Well an agent of the

government.

COLONEL HENLEY: Right. Obviously

this not an apt analogy, but sort of the

reverse public safety exception where your

prosecutor's trying to get information in when

there's no rights advisement under public

safety exception. Is there something

equivalent that we would approach here with

the public safety concerns in trying to get

the victim to come forward with the complaint?

That's why you don't have to

advise someone of their Article 31(b) rights

until it goes beyond their initial complaint.

And there's a public --
MR. STRAND: Could we determine it to be an exigent circumstance?

COLONEL HAM: So there are potentially perhaps two ways to do that. One is the alcohol and drug abuse kind of automatic transactional immunity, but the difference would be there you're reporting only your own misconduct. And here you're actually alleging someone else's misconduct.

Or an amendment to Article 31(b) that would all the Service Secretaries to define a narrow category of offenses when in conjunction with you know, whatever --

COLONEL HENLEY: Right.

CHAIR HILLMAN: A serious offense sex related or serious violent offense. The rights, warnings don't have to be provided.

BRIGADIER GENERAL DUNN: To the victim. For the violation misconduct. That might -- actually what Patty suggested, that might actually be the best way to go.

Because if you get into this
alcohol and drug thing you get into this issue
of oh, I got caught. Let's see how I can get
myself out of it. I can make an allegation
and we certainly don't want that avenue open
I don't think.

    COLONEL HENLEY: Well you want to
give -- you want to give the appropriate
investigator some authority not to advise.

    BRIGADIER GENERAL DUNN: Right.

    COLONEL HENLEY: Until -- until
something happens that now they must. So they
need that guidance. And I think that would --

    COLONEL HAM: So that would give
the Service Secretaries authority to define as
narrowly as they wish or broadly as they wish,
the types or category of offenses that would
A, constitute collateral misconduct and B, --
actually it would be Secretary of Defense.

    BRIGADIER GENERAL DUNN: Correct.

    LTC McGOVERN: Right.

    CHAIR HILLMAN: We want it to be
standardized, that's what I was going to say.
COLONEL HAM: A, the category of misconduct. And B, what collateral misconduct is. How events in time were related to the offense they're alleging occurred. There are -- we do have definitions of collateral misconduct somewhere, it's basically -- I don't want to use -- it's specifically defined.

BRIGADIER GENERAL DUNN: If we can capture that thought, I think that covers what we're talking about.

COLONEL HENLEY: Yes.

BRIGADIER GENERAL DUNN: And it takes it off the judicial panel right, it keeps it in here.

CHAIR HILLMAN: Thank you. And I think that -- and I also -- I wouldn't leave the possibility of the alcohol and drug you know, whatever treatment program as a you know you can self report without being punished for that misconduct. I feel like that's relevant too.
And that's something you could do. If we could make it clear that people could use that right now, they could also get treatment. Which to be honest from a victim's perspective, because this so often triggers substance abuse issues down the road, that would be a positive step.

Although it does -- I agree with General Dunn that it doesn't solve the problem entirely of having somebody feel like they're being called to account, including for their substance abuse, which they may not want treatment for and may not have issues with.

So I like the other solution better. But in the meantime, I think we should encourage them to use that right now.

COLONEL HENLEY: What about the --

COLONEL HAM: But see the issue you've identified is the barrier to reporting, so the remedy you're proposing -- the barrier to lift -- you want to lift the barrier to reporting it sounds, but without giving any
additional benefit or -- I don't know what the
right word is -- incentive to report something
to avoid the consequences of your own
misconduct.

COLONEL HENLEY: Right, so isn't
the concern is you have to self report, but
then the victim goes into the CID agent, and
the CID agent then advises her of her Article
31(b) rights and she leaves. They self
reported, they've gone in.

All you're -- it appears what
we're trying to do is that self report by
itself would allow the agent the discretion
not to advise of 31(b) rights.

COLONEL HAM: Then that would be
two -- that would be two things then. That
they would have to have reported already. And
then there would be this whatever category of
offenses the Secretary of Defense defines.

But that would eliminate the
barrier to reporting then, because they've
already reported. I mean it causes them to
report, but then they get the benefit in other
words is what I'm saying.

MR. STRAND: So what I'm hearing
is if we recommended that the Secretary of
Defense --

BRIGADIER GENERAL DUNN: That
Congress authorize a limited waiver of Article
31(b) for certain categories of minor
collateral misconduct defined by the Secretary
of Defense.

COLONEL HAM: When the victim has
come forward? Or I mean, do you want to add
that in, or do you want to define it?

BRIGADIER GENERAL DUNN: What if --
- you know what if someone else reports it?

MR. STRAND: As a result of
reports of sexual assault. I think both. I
think we want to encourage people to come
forward. And then once they've come forward,
we want to encourage them to continue to be
able to cooperate to provide information, and
that would do both.
BRIGADIER GENERAL DUNN: I don't think you get a benefit from -- it's one thing to say I have an alcohol problem, I need help and go into the alcohol, you know the ADAP program. It's another thing entirely to say that if you can get to CID and report a sexual assault, that you're then absolved of you know, a variety of collateral misconduct.

MR. STRAND: So if I know like if I'm smoking marijuana and I may be think -- or somebody told me that my commander or somebody in my chain of command saw me. So I'm going to beat feet it to drug and alcohol --

BRIGADIER GENERAL DUNN: And there was going to be a piss test on Monday morning.

MR. STRAND: Right, and I'm going to beat feet it to drug and alcohol, that could be a problem. And it's certainly a discussion that I'm sure they had then.

BRIGADIER GENERAL DUNN: Right.

MR. STRAND: Or if they go to drug and alcohol and CID or MPI has already opened
a case, or security forces investigators are already opened a case on you know, that we've got information that they're dealing with drugs, using drugs, it doesn't give them a pass on that, it's just that we can't use their disclosure that they have been using against them.

BRIGADIER GENERAL DUNN: Yes. But I think what Patty suggested is the correct thing.

CHAIR HILLMAN: But the intersection here is that 90 percent of sexual assaults involve alcohol that we're looking into now. And with that huge percentage it feels like the alcohol use is something we specifically -- I know we're not ready to define collateral misconduct. But if there's a treatment program option that already -- that we could -- that already is an exception, that self reporting --

BRIGADIER GENERAL DUNN: But the commander can refer the victim to the alcohol
program independent of what else is going on because that's not an adverse action of any sort.

LTC McGOVERN: Colonel Ham raised an ASAP program as an analogy where you can go in as a self referral and get immunity. Not necessarily that these -- my understanding of it was --

COLONEL HAM: No, it's the same -- it was my understanding it was the same problem the military was a similar problem. You want people to report X in order to --

MR. STRAND: To get help.

COLONEL HAM: Get help or in order to do a result. So here the issue is you want people to report sexual assaults so it can be investigated et cetera, without -- both -- in both instances without repercussion to the reporter. So it was the only analogy where I could think of where the military is already doing that.

I guess the point being that it is
already being done in the instance. But
you're not plowing completely new ground by
whatever you're proposing.

LTC McGOVERN: I just want to
clarify, you weren't saying that these victims
need to go to ASAP, but that's an analogy
where you can get transaction immunity right
off the bat by self reporting.

CHAIR HILLMAN: Right, and that
was no exception that Congress made to Article
31, so why can't we just do that now?

COLONEL HAM: Right.

COLONEL HENLEY: Right.

LTC McGOVERN: Because you're not
referring yourself to a --

MR. STRAND: Treatment.

BRIGADIER GENERAL DUNN: Yes,
you're referring yourself to a medical
treatment facility.

MR. STRAND: But there is also --

LTC McGOVERN: But you're lightly
exposing.
BRIGADIER GENERAL DUNN: Which is where you all ready have all that tied to those policy protections.

MR. STRAND: But there's also a lot of other misconduct like fraternization where you know, they were having consensual relations before and all of a sudden it gets ugly.

CHAIR HILLMAN: We'll call time out on my concerns on that. So I think we're close on where we want to go forward.

MR. STRAND: Okay.

CHAIR HILLMAN: Are we close on this?

MR. STRAND: Yes.

MR. BRYANT: Some of the first things we're doing is just identifying the fact that the collateral misconduct issue has a chilling effect on victims reporting and causes, I don't know, confusion and consternation among the investigators themselves.
So that's the problem. Somebody else needs to fix it. We have some recommendations. I -- what would be wrong with the investigator starting out their interview with, before we go any further, I just want to advise you that, I would remind you that you have the right to report drug and alcohol abuse at transaction, whatever the program's called, ASAP, right then. And then he's done it.

BRIGADIER GENERAL DUNN: No, because he still has -- he's got to get away from 31(b) though. I mean that's a statutory.

MR. BRYANT: No, but if he says that, are you here to tell me that you were -- that you were drinking or smoking dope last night when this happened. You are, is that what you're telling me? Isn't that the reporting? Do they have to report to a particular person?

BRIGADIER GENERAL DUNN: Yes, it has to be done in the health system. Where
you can go -- I mean I can go -- if I'm on active duty I can go into the medical system and admit to all sorts of misconduct and get medical treatment.

MR. BRYANT: Okay.

BRIGADIER GENERAL DUNN: And that's -- none of that comes back out onto the --

MR. BRYANT: Psychotropic drugs and all of that.

BRIGADIER GENERAL DUNN: None of that comes back out. But so what we're trying to do is just remove -- I'm a victim at 2:00 in the morning, I've had a traumatic experience and now somebody's reading my rights because I had two beers and I'm only 19.

So I -- I need to be able to --

MR. BRYANT: I understand.

BRIGADIER GENERAL DUNN: I need to be able to not have my rights read to me now and I also need to be truthful about the
incident and all the collateral stuff.

So I think what Colonel Ham

suggested is that -- is look at a limited

waiver of the requirement to read Article

31(b) rights to the victims of whatever. And

--

COLONEL HENLEY: Well, certainly --

--

BRIGADIER GENERAL DUNN: I mean

sexual assaults and violent crime in -- for

certain specified categories of collateral

misconduct and make the SECDEF specify

drinking not that --

COLONEL HENLEY: Well, certainly

for the initial report, you would want to

remove that requirement from the agent. And

then you have a cooling off period if there

are subsequent interviews

Then I think someone can make

that determination whether or not a rights

advisement should be provided. Because by

that point they have counsel, right? I don't
know whether --

COLONEL HAM: They are entitled to
counsel right now upon a restricted report.

MR. STRAND: If they want it.

COLONEL HENLEY: Is that person
going to show up there at 2:00 o'clock in the
morning?

MR. STRAND: Right, but that's --

BRIGADIER GENERAL DUNN: Yes, yes.

That person will.

LTC McGOVERN: Yes.

COLONEL HENLEY: Oh, they will?

Okay. So at the 2:00 o'clock in the morning
initial interview with CID, they'll have their
victim's advocate there, or they're --

LTC McGOVERN: If they elect to
have a counseling service.

BRIGADIER GENERAL DUNN: So is
this a non-issue because now the SVC is there
and can say to the victim, they're going to
read you your rights, but the policy of this
command is that collateral misconduct will be
addressed at the very --

MR. STRAND: It will still be an issue.

BRIGADIER GENERAL DUNN: So is it a non-issue?

MR. STRAND: No, you're going to have an issue on deployments. You're going to have an issue at smaller installations. You're going to have an issue when you don't have a special victim's prosecutor right there.

CHAIR HILLMAN: It's still a big issue because we need to change people's minds before they encounter a special victim's counsel. Otherwise they won't even report.

COLONEL HENLEY: Right, they're not -- they're not a criminal.

BRIGADIER GENERAL DUNN: And because the Navy is not reading right and the other services are.

COLONEL HENLEY: They're still a victim, they're not a criminal and by reading
their Article 31(b) rights, when they walk in thinking they were a victim and then an agent now reads me my right, I'm a criminal?

BRIGADIER GENERAL DUNN: Right.

COLONEL HENLEY: See you later.

BRIGADIER GENERAL DUNN: Right, exactly.

COLONEL HENLEY: So I think there's a mechanism to do that. How you do that on the ground, the actual procedure that will be adopted if at all, I think is simple, whatever it is. You're just giving the agents the authority not to advise upon belief of minor collateral misconduct, however you define that.

MR. STRAND: But Article 31 is going to have to be modified to do that. And then the Secretary of Defense is going to have to lay down --

BRIGADIER GENERAL DUNN: Well so maybe instead of being so specific, maybe we should say this is an issue, and the
recommendation is that the Secretary of Defense figure out how to fix it.

CHAIR HILLMAN: The Secretary's asked us to figure out how to fix it.

BRIGADIER GENERAL DUNN: No, no, no. The Secretary of Defense --

MR. STRAND: But I think we always need to advise Congress what our recommendation for them.

BRIGADIER GENERAL DUNN: So then the Secretary of Defense in conjunction with you know, all the great legal counsel that he has, sorts through the you know, the legal aspects of exactly how to do this. You know get the special authorization to do that.

You see what I'm saying, give them the big, the end state as opposed to all the steps along the way.

LTC McGOVERN: We can flag the issue. I just think we continually run into the problem, okay, the SECDEF can say all underage drinking, transactional immunity.
But then these cases do involve adultery, fraternization commonly, you know, or those types of disobeying regulation issues. Sleeping in the dorm, and it would be an exhaustive list for the SECDEF to try to think of all these things.

BRIGADIER GENERAL DUNN: Right, taking drugs, smoking dope, yes.

LTC McGOVERN: The SECDEF is then in the corner to say okay, well I knew this was an issue before and now I'm force with all this stuff.

COLONEL HENLEY: And I know we're --

CHAIR HILLMAN: Yes, spending a lot of time on this.

COLONEL HENLEY: But to the extent that you adopt a similar Miranda requirement in a civilian community for sexual assault then, because on the initial interview, that's sort of where you're going.

When the victim comes in for the
initial interview, they're not under arrest or apprehension. And I don't know if you can do that. The Secretary of Defense -- I mean that would be the modification 31(b).

MR. BRYANT: Yes.

COLONEL HENLEY: 31(d), (e), (f), whatever you call it. The initial victim interview with a law enforcement agent, unless that individual is under arrest or apprehension requiring Miranda, there's no requirement to advise a 31(b).

MR. STRAND: But that would have to be modified by Congress.

COLONEL HENLEY: Well I don't --

MR. STRAND: Because 31(b) doesn't attach to arrest or apprehension or custody. Article 31(b) can be you know, when you're not in custody you can be all those other circumstances.

BRIGADIER GENERAL DUNN: Yes, that's what he's --

COLONEL HENLEY: I am not saying
that, but I'm sure there's a provision in one of the other Articles.

MR. STRAND: Well there currently is exigent circumstances. You know like so if I'm investigating a stolen grenade, and --

COLONEL HENLEY: Well that's what I said about the public safety exception --

MR. STRAND: Right.

COLONEL HENLEY: Where you have a government agent talking to a suspected defendant with no rights advisement, but the statements that individual makes can still be admitted at trial under public safety exception. It's sort of a reverse public exemption.

MR. STRAND: Right. And as an agent I can do that. Because I'm -- what am I looking out for? I've got a grenade, and I -- this is a real case that I worked.

I had a grenade a ser -- a bunch of grenades that were hidden on a playground. Kids were on the playground. We didn't know
which one. Did I advise that person of their rights? No I didn't. Why? Because our important thing was to save lives.

But that's where exigent circumstances usually line up.

COLONEL HENLEY: Is public safety in the discussion section of the manual? I think it -- I don't know if it's --

COLONEL HAM: Under the MRE.

COLONEL HENLEY: Yes. It's certainly a judicially created rule.

MR. STRAND: But the MRE covered --

COLONEL HAM: But what you're talking about again if your interest -- as I think the staff understands it is to drop the bar to reporting. So what you're talking about would eliminate that bar to reporting. However it wouldn't grant any kind of immunity.

COLONEL HENLEY: You would still --

-- could be prosecuted.
COLONEL HAM: Right.

COLONEL HENLEY: Those statements that you make at that initial interview were subsequential, could be used against you.

BRIGADIER GENERAL DUNN: If there were four witnesses who saw you drinking, you can -- the commander can take action against you at the end. It's not any kind of granted immunity. But you wouldn't be --

COLONEL HAM: So I guess the question is so where's the bar to reporting dropped?

CHAIR HILLMAN: So and also, if we change Article 31 and we don't actually say we're not going to prosecute collateral misconduct, we hang victims out to dry. Because they don't get advised that they could be prosecuted for this and then they could be right down the road.

So we really do have to do both. Right? We have to change the statute so there's actually room for this. And we have
to set out a policy that this kind of conduct
isn't going to be prosecuted, right?

BRIGADIER GENERAL DUNN: But the
policy -- well the policy is not that it won't
be prosecuted at the moment, it's that it will
-- any decision on it will be pushed to the
end of the proceedings. And yes some are --
some are being.

COLONEL HENLEY: That's a
distinction without a distinction.

BRIGADIER GENERAL DUNN: Well I
know, but there's a difference between having
two beers and sitting there taking you know,
narcotics with some guy. You know, I mean
there's a range of conduct that can --

CHAIR HILLMAN: Okay, let's --
there's a range of opinion. So let's do the
best we can to draft something and we can keep
it --

BRIGADIER GENERAL DUNN: And we
got to flag the issue and there's got to be
some solution to this.
CHAIR HILLMAN: and then your folks are going to look at this some more. And how much more time do you need to get through investigations Russ?

MR. STRAND: About another hour.

LTC McGOVERN: Can you just update us on some issues?

MR. STRAND: Okay update. We have taken information from restricted reporting. The issue is information from restricted reportings for criminal intelligence purposes. In the Fiscal Year 14, NDAA requires the response systems panel to make an assessment of the means by which name if necessary known on unknown subjects.

We've split this into two different findings and recommendations. One finding is we currently don't do that. We don't have a searchable database to track offenders in the DoD database.

And so our recommendation is that DoD implement a policy and procedures to
maximize that database with SARCs asking for
and entering offender data. That's one
recommendation.

The other find and recommendation
is along with the blind reporting -- so the
issue is blind reporting separate from a
searchable database. Blind reporting many --
and we've had testimony, that many civilian
agencies, including Ashland, have blind
reporting to where they can report to law
enforcement whatever happened, and then they
decide whether they want an investigation,
they being the victim.

LTC McGOVERN: My only concern
there is many. Who do we know besides
Ashland?

MR. STRAND: Philadelphia. Almost
all of the places we --

LTC McGOVERN: Philadelphia didn't
have it. I didn't think there was. We'll
research that as staff.

MR. STRAND: Okay.
LTC McGOVERN: I just want to be careful with those generalizations.

MR. STRAND: Right. I believe all the -- the ones that I remember that we were talking to, when I asked questions about well, what if somebody reports something and they don't want an investigation. Every single one without exception that I remember, said we don't do anything with it.

Now Ashland is a specific thing where they're doing it for crim-intel collection. And also to increase reports.

So our recommendation is, change the policy to allow a victim to talk to an agent with either special victim's counsel or a victim advocate, with an agent. Provide whatever information they feel comfortable providing. And then after discussing a potential investigation with the agent, then the victim makes a determination at that point whether they want an investigation to move forward or not.
That's our recommendation.

CHAIR HILLMAN: So this puts the victim in the driver's seat?

MR. STRAND: Yes. It expands the ability for the victim to make more decisions and gives them more informed decision making ability.

CHAIR HILLMAN: And it pushes the determination of restricted or unrestricted further down.

MR. STRAND: Yes.

CHAIR HILLMAN: And so it allows more data collection by law enforcement.

MR. STRAND: Right.

CHAIR HILLMAN: It gives victims more control.

MR. STRAND: Yes.

BRIGADIER GENERAL DUNN: and it provides the opportunity for if the victim decides not to go forward, but the investigators can have a searchable database you know, for them to run it and say you know,
there have been two other complaints on this
same guy. Let us look at that.

MR. STRAND: And we may even know
that when we talk to the victim.

CHAIR HILLMAN: So what's the
downside of this proposal?

COLONEL HAM: Protecting the agent
from allegations that he or she talked the
victim into not going forward because he or
she didn't believe the victim.

MR. STRAND: That's why it has to
be in the presence of a victim advocate or
special victim's counsel.

COLONEL HAM: And improper release
of the information or improper use of the
information when it's not backed by any
titling decision or law enforcement
investigation.

MR. STRAND: We do that all the
time with drug information, fraud information.
You get bits and pieces, we have raw data
folders and we collect information every
single day. Same exact kind of information.

We don't release it to the public.

We use it for our own criminal intelligence procedures.

MR. BRYANT: I know, but what she's talking about telling a victim that we hear this guy's done this twice before. Is that a problem? Because what you're talking about, you don't call in a victim of fraud do you? You call in a bank and say well we hear this guy's done this twice before?

Isn't that what you're concerned about? One of the concerns?

COLONEL HAM: Or improper use for assignment or promotion or security clearance purposes.

CHAIR HILLMAN: Right, can the commander ask you to look in the law enforcement database and see if anybody's popped on your list?

MR. STRAND: No. Not for the criminal intelligence. I want to
differentiate between what we use as our regular report system database and a criminal intelligence database.

A criminal intelligence database by it's very nature is little bits and pieces of unconfirmed data. There's no -- there's no adjudications, there's no determinations. We get all kinds of information on all kinds of people on a regular basis.

And the reason we do that is because if we have other reports or things like that, we're doing an investigation, it's very helpful. And this is what Ashland uses their's for.

LTC McGOVERN: So the services already have this capability?

MR. STRAND: Yes.

BRIGADIER GENERAL DUNN: Yes they do. I mean this isn't new.

MR. STRAND: We do it on a routine basis.

BRIGADIER GENERAL DUNN: All the
drug stuff. To build a --

MR. STRAND: If somebody comes in
and says Kelly McGovern is over at the JAG
office and she's selling you know, notary
things for $200. We may or may not think
that's credible, I don't know. But we're
going to collect that information.

If somebody else comes in and says
Kelly McGovern's selling notaries for $200.
Then we might do something about it. But we
don't have to not have that data.

MR. BRYANT: Yes. It just makes
sense. It's good law enforcement.

MR. STRAND: It is good law
enforcement.

MR. BRYANT: In the civilian world
they actually report encounters. Stopped Joe
Blow on the street, bah, bah, bah. They put
that in the computer.

MR. STRAND: We do the same thing.

LTC McGOVERN: And is that Army
wide then for CID? Is it services wide? Is
it DoD wide? What's the capability?

MR. STRAND: DoD wide. We all do it.

COLONEL HAM: Can defense counsel access it for discovery?

MR. STRAND: No.

COLONEL HAM: then who has access to it?

MR. STRAND: Law enforcement.

COLONEL HAM: Who is law enforcement?

MR. STRAND: The MCIOs and the military police security forces. But even that, if the MCIO has the information, the local MPs and security forces don't have that access. It's in a separate database. But the law enforcement, security forces, MPs, naval master at arms, they have their own separate criminal intelligence databases as well. So what happens is if I'm working a particular case, I might ask the local MPs or local -- ask the security forces
hey, do you have any information on this
neighborhood, on this person, on this family?
And they'll look and say yes, this is what
we've got and share it with us.

And that's really the purpose for
this.

MS. FRIED: Can a military Judge
order?

MR. STRAND: A military Judge can
order anything. Are we going to have -- but
see again, I think we're separating some
things out that we do traditionally on a big
huge across the board thing. We're already
doing it. We're just not doing it because we
don't get the information from the victims.

BRIGADIER GENERAL DUNN: Right.
This is really an issue of getting the
information in case somebody is a serial
offender, to be able to help identify that.
And the way the restricted reporting system is
set up now, --

MR. STRAND: We don't have any of
that information.

BRIGADIER GENERAL DUNN: If it's never converted, then the individual's name is never in the criminal information -- the criminal intelligence database. And if the soldier PCSs to Germany and there's another incident with another woman, --

MR. STRAND: We right now are working a case where we have nine victims. We don't know if there's any other victims because the service database for sexual assault has no -- does not have that information. And we don't have any information either.

But if this was in place we might have information from installation X, Y and Z. We can go back to those MCIOs and say okay, when they were at this installation, do you have any crim-intel data. And you know what we'd be able to do? We'd be able to identify our other potential victims and other potential offenses.
But that is not in a public
database where we release it and it's not used
of clearances. It's not used for promotions.
It's just not accessible for that. That's not
the purpose of it. The purpose is --

COLONEL HAM: It doesn't go into
the Defense Consolidated Database of
Investigations?

MR. STRAND: No, it only goes --

COLONEL HAM: Doesn't the very
fact that it exists give it the imprimatur of
truth if the reason to have access to it is to
gain evidence against a person?

MR. STRAND: You're talking about
criminal intelligence across the board. And
we do that routinely.

COLONEL HAM: So the answer's yes?

MR. STRAND: Well we don't -- we
don't verify you know, the veracity of the
report. We don't -- there is no verification,
it's just bits and pieces of information that
goes into that database.
And so if we -- that's why we
don't release the information. That's why
it's not used for promotions or clearances.
Because it is not substantiated information.

COLONEL HAM: Can it be used to
substantiate other information?

MR. STRAND: In totality of
circumstances, yes. I mean if you've got --
for example the one I gave you. If I've got
somebody that you know has got eight victims
that we now know of, and I go to Fort X, or
installation Y and they said well yes, there
was a -- there was a victim that came in and
said that you know, he was doing this, but
didn't want an investigation.

Can we use that information? Yes.

We can go back to that victim advocate. We
can contact them and say hey, we've got some
other reports and there we go.

Now can we use that to prosecute?
Probably not. But we can use it for the
investigative piece.
MR. BRYANT: It's great information to have when you bring him or her in and start questioning them too. Like okay, yeah we know what you did at Fort Hood too pal.

COLONEL HAM: Right.

MR. BRYANT: Hey, it's a great tool.

CHAIR HILLMAN: I understand that prosecutors like this. So, what do you think Colonel Henley?

COLONEL HENLEY: I'm not sure what we're deciding. Is there a recommendation?

CHAIR HILLMAN: The recommendation is that we shift the point at which a victim decides about a restricted or unrestricted report until after some information is gathered by law enforcement. They get some information from their special victim's counsel or victim advocate about what their options are going forward.
And if the victim at that point
makes a restricted report, the data already
collected goes into a criminal intelligence
database that's searchable by law enforcement
in the future.

BRIGADIER GENERAL DUNN: And this
is only, of course if the victim wishes to
talk to law enforcement.

COLONEL HENLEY: Right.

MR. STRAND: And again, it's an
option. They don't have to talk to law
enforcement.

BRIGADIER GENERAL DUNN: It's just
an option. Or an alternative recommendation
could be that you know, somewhere in the
system this data is captured. The
individual's name, location, et cetera, and
put into this database.

But the problem with that is then
you're making the victim advocates and the
SHARPs ask investigatory questions.

MR. STRAND: It also takes care of
another issue. Some victims don't know what the law enforcement process is. They don't know what the criminal investigative process is. And if they're being told by a victim advocate, you don't have to talk to law enforcement, that might be a barrier to reporting. Because what are they hearing from somebody who's helpful? You don't have to do this.

And I think it opens a door. And I think what we saw from what we heard from Ashland. You know a lot of victims, once they talk to that detective, once they talk to that person and they gain some more confidence, they often times go forward with an investigation.

Because now they can ask questions at the source. What's going to happen here? What are you going to do here? And they get to know that person as much as possible, and it will encourage reporting.

COLONEL HAM: Does the database
have a name?

MR. STRAND: Well they are all generally called crim-intel databases. It's separate from our reporting data bases. So if I go into our -- like the CID's automated criminal investigative reporting system, when I put a report in there, it goes into one database. It will eventually fit into NIBRS and DIBRS and NCIC, you know, it depends on how the report is.

But if I put in little pieces of information or I can glean data from -- and put it into the crim-info database, I have to do a word search, and I have to do a code search, and I have to do a location search to get whatever these bits of information that I have. It's not indexed specifically for that person per se in a report. It's just scattered in there.

And it can really be helpful. I ran a criminal intelligence center for several years. And it was just -- and we had criminal
intelligence coordinators. We have criminal intelligence agents that that's all they do is collect information from field interview cards.

COLONEL HAM: Is there a regulation on -- or a DoD instruction that controls it? What DoD instruction or directive controls it?

MR. STRAND: I don't know the answer to that. I know that each services has regulations on the -- on collection of criminal information.

CHAIR HILLMAN: Okay, let's pause on this. Colonel Henley?

COLONEL HENLEY: Right. I said anything that gives the victim more control over proceedings, or allows more time to make an informed decision, is good. So I support the recommendation.

CHAIR HILLMAN: Okay, given Colonel Ham's concerns about the database itself and sort of what's happening, could we
just look into that and see actually where it's going to end up and who would have access to it, just so that we have -- we can put that in here as well, in with the recommendation.

Okay, Russ, you have a little bit of time left, but not much.

MR. STRAND: Okay, we took a whole bunch of findings and recommendations on unfounded, founded, what we call this and what we call that, and we put it in one category and I called it case determinations. And so we basically what our finding was is the services are all doing it differently. With all different thoughts, with all different means of whether we title, whether we have JAG, you know get with JAG or whatever.

So we basically have two recommendations that came out of that. One is that the MCIOs make determinations on case closures. And they use it in accordance with the UCR definitions and guidelines.

Then there's a second
recommendation that goes along with that to
address another issue. And that's where every
time we work a close, every time we close a
case, we have to get a JAG prosecutorial
determination. And that's going to be part of
our report.

So two separate things. One is
the MCIO make the determination on whether
it's founded, unfounded, all those other
things. And then JAG make a determination on
whether it's prosecutable or not. And that
has to be part of the report.

Therefore -- then we'd also
recommend that somewhere when we have the JAG
database or somewhere, so that when we have
the reports go forward, there's another field
in that database that can say okay, this case
was -- so we have 1500 cases, 1000 of them
were founded and out of that 1000, JAG
determined that 500 were prosecutable.

That means --

CHAIR HILLMAN: So JAG doesn't
determinate it, the convening authority does.

MR. STRAND: No, the convening authority determines whether to prosecute. The JAG determines whether it's prosecutable and make that recommendation. You know, kind of the ethical recommendation.

COLONEL HAM: What does prosecutable mean? You mean whether there's probable cause? Or --

MR. STRAND: No. Probable cause is the case determination. The problem that we're currently having is -- specifically in the Army, because this is -- the Army's currently making that determination. Is that often times when we go talk to a JAG, we're talking probably cause, but the JAGs thinking preponderance of the evidence or whatever.

BRIGADIER GENERAL DUNN: Beyond a reasonable doubt.

MR. STRAND: Beyond a reasonable doubt. And so they're often withholding probable cause determinations because they
don't want to be responsible for saying this
is a founded case but now I've got to explain
I'm not prosecuting it. And that's a serious
problem.

And it's across the board. But it
also goes to the other thing --

LTC McGOVERN: I didn't hear any
investigator say that.

COLONEL HAM: I think prosecutors
would disagree with you Mr. Strand. That
they're disagreeing that there's probable
cause. They're disagreeing with the
investigator that there's probable cause.

MR. STRAND: I know they are.

COLONEL HAM: Having opined on
hundreds and hundreds of cases as a prosecutor
right.

MR. STRAND: Yes, but when the
last thing that a prosecutor gives us, and
these are some clear examples. The last thing
in a case file that I've seen that the
prosecutor gives us, or the magistrate gives
us, is there's probable cause for a search
authorization.

And the search authorization is
conducted. And there's not other
investigative activity. And then the
prosecutor will come back and say well,
there's no probable cause.

BRIGADIER GENERAL DUNN: That's
because the search warrant didn't turn up
anything.

COLONEL HAM: Once there's a
probable cause determination, that thing goes
a lot of places.

MR. STRAND: Correct. But let me
get this --

COLONEL HAM: And it is used for
promotions, it is used for security clearance.
It is used for assignments. So the policy
right now is that a JAG officer is involved in
that opine.

MR. STRAND: Only in the Army.

Also, but every single civilian police agency
in the United States --

    COLONEL HAM: Civilian police agencies don't forward their investigations to the Defense Consolidated Database of Investigations to be used for security clearances, assignments, promotions, et cetera. That's the distinction.

    MR. STRAND: Right. But even in the current DoD instruction, it is not a legal decision, it's an administrative decision. And that's the problem that we run into.

We have JAGs screening these things out. We have JAGs turning reports that really shouldn't be unfounded into -- they are founded reports into unfounded. And we are also in contravention with other law enforcement a -- this is a law enforcement report.

And when that law enforcement report goes forward as a founded report -- well actually whether it's founded or unfounded, it still goes in the same database.
It is still reported. If we have credible
information at the beginning of the case, that
information still goes forward regardless.

And where the people are tripped
up on security clearances is they're asked
were you ever suspected of this? And they
answer those questions. Whether it goes in
the database or not.

LTC McGOVERN: Well Russ, when we
heard from investigators in site visits and in
presentations, they talked a lot about the
increased communication with prosecutors. And
Baltimore in particular had the highest
unfounded rate. Now they run everything
through the SARC and the prosecutor.

So it seems a little different
when we've heard a lot of the best practices
in civilian jurisdictions are for the police
force to coordinate more with the prosecutor
early on to get the prosecutor to cover them
and agree that yes, this is founded or
unfounded before the police close a case. As
a matter of fact, they just have a bunch of suspended open cases because they don't want to unfound cases themselves.

So if in writing this up, to say that this is being done in civilian, but we want our investigators to have this power to found or unfound, seems a departure from current best practices.

MR. STRAND: You talked about one particular organization, one particular location. But I've worked for decades in the civilian law enforcement field. And I will tell you that most civilian police departments, although they -- coordinating with the lawyers is one thing. Making case determinations at the end is quite another. That is an emerging practice.

LTC McGOVERN: After having 19 jurisdictions interviewed by the JSC-SAS, I believe the majority, if not all of them, the investigators were coordinating with the prosecutors before making case determinations
on penetrative sexual assault offenses.

MR. STRAND: Yes. And we do that.

We coordinate. We get their opinion. And even the DoD instruction right now says it's an administrative, not a legal decision. Yet we have turned it into a legal decision outside of the current policy.

So what used to happen is, as an agent, I would make -- I would coordinate with JAG early on, we've always -- this is nothing new. Coordinate with JAG, work the case together. Find out what they need. Find out what their thoughts are. Work it along the way.

And then I would go and I would do a final outbrief to the JAG and we would talk about the case. And the JAG would say well I think there's probable cause to believe this and I think there's probable cause to believe that or whatever. And then we would write that in our report.

But then we would still make the
determination of whether from an operational standpoint, we believe that person is a suspect. Because that title block doesn't mean and it doesn't say, in fact every report says it, this is not -- this is not a determination of wrongdoing. It is -- they are a suspect.

LTC McGOVERN: But it's going to follow you for the next 40 years.

MR. STRAND: You know, but it's going to follow whether it's founded or unfounded.

BRIGADIER GENERAL DUNN: Yes, but it's not going to mean -- this is why I recommended that we not address this at this particular moment.

MR. STRAND: Right.

BRIGADIER GENERAL DUNN: Because it's pretty emotionally charged. But I think Colonel Ham's comments as usual, sort of capture the issue of the database and the consequences that flow from that, but do not
flow in the civilian community.

But once -- once you're in that database, it does, it is looked at for promotion screening. It is looked at for security clearances. It's some -- it follows you the rest of your career, which may be short.

MR. STRAND: But our people from the crime records center come and brief our courses and they say that they do not release information for security clearances and they do not release information from that database for employment. Other than working in child development centers and other key positions.

But that is -- that is a myth.

That is a myth. It is not used for security clearances.

BRIGADIER GENERAL DUNN: Well I'll tell you the dirt -- the dirt boards for officer promotions are not a myth. I mean that --

MR. STRAND: What do you mean the
dirt boards?

BRIGADIER GENERAL DUNN: When officers are selected for a promotion to general officer, they run a search across all of the databases, IG, NCIS, the CID, I mean that is not a myth I can assure you.

LTC McGOVERN: Well, I'll propose that we look closely at the findings and recommendations you all have worked on concerning the confusion of founded and unfounded in the proposals. We'll send it out to the group for further comment.

MR. STRAND: Okay. The other problem that we have with titling and case determinations is that not all of the services are doing the same thing. Two services are letting the commanders decide.

LTC McGOVERN: Now that is an issue we need to address.

MR. STRAND: Which is a significant issue. And so --

CHAIR HILLMAN: So who is that?
Who's letting commanders decide?

MR. STRAND: The Air Force and the Navy.

COLONEL HAM: Letting commanders decide which decisions?

MR. STRAND: They're not closing out their reports as founded or unfounded until after it goes to the commander. The commander makes that determination.

COLONEL HAM: But that's different than the titling decision?

MR. STRAND: No, that's including the titling decision. Where it's founded or unfounded.

COLONEL HAM: Okay, so all -- across all services, the MCIO, or the military criminal investigator makes the titling decision.

MR. STRAND: The initial titling decisions.

COLONEL HAM: Based on credible information.
MR. STRAND: Correct. And then to close out a case, according to the DoD instruction, you're supposed to have probable cause to believe that occurred. And this is another part of the confusion. This is one of the findings.

So if I have credible information to determine that -- or if you had a case and you were the investigator and you had the credible information to determine that I should go in the title block, because that's required. So now my name goes in the title block.

And the DIBRS, you pulled that up earlier Jan, the DIBRS requirement says even if you determine -- even if you determine that maybe the crime didn't occur, or whatever, my name is still in that entity block to be searchable for 40 or 50 years regardless.

COLONEL HAM: Unless I have it removed because you didn't have credible information in the first place.
MR. STRAND: No.

COLONEL HAM: Yes.

MR. STRAND: The only way you can have it removed is from mistake of fact.

COLONEL HAM: Not correct. It used to be only for mistaken identity that.

BRIGADIER GENERAL DUNN: Right,

but now she can recommend for credible information.

MR. STRAND: Right. And it can go to the service -- right now it goes to the service MCIO director or commander for that determination. So it's going to -- but it's still going to be there in the unfounded part. It's still going to be there.

So if -- if it does get check by the GOMO boards or whatever --

BRIGADIER GENERAL DUNN: Yes, but unfounded is vastly different then founded.

MR. STRAND: It is. It is.

BRIGADIER GENERAL DUNN: Or titled, yes. There's a huge difference.
Because anybody could be investigated --

MR. STRAND: Right.

BRIGADIER GENERAL DUNN: Because somebody makes an allegation. But once you get to founded and titled, you're in a completely different.

MR. STRAND: So moving on, --

BRIGADIER GENERAL DUNN: But I think what we want to take away from this last piece, is that there needs to be consistency across the services in terms of who makes the decisions. And with who input from whom.

CHAIR HILLMAN: And who should make it then?

BRIGADIER GENERAL DUNN: Yes, right. Who makes it and who --

CHAIR HILLMAN: That's what I'm asking. Are we going with the Air Force and the Navy model, or are we going with the Army model?

BRIGADIER GENERAL DUNN: Oh, I think it's clearly an investigative agency and
a lawyer issue.

MR. STRAND: It's an investigative issue. This is an investigation.

BRIGADIER GENERAL DUNN: It's not a commander issue.

CHAIR HILLMAN: Okay.

MR. STRAND: This is an investigation. It's an investigative report. Investigators should be deciding on how that report is written.

BRIGADIER GENERAL DUNN: With legal input.

MR. STRAND: With legal input.

CHAIR HILLMAN: Okay, so understood. I just didn't -- wasn't clear on which direction you were pushing. Okay.

MR. STRAND: Yes. So, we're almost done.

COLONEL HAM: Mr. Strand I just want to apologize for interrupting you. I don't mean to say I'm an idiot, but I think I wrote the only Article 1 titling that exists.
So I look very deeply into these subjects a few years ago. And Congress had ordered a -- I think it was Congress, a study of titling throughout the services with the intent to standardize titling on all crimes.

MR. STRAND: NDAA 14 required it in sexual crimes.

COLONEL HAM: At the time the Army based it on the probable cause standard. And all the services now use the credible information standard. So I didn't mean to interrupt you but, again, I had sounding like an idiot saying I think I wrote the only article on this subject, but I think I have.

MR. STRAND: Right. I haven't written an article. I've lived it for a long time. And it certainly is something that we're concerned about. Obviously we don't just willy nilly because we have the power to put people you know, in those blocks to hurt people. Most agents, the vast majority of them take it very seriously. Just like the
vast majority of detectives and police

officers around the world do.

But I would suggest that you know,

how many -- how many police reports do you

think are written every single day and

finalized every single day in the United
States on penetrative sexual assaults? I

would suspect that in most of those

jurisdictions they don't have a final okey
dokey from the JAG -- from the local lawyer.

Because they just write them, they write them,

they write them.

So I think it's something we could

probably take another look at.

Training for investigators. Do

agents assigned to SVUs and as lead agents on

sexual assault have required training and

experience. Have a robust training

requirement.

We put in some recommendations

based on the last time we met as far as some
defense funds, authorizations. And then
recommending that DoD designate a lead agency
for advanced sexual assault investigations
training.

CHAIR HILLMAN: Meaning what?

LTC McGOVERN: How do you think
that will be received?

MR. STRAND: By DoD? Or by
Congress?

LTC McGOVERN: Well from the
prosecution perspective, I think we talked
about the different JAG schools have their own
programs and they should collaborate and
discuss. And yet for investigators we're
saying you should have a lead agency. And I
just want to be able to reconcile the
difference.

MR. STRAND: We're used to doing
that. We have a lead agency in forensic. We
have a lead agency in all kinds of other
things within the MCIOs. That's a normal way
to do business within our -- with our
groupings.
Well we call them executive agencies. So we have an executive agency for this and we have an executive agency for that.

LTC McGOVERN: Right. This is again a highly emotional issue.

MR. STRAND: It is.

LTC McGOVERN: And each service takes great pride in whether they use the FETI or cognitive methods. So I just want to be weary before recommending.

MR. STRAND: Right. And I'm okay either way. I'd rather not have the fight later on. But what we're seeing is, there are some differences. And there are some legitimate differences.

But in accordance with the GAO report, they said that we're probably wasting some money. We're wasting some resources. And we're wasting -- you know, we're duplicating and triplicating the same efforts.

So we could leave that in or take it out. Whatever your pleasure is.
BRIGADIER GENERAL DUNN: But we're defining best practices here. And I realize that the fiscal aspects of this on some level are best practice. But I don't think that should be our focus. I think our focus should be on how to best -- so in other words, if we have a working group address the investigative training which exists.

MR. STRAND: Right.

BRIGADIER GENERAL DUNN: And we have found here that there is a robust, continuous training. We've made a few recommendations to -- you know, for review and refresher training. I think that -- I'm not sure we need to go down the road of saying it should be consolidated because --

MR. STRAND: I'm okay either way now.

LTC McGOVERN: I just note in the DoD IG report provided to the panel, that is really covered a lot and they relish or cherish I should say, their independence. So
I just wanted to raise that as an issue for you to consider.

MR. STRAND: Right. Yes.

BRIGADIER GENERAL DUNN: I think coordination matter is probably a better referred to.

MR. STRAND: And we had a lot of discussions on SAFEs, availability of SAFE. And the SAFE exams. We did have some discussion about the 14 -- Fiscal Year 14 NDAA that requires SANS at -- services that required they have 24/7 coverage.

And we talked about a recommendation that that may be reexamined. Because in some places that might be applicable. You know Fort Belvoir has a 24 hour hospital, but they have some of the best SAFE examiners you know, ten miles down the street, it doesn't seem to make sense then why you would have to fund and supply a SAFE examiner at Fort Belvoir for example.

Or if I don't want to go to Fort
Belvoir for whatever reason, and General Dunn brought this up, you know maybe I'd rather go to Fort Belvoir, or maybe I'd rather go to the civilian facility. I know it doesn't mandate where victims go. But it does create potential problems and issues.

So our thought was that it was premature. Before they examined the issue, they just put out that blanket policy. We've examined the issue and we believe that the services are doing it pretty much the best they can and in conjunction with what their specific needs are. Not only by service, but by location and by mission. And we don't think that should be prescribed anymore than that.

CHAIR HILLMAN: Is this in the NDAA already?

MR. STRAND: Yes.

BRIGADIER GENERAL DUNN: Yes.

CHAIR HILLMAN: So you're recommending a change in what the practice
that's been set up there?

    BRIGADIER GENERAL DUNN: Yes.

    MR. STRAND: And --

    CHAIR HILLMAN: And just to be clear, the grounds are that it's not -- it results in inefficient allocation of resources given the dynamics of victim reporting and the locations of civilian facilities with comparable capacity, is that right?

    MR. STRAND: Right.

    BRIGADIER GENERAL DUNN: Yes, and the number of cases in the military. So for example, if you are in this area, you are probably better off going to Fairfax County where they do hundreds of these exams a year versus going to Fort Belvoir where they might do six.

    CHAIR HILLMAN: Right on.

    MR. STRAND: And that Madam Chair concludes our small discussion on investigations.

    G Okay. Any other comments on
investigations? All right, let's stand up for five minutes, okay. And we'll come back in five minutes.

(Whereupon, the foregoing matter went off the record at 2:29 p.m. and went back on the record at 2:40 p.m.)

CHAIR HILLMAN: Okay. Just for planning purposes, I think we'll end up probably going straight through until five, but we want to finish by five. If you feel your attention lagging, Jan put out more food in the break room, so hop up and grab it, including more vegetables and healthy things, as well as the cookies.

And we're next up with prosecution. General Dunn and Rhonni Jaus were working on this. Since Rhonni left, General Dunn, are you doing this or is Kelly doing this one?

BG DUNN: Well, let me just say
for the record that Rhonni was supposed to do
it before she got on the plane, but I will
pinch-hit here and move through these. Okay.

CHAIR HILLMAN: You all have
handouts on this.

BG DUNN: Yes, and writing, which
I presume you can read. So, one, is there a
civilian best practice for the organization of
prosecutor's office? Based on the evidence we
collected, the answer to that is no. The
organizational structure in civilian
jurisdictions varies. Many of the larger
urban jurisdictions do, in fact, have
specialized sex crime prosecution offices, but
many smaller cities and rural offices do not.
Similarly, many of the prosecutors in
medium-sized offices handle a variety of
felony cases, to include sexual assault.

One thing that we do note or we
did note is that, regardless of the structure
in the civilian offices that we looked at,
each one emphasized the importance of a
relationship between the prosecutor's office and police department investigators and victim advocates in sexual assault cases.

The recommendation is do not mandate a particular organizational structure for the services. It's more important to ensure that critical communication between prosecutors, investigators, and victim support.

All right. Is the military special victim capability an effective approach to prosecuting sexual assault cases?

The FY 13 NDAA required the services to establish special victim capability, which is different from special victim counsel, although they have the same acronym.

Most of the services are already implementing this capability. A couple of them have been at it for several years. DoD has published a manual with instructions that oversee this. Each service has designed a different approach based on the service
resources and the structure of the different services' staff judge advocate offices.

All right. Let me see what's important in this next part here. Okay. The Army initiated a special victim prosecution program in 2009. That program has been in place for, obviously, four or five years at this point. It does appear to have a positive effect, but it is a little early to assess whether this concept is effective in remote areas or whether it's effective in a deployed environment and at smaller installations.

It's kind of a regional concept now for the Army special victim prosecutors. So they handle, you know, there's generally stations at large installations that handle smaller installations in a geographic area.

The recommendation is to continue to fully implement these special victim capability across the services and continue to develop the expertise of prosecutors, investigators, victim-witness liaisons,
paralegals in large jurisdictions and to
ensure that there is a reach to smaller and
more remote installation.

MR. STRAND: A question on this.

BG DUNN: Yes?

MR. STRAND: The services are all
basically doing similar things, right, like
the Air Force? Because they're smaller,
they're doing it more regionalized with some
reach-back back to the headquarters more than
the Army can because we're so large, because
the Army is so large. So the Air Force model,
does that seem to be working for them, as
well, from what you've seen?

BG DUNN: Well, I think all of the
evidence that we've all heard in terms of the
training, the establishment of communication
amongst investigators and prosecutors, the
focus on specific training for sexual assault
prosecutions to be conducted by specific
prosecutors and overseen by senior
prosecutors, whether it's handled in
consolidated offices that do it regionally or whether it's handled in offices installation by installation does seem to be trending positively.

I mean, it seems to have a positive effect across the services. But the key here is the services are structured differently and there shouldn't be a cookie-cutter requirement for those offices.

MR. STRAND: What works well for the Air Force may not for the Navy and the Army and the Marines.

BG DUNN: Right. Okay. This next one really is more of the same. It's a discussion about co-locating with prosecutors, whether to co-locate investigators with prosecutors or to co-locate investigators, prosecutors, and victim services. I think we addressed that a little bit in the last discussion.

COL. MCGOVERN: We can work to merge.
BG DUNN: Yes, yes, so we can work to merge that together. But the key is communication is absolutely critical. There are some concerns with co-location. And however it's done, it's got to be done with sensitivity to the victims and what makes them most comfortable in terms of a venue to report.

All right. Special victim counsel. This is a very new concept. The information that was provided to the Subcommittee was generally positive, in terms of special victim counsel, both from prosecutors and defense counsel. So it's, you know, it's too new to really make an assessment, but we need to continue to review the role and, if necessary, establish procedural rules with clear parameters on how those attorneys will represent their clients because everybody could foresee issues that haven't really come to --

CHAIR HILLMAN: Can I ask about
this? I don't know if we're in a position to comment on this, but the undue command influence, unlawful command influence issue with special victims counsel, is there, we've just had a ruling that special victims counsel can --

BG DUNN: Create an issue.

CHAIR HILLMAN: -- can commit UCI, right?

MR. STRAND: Yes. So a captain writing to a major general can --

COL. MCGOVERN: Well, she didn't create an UCI. She raised an issue.

COL. HAM: Yes, the law, that's related to the law we know, which is no counsel can make an argument that brings either Army policy or, I'm sorry, DoD policy or the case law example that Colonel Henley made, as well, the war on drugs, can't make an argument that brings a policy consideration into the courtroom. That's the analogy --

CHAIR HILLMAN: Is that true for
special victims, special victims counsel, too?

MS. FRIED: I think it's all attorneys. Everybody involved in the military justice system is what UCI says.

CHAIR HILLMAN: Everyone is subject to the code.

COL. MCGOVERN: I can go get it.

MR. STRAND: So it's not just somebody outranking that person influencing them.

COL. HAM: I have not read the record, but the analogy that I can draw from the public reports is that that was the argument that was a problem, bringing policy discussions and policy prescriptions to advance a specific position. And, again, the case law analogy I'm aware of and am comfortable with is bringing the policy into a courtroom in a sentencing argument or a closing argument.

CHAIR HILLMAN: In other words, the Air Force's interest in ending drug abuse
within ranks requires that you convict this individual because this is a, we can't allow this problem. So it moves the focus from the merits of the case and the individual at hand and the conduct that's being punished to the larger issues and makes it look more like a show trial.

COL. HAM: And Article 37, Article 37(a) does have a section on convening authorities and then no person subject to this chapter may attempt to coerce or by any authorized means influence reaction of any convening approving or reviewing authority with regard to his judicial acts. So I'm trying to piece together the public reports. Again, I don't have any --

CHAIR HILLMAN: But that's the statutory language then. It says coerce or influence. But isn't the whole creation of the special victims counsel intended to influence the system on behalf of the victim?

COL. MCGOVERN: Right. On behalf
of that victim. In that case, I believe the
special victim counsel said my victim wants
this, but you also should also consider what
this is going to do Army-wide policy for
sexual assault in the military, that latter
consideration is inappropriate.

CHAIR HILLMAN: But that's
inappropriate according to the regs. It's not
inappropriate according to the statute. So
Article 37 says can't influence or coerce,
right? It doesn't have that extra piece. I
understand that's what we tell people, that
you can't make the Army-wide policy, right?
Read that again, Colonel Ham.

COL. HAM: No person subject to
this chapter may attempt to coerce or by any
unauthorized means influence the action of a
court-martial or any military tribunal or any
member thereof in reaching the findings or
sentence in any case or the action of any
convening approving or reviewing authority
with respect to his judicial acts.
COL. HENLEY: Right.

Unauthorized. So can't the convening authority consider general deterrence in determining whether or not that's an appropriate agreement to accept or not? I mean, again, that's a rhetorical question, and I don't know what we actually said on the record.

COL. HAM: Yes, I'm not taking a position either way. I was quoted in some news articles. I hesitate to mention those articles, now realizing how inaccurate they can be. But the argument was made that what you do may influence the debate on whether the commander should retain the authority in the system.

CHAIR HILLMAN: I'd just like to flag that, in the special victims counsel, I think we should say we need to interpret Article 37 to give guidance going forward with respect to what special victims counsel can do. And I'd recommend that they be able to
argue on behalf of the overall deterrence and encouraging victims to report part of it, as well as the particulars of the case. I mean, this is a new thing. I mean, we haven't --

MR. STRAND: But doesn't the JAG do the same thing?

COL. HAM: It is not permitted to make an argument in court that brings outside policy in --

MR. STRAND: No, but to the convening authority behind closed doors, isn't the JAG or the prosecutor able to make those same arguments about good order and discipline and all those other things?

COL. HENLEY: Well, that's how you would define unauthorized. To me, that's the --

MR. STRAND: Right. Because they're authorized to do that.

COL. HENLEY: I don't know, but I'm sure the judge said I don't know but, in the interest of fairness, I'm going to give
the parties a chance to think about it, go
ahead and take a week, and then that's where
they come up with a -- I mean, I don't think
he definitively ruled that there was unlawful
command influence.

CHAIR HILLMAN: It sure has set a
precedent that is going to affect what, I
mean, it's just it's out there now. I feel
like we should suggest we need some
clarification on it.

COL. HENLEY: Whether Article 37
needs to be clarified or amended or modified,
adding to address now special victims counsel
and the obligations to talk in terms of
general policy.

COL. HAM: Would it help to pull
-- I mean, I know, real lawyerly, would it
help to pull the case law on the issue?

CHAIR HILLMAN: Sure. Yes, I
think it would. Yes, more work. All right.

Sorry to derail you on this stuff.

COL. MCGOVERN: No, that's a key
point that we had included.

COL. HAM: So it does not prohibit
a general to argument, as I understand it. It
does not prohibit that at all. It prohibits
a very specific type of argument to the
convening authority or to the members or to
the judge.

COL. HENLEY: One would think, but
I agree with you. We're not sure because of
-- well, but I need your recommendation. Is
it 37 should be reviewed to see if
modifications are appropriate, given -- and
you could footnote, too.

COL. MCGOVERN: Absolutely. I
mean, it clearly impacted the prosecution of
the case.

COL. HENLEY: And what special
victims counsel can do that would not be
unauthorized. I mean, again, I'm not sure you
have to amend 37 but give clarification as to
what unauthorized means in the context of new
special victims counsel. So at least the
parties, the military judge, the defense counsel, the trial counsel know what the rules are, and that issue can be fleshed out in pretrial litigation.

BG DUNN: All right. In terms of both prosecutor and, in terms of prosecutor interaction with the victim in the civilian jurisdictions that we visited, the consensus is that the sooner the prosecutor begins to form a relationship with the victim the better. And in the military, there is now a 24-hour standard for notifying the prosecutor of a case. And then after that, the sooner the prosecutor can meet with the victim the better.

So the recommendation is we should sustain the military 24-hour standard and encourage that interaction as soon as possible. Again, with the presence of the special victim counsel, that will play into this process, as well, and we haven't had the time to see how that will play out.
Okay. Should there be investigators assigned to prosecutors? In the civilian world, it appears from the evidence that the Subcommittee has when the police close a case they close a case, and the case subsequently moves to the prosecutors. The prosecutors generally have investigators who they use to flesh out the case, so to speak.

The military system is different. The military system, on the prosecution side, the investigators generally perform that role. They may finish their investigation, but, you know, once the case is headed to prosecution, anything that the military counsel need is generally, I won't say military counsel, anything the military prosecutors need is generally investigated by the MCIO.

So in terms of assigning investigators to prosecutors in the military, we didn't see that as a, we don't see that as a necessary requirement. Now, the defense counsel is a separate issue and will be
addressed later.

MR. STRAND: And one of the things we overlooked in our investigative findings and recommendations was we did have a finding that prosecutors and defense attorneys complained that, you know, agents weren't doing what they needed to do sometimes after the case was closed and that they had a hard time getting any information and getting additional investigative resources. So one of our recommendations for that was to require that the cases remain open until final adjudication to help, you know, solidify that.

BG DUNN: Yes, yes, to avoid the administrative hassle of having to reopen a case should it have been closed. Thank you, Russ, for adding that.

MR. STRAND: You're welcome, ma'am.

BG DUNN: Okay. In the civilian sector, district attorneys do have wide prosecutorial discretion in charging
decisions. Do military prosecutions also have discretion? Consensus from all the testimony we heard is that, yes, military prosecutors do have discretion in charging up to a point, I guess, for some of the, you know -- well, military prosecutors do have discretion in charging.

CHAIR HILLMAN: Sorry, just the term military prosecutor. Do we mean trial counsel?

BG DUNN: Yes, yes.

CHAIR HILLMAN: Because really the charging, they write the charge sheet but the convening authority signs it?

BG DUNN: No, the commander.

CHAIR HILLMAN: The commander?

BG DUNN: The commander. So if I'm Private Stucki down in Company C, the prosecutor will write the charge sheet and my commander will usually swear that charge sheet out. And then it's pushed forward through the levels of command and maybe two or three
levels before it gets to the -- yes, yes.

CHAIR HILLMAN: So it's just the
fact that there's still, the authority to
prosecute rests in the convening authority
gets obscured by military -- just they don't
have the same, it's not the same. The DA's
office is deciding and is prosecuting the
case, but the judge advocates are not. It's
the convening authority on who's making --

BG DUNN: On the decision to
prosecute, but, in terms of what to charge,
the prosecutors write those charge sheets.
And I don't think we --

CHAIR HILLMAN: And then the SJA
makes a recommendation with respect to those
--

BG DUNN: To referring the
charges, right, right.

CHAIR HILLMAN: Right. Dillon,
you were going to say?

MR. FISHMAN: Well, I'm not sure
how it's done. And we haven't really gathered
information on this, but we might want to collect it. On the issue of preferral, which is really what we're talking about here, there may be practices that vary. For instance, some SJAs may require their trial counsel to present them with the draft charges before the action of preferral occurs, which is tantamount to them having a decision. But we may wish to gather information on this for you.

CHAIR HILLMAN: I don't know that you have to look too much further. I just want to be clear that we show where the function of the prosecutor lies as we go through this because the decision-making authority isn't in the attorney the way it is in the, you know, in the civilian --

BG DUNN: Right. In the civilian world, they draft and decide whether or not to prosecute. In the military, the trial counsel with supervisory oversight generally drafts, decides what to charge, drafts the charges,
but then there's a separate process in terms of making the decision to go to trial. And there may be --

COL. HAM: The code can prefer charges. It does not have to be a commander.

MR. STRAND: Could a military prosecutor influence or make a decision on whether or not, you know, well, if we go with this charge, we're going to go ahead and recommend that they not go on a sexual offender registry or, you know, like some civilian prosecutors have wide discretion on that. Do military prosecutors have that, or is that clearly up to the convening authority or even to the panel if it goes to a court-martial?

BG DUNN: There are 50 sex offender registries, right? Fifty-one with the federal registry. Well, I don't know how many states have them, but I don't think that any military prosecutor actually looks, I don't think we have any evidence that military
prosecutors look at that. The military
defense counsel clearly looked at it. I don't
think the military prosecutors looked at it
because the accused could be being court
martialed in Kansas and he could be from
Alaska.

MS. FRIED: Dean Hillman, we can
articulate in the finding the contrast between
the military prosecutor and the role of the
commander who's preferring the charges just to
explain that clearly.

CHAIR HILLMAN: That would be
great. Thank you.

BG DUNN: Okay. But the
recommendation is that military prosecutors
and commanders continue to have discretion to
charge the case based on the facts of each
individual case.

CHAIR HILLMAN: I'll just flag on
that. I think that, I don't think convening
authorities should continue to have this. I
think it should be independent military
prosecutors, but that's not going to, if
there's others, that's in the role of the
convening authority or the role of the
Commander Committee's purview really rather
than ours. But it's a part where we just
overlap on this so

COL. MCGOVERN: And I think this
discussion with Ms. Jaus from last week, she
had explained that there may be more
flexibility within the civilian charging
decision because they have levels of rape,
where our Article 120, everything is grouped
more as a sexual assault, so there's a
perception that there may be less flexibility
in the military. So, again, we will try to
stay away from the role of the commander in
this and maybe make it geared more towards
what does Article 120 afford as far as
charging decisions overall and options?

BG DUNN: That was a pretty lively
discussion on that. I mean, you know, from
Ms. Jaus' perspective, there was -- I don't
even know how to quite characterize it. It was sort of rape and then there was rape with a certain level of violence and then rape with another level of violence, and that is just not something that is contemplated in Article 120. It's either rape or it's not rape.

MR. BRYANT: Yes, that's true in a lot of civilian jurisdictions, too. Not everybody has degrees of rape. Many states do. But in Virginia, it's either rape, or it's not rape, it's something else.

BG DUNN: So it's similar to the military. But --

COL. MCGOVERN: We'll tighten this one up.

BG DUNN: Yes. And another piece, I guess, which fits in here is that Article 120 right now does cause considerable confusion, not necessarily in the prosecutorial world but outside looking in. And if Article 120 is going to be revised, then it probably makes sense to make it clear
and put the non-penetrative offenses in a separate category from the penetrative -- I cannot say those words.

CHAIR HILLMAN: You just said it.

But you're not making any recommendation that we modify 120?

BG DUNN: Well, I think the consensus of the sub-Subcommittee was that it should be looked at for that reason because it does cause so much confusion from the outside looking in.

MR. BRYANT: Then why can't we say needs to be revised instead of if it's going to be revised? I don't --

BG DUNN: It's been revised so often over the last --

MS. FRIED: Remember, the Judicial Proceedings Panel is going to be looking at Article 120 since the 2012 amendments.

BG DUNN: Okay, good.

MS. FRIED: So you might want to ask them to look at this --
BG DUNN: Okay. So maybe --

MS. FRIED: -- which was a volunteer panel is really going to be focusing on Article 120. So if there's something you think they need to focus on in particular, you can make that recommendation.

BG DUNN: Okay. That would make perfect sense. The Judicial Proceedings Panel specifically look at Article 120 with a view

CHAIR HILLMAN: With a view towards? We can punt, but I want to punt with a clear mandate for them. I mean, I'd say that they ought to look for, to balance the harms of another change in the statute after so many recent changes in the statute with the possibility of optimizing the statute to improve the confidence of victims, the messaging regarding the types of behavior that constitutes sexual assault, and the ease of charging with respect to the very, the spectrum of crimes that fall under this
umbrella because right now it's just this very
big umbrella that obscures as much as it
reveals, and it doesn't really help. Anyway,
but I'm not sure whether the optimization of
the statute is worth the disruption in the
system of changing it again.

COL. MCGOVERN: I think this
previously had been two of the separate
findings, which were kind of then merged and
maybe need to be separated out again.

BG DUNN: Yes, yes.

COL. MCGOVERN: Do you want to
address whether or not there's pressure or the
finding, the anecdotal evidence about IOs?

BG DUNN: Oh, oh, yes, I did skip
right over that. Okay. We do have, we have
heard continuous comment about cases where the
Article 32 investigating officer recommended
against trying a case, but the commander
decided to take the case to trial. And we're
going to recommend that the services take a
look at that and pass the information back on
how many times that happened, what was the
result in those cases.

COL. HAM: Would you want to know
what the SJA recommended, as well?

BG DUNN: Yes, I think that would
be relevant.

CHAIR HILLMAN: I think we should
say it's a one-way ratchet that we've sort of
set up now and that that's of some concern.
So that would be here, wouldn't it? Because
this is where the review process that's been
changed for the decision, the elevation of
that has an impact in the review process that
gets triggered so

BG DUNN: Okay, all right.

Forensic psychiatry experts. The military
does have forensic psychiatry experts. They
are limited. The government does have
resources to hire civilians when military
forensic experts are not available on the
prosecution side of cases. That's what we're
discussing right now is the prosecutors.
It has, you know, military prosecutors routinely use these experts. As a matter of fact, we got some comment that perhaps they overuse these experts in cases where it's not really required, which may, you know, tie into your previous comment about the one-way ratcheting. You know, everybody is trying to make sure that every case is tried to its fullest, shall we say, in the current environment. And so this really, in the end, is a resourcing issue is that it should be, you know, used when necessary and not used when not necessary in order to conserve resources.

All right. Collateral misconduct, I think we have discussed pretty thoroughly a little earlier today. Being read your rights for collateral misconduct when you're a victim has a chilling effect on reporting. In civilian jurisdictions, they have vast flexibility with that. The military does not have the flexibility in terms of reading the
Article 31(b) rights. However, current service regulations have established policy reserving action on collateral misconduct until a resolution of the case.

The convening authority can grant immunity or offer a, you know, lower-level resolution to the victim. Those options are out there. Many victim groups have reported just that the issue, generally, is a bar to reporting. And one other factor we wanted to address is that it's difficult to message this particular issue because, you know, you don't want to put out there that, you know, you're guaranteed immunity from whatever your collateral misconduct is if you report a more serious crime to authorities. It's difficult, and we discussed that pretty thoroughly a little earlier.

But in terms of holding off and addressing the misconduct later, the recommendation is to continue to encourage commanders to be sensitive to the issue,
establish a policy that there's a presumption
in favor of immunity for minor misconduct, and
keep the status quo with the commander, as the
commander's discretion at the conclusion of
the case.

MR. STRAND: Would that conflict
with our previous recommendation?

BG DUNN: Yes, that does. But
we're going to work that back and forth, I
think.

MR. STRAND: Because we can
discuss it more, if you'd like.

BG DUNN: Okay.

COL. MCGOVERN: If we could go to
the red version. We found that there was
overlap between the prosecution and the
defense in a few of these areas. So Colonel
Henley could chime in with General Dunn in
discussing these topics to provide both
perspectives to come up with a consensus for
our recommendations.

BG DUNN: Since the defense
expressed the concern about the demise of Article 32 investigations, so Colonel Henley can address that.

COL. HENLEY: Well, the ultimate alternate proposal is what to do with the 32. And I think, as we discussed in the defense discussions, a lot of these issues are related to each other: what to do with subpoenas, expert witness, discovery issues that arise before a military judge is involved.

So if you adopt it, some process where the judge or a magistrate is involved early on in the process, either pre- or post-preferral of charges, to address some early issues in the case, pretrial confinement issues, discovery issues, subpoenas, witness requests. Does it make sense to also have, at the same time, an Article 32 procedure that's being run by an investigating officer, rather than a military judge? And I think those are the two recommendations. One was, I guess that was the proposal, which is don't do
anything and just see how the new 32 process
plays out, that no longer is a victim required
to testify, and see if that addresses some of
the concerns.

I guess the alternate proposal
was, if you're going to get a judge involved
early on in the process to address some of the
defense concerns on access to evidence, could
the judge also conduct a equivalent 32
procedure which would be a probable cause
hearing that I think we discussed. I mean,
haven't we sort of discussed that, at least in
some fashion?

So, I mean, that's the proposal.

Is that what we were talking about?

COL. MCGOVERN: And I think the
reason that this overlapped is there were some
things that the prosecution, their difference
of opinions of how the 32, whether it will
actually speed up the process, whether you
have your victim, you'll be able to see the
victim take the stand or not. There's pros
and cons from both prosecution and defense to
the changes, but the consensus seemed to be
they don't quite know yet, it's too early to
tell since we haven't started it.

COL. HAM: So, sir, you also
mentioned, too, if the judiciary was involved
as a judiciary instead of as an investigating
officer that the recommendation for any lack
of probable cause would dismiss the case,
although not with prejudice?

COL. HENLEY: Yes, I think so. If
you have -- and, again, the actual process
with timing or deadlines certainly could be
massaged. So you have a scenario where a
trial counsel has preferred charges. There's
a time frame in which the trial counsel has
get a probable cause determination, just
arbitrary, take 30 days. So the judge makes
a determination based on the evidence
presented whether there's probable cause.

If a finding of probable cause is
made, then another arbitrary figure, the
convening authority would have 45, 60 days, 90
days to refer to a special general
court-martial. If the military judge, in his
or her capacity as a military judge, finds no
probable cause and the case is dismissed
without prejudice, the trial counsel can
re-file or re-prefer charges and go over and
start again. But at least there's some
determination that's binding upon the parties
without prejudice if maybe you thought you had
the evidence but were unable to convince the
military judge the probable cause standard.

So I guess what we were
discussing, and, Kelly, you can -- and Patty
the same -- I think the issue, initially, is
whether or not a military judge should be
involved at all to address some of the defense
concerns about access to information and
disclosing information to the convening
authority to get experts or subpoenas or
documents. And if you accept that and the
proposition, then why not have the judge
involved in other aspects of the proceeding?

So what we ultimately decided I think was, if you're going to do that, then have whatever rules you have apply equally to both prosecution and the defense on access to witnesses. So if a trial counsel wanted to subpoena witnesses or access to evidence or expert witnesses, they would be required to go through the military judge, as well, who would make that determination using the same standards that would be applied to the defense. The convening authority would still be obligated to pay, and the judge would not obligate the government. But the decision on whether or not it's relevant to the proceeding would be made by the military judge for both parties.

And I think -- again, I didn't go on any of the visits. But it appears that's one of the criticisms the defense consistently raises is they have to defend their requests where the government does not, and this would
seem to at least even the playing field. But
--

MR. STRAND: So what I hear you saying is, basically, you're looking at the role of the judge in whether or not to bring them in earlier, bring him or her in earlier, expand their duties --

COL. HENLEY: Yes. And all we're proposing is to adopt a process that goes on in every criminal court in any state or federal system every day.

MR. STRAND: The biggest difference is right now they can't get involved until referral?

COL. HENLEY: Referral.

MR. STRAND: Referral. Okay.

COL. HAM: With some exceptions.

COL. HENLEY: Yes, minor exceptions.

COL. MCGOVERN: So I probably didn't set this up the best, tee it up for you, sir, but the list that I just handed out
are those issues for the defense team, which then relate also to the 32 issue. Last week or two weeks ago, Colonel Morris had briefed this to the Subcommittee and noted how intertwined the issues of, the concerns of the defense counsel to request experts, witnesses, subpoena power, and all that. So we tried to separate those out into findings, and it continually came back to the judge involvement. And that's where Judge Henley or Colonel Henley has come up with some proposals as to the judge involvement.

MR. STRAND: So what I hear you saying basically is that you want the judge to be involved earlier, expand their role?

COL. HENLEY: I think that would be beneficial if the focus, again, is on the victim. It appears one of the criticism, from the victim's perspective, is length of time the process takes, and part of that, through no fault of the defense or the prosecution, it just takes a while to schedule these types.
So you have an accusation, there's a delay to referral, there's a lengthy day to 32, and then there's a longer delay on determining whether or not to refer these charges to court.

MR. STRAND: And then you've got all these rape shield issues and other potential issues along the way that are not being dealt by the judge.

COL. HENLEY: Correct. They're being identified but not addressed.

MR. STRAND: Right.

COL. HENLEY: And I guess what the sense is, if you can address some of these procedural concerns on discovery, subpoena, funding issues, experts with getting the judge involved earlier on in the process, is there a benefit to having the judge involved in the pretrial investigative process, as well, given some of the concerns that have been raised on what it's now used for. It's not reason to believe to go forward with the offense or
whatever stand you want to apply, but it's a
discovery tool and there's little control over
the proceedings.

Whether or not a military judge is
detailed to the 32, that individual is
functioning as an investigative officer, not
as a military judge. They don't wear a black
robe, there's no formality in the proceedings,
it may or may not be in a courtroom but
usually it's in a conference room. So I think
having the judge involved, it's not a 32
investigation anymore. It's what civilian
communities --

CHAIR HILLMAN: The judge qua
judge. Right.

COL. HENLEY: Exactly. It's a
judicial stamp in the middle of a process
between preferral and referral that we have
enough to go forward. That's all it is. And
it doesn't mean that you can't start, not
start over but the judge makes a determination
which is binding. I guess that's also one of
the criticisms you have with the 32 investigating officer making recommendations and they're not being followed regularly. It's not an exception, and it's not tied to the status of the IO. It could be a military judge who makes these recommendations, and you would think, under most circumstances, the recommendations would be followed.

COL. HAM: Judge advocates are required for all, not all Article 32 but all -- all Article 32s or all sexual assault --

COL. MCGOVERN: All sexual assault.

COL. HAM: But as a point of comparison, I can't remember which Federal Rule of Criminal Procedure it is, but if someone is confined, the government has ten days to do a preliminary hearing. That's the time frame. If the defendant is confined, to my understanding, Mr. Bryant can confirm or deny, is that it says you have 30 days to indict, you have ten days to a preliminary
hearing. So in the federal system, most of the time there will be an indictment within ten days, so there will not be a preliminary hearing.

MR. BRYANT: Preliminary hearings in the federal system are very rare for that very reason. They're running a grand jury in even the outlying districts three days a month and, like in Norfolk, six days a month, two different grand juries. So they've got an option to get in to get that indictment.

COL. HAM: So you can meet the ten-day period.

MR. BRYANT: Within that ten-day period, and they just, boom, no preliminary hearing, whether it's done in an arrest by warrant, and those are not that frequent in the federal system either. Usually, the FBI and whoever, the DEA, they would prefer to do it by indictment in front of a grand jury to start with.

COL. HAM: I only meant to address
the time --

MR. BRYANT: Yes, sure, the time period. You're right. I think it's ten. And then if they're out of custody, 28 days.

MR. STRAND: So if you increase their role, it would, obviously, probably impact the judiciary. They'd probably have to require more authorizations and more judges.

COL. HENLEY: Right. But the view would be that maybe that, I wouldn't call them two categories of judges but you can have a judge who can handle some of the initial preliminary requirements up through the probable cause determination. So they need military judges but relatively new military judges, majors, lieutenant colonels. And then the actual trial judge might be a more experienced practitioner.

COL. HAM: Sort of like a federal magistrate handling --

COL. HENLEY: Yes.

COL. HAM: -- search
authorizations and --

COL. HENLEY: Yes, expert witness requests, you know, confinement issues.

BG DUNN: Confinement issues.

COL. HENLEY: Any discovery disputes that arise between the parties, medical records. I mean, you can address that early on in the trial process, get it out of the way. The decisions can be reviewed, ultimately, by the trial judge, if necessary. But it's a judicial process, not an administrative process, which I think that's the view that an outside observer has of the system. It's not judicial proceeding, it's --

CHAIR HILLMAN: So this would change the probable cause determination. I mean, this would, right now, the Article 32 investigating officer makes a recommendation to the convening authority with the staff judge advocate's gloss on that, right? And this would change that.

COL. HENLEY: Yes.
CHAIR HILLMAN: So it's a significant shift in authority. I mean --

MR. STRAND: Well, yes, because then the convening authority, if the judge says there's no probable cause, then the convening authority couldn't go forward is what I heard him saying.

CHAIR HILLMAN: That's right. Its binding.

COL. HENLEY: Yes. Now, they would have the option of re-preferring charges. I guess you could have --

BG DUNN: Gathering more evidence perhaps.

COL. HENLEY: Yes. You know, after 30 days, whatever. Is there, there's no --

MR. BRYANT: In the civilian system, if the judge at the preliminary hearing dismisses the charges, you can still take it to the grand jury. So you don't have to start over with a warrant again.
COL. HENLEY: But there's no you have to wait 30 days or anything. You can go the next day and -- so the government still has an avenue to get the case to court, but the convening authority still decides whether or not to refer and at what level the court should be, what level of court should be selected. So the command is still deciding whether or not to court-martial.

MR. STRAND: So even if the judge says there's probable cause, the judge isn't deciding what to do with that. It could still be a --

COL. HENLEY: It could do admin disposition. It can say, well, I understand you said there's probable cause on all four charges, but I'm going to only send three to trial. There's still that command input, it's just, to me, what started this was the criticism that the defense has to explain why they need experts or assistance or subpoena. They don't have a subpoena authority. Okay.
So if the judge is involved, can the judge also address the recent issues raised with how the Article 32 is involved?

MR. STRAND: Could it be the same judge with both proceedings, or does it have to be different? So if I'm a judge, I'm listening maybe in the 32, can hearsay come in in a 32 --

BG DUNN: Well, the judge isn't going to do a 32.

COL. HENLEY: Right. It's just the PC determination. It's just tell me what you have. It could be a paper --

COL. MCGOVERN: Ms. Jaus did say, yes, it can be the same judge throughout the civilian process or it can be two different judges. The younger judge is handling the preliminary matters.

COL. HENLEY: But especially in high-profile cases, if you have, you know a case is probably going to end up in a court-martial, it would seem beneficial to all
parties that you have a trial judge detailed
early on in the case that could then shepherd
the case through the entire process. Some of
these other cases, whatever, sexual assault or
not, larcenies, AWOLs, whether or not it's the
same judge that does the PC determination ends
up presiding over the trial, I'm not sure that
there's necessary value there.

The big problem if you're in
military justice is you can't get to the judge
until the referral of charges, which could be
months and even years down the road. And that
--

MR. STRAND: And all kinds of
legal issues are being raised and filtered and
ruined sometimes.

CHAIR HILLMAN: So if our
objective is to improve response to sexual
assault, one of the issues we run up against
is a lack of faith in the legitimacy of the
system, misplaced or not. And that lack of
faith could be addressed. I think we need to
say this. Whether we actually recommend this happen I think is separate.

So we need to say one way to address this is to have a military judge as a judge because already many Article 32 investigating officers are military judges in high-profile cases, but we want them as a judge available from the start. It also addresses the issues of defense counsel where what's addressed later here, the change in discovery options, right, in the Article 32 change, which I do think we also want to point out the change in the Article 32 process has an impact on development of the case and having a judge there in place from the start would help to mitigate those effects on the development of the case. And it follows on the resource issues, too, the defense faces right now with the emphasis on prosecuting aggressively.

COL. MCGOVERN: The one other significant update this week, as we worked
through the issues two weeks ago, Colonel
Henley, if you could address your proposal
that this work both ways for prosecution and
defense.

COL. HENLEY: I think I alluded to
that. So the requirements, whatever
requirements you have should apply equally to
the trial and defense counsel. So the trial
counsel wants witnesses, then the trial
counsel should go through the military judge
and go through the same process that a defense
counsel goes through following the relevant
case law and establishing relevance,
materiality, and why they're needed and what
they would say, and the judge makes that
determination for both sides, for the
government and the defense. So the criticism
that the defense has that the government has
unlimited resources and they don't have to
justify or defend their requests would be
addressed, and you can still have ex parte
requests from both sides if the government or
the defense didn't want to share some of their justification.

But I guess the process, what we said is the judge would decide and then the actual process would still be on the convening authority because I think what we ended up deciding is not to give the defense their own budget. We didn't think that's really what TDS wanted was to have their own budget responsibility. But it was not a funding concern but a disclosure concern. So if you address their disclosure concerns with the military judge, the actual funding would still be by the convening authority. So the judge grants their witness requests and then the trial counsel would take that order down to the resource management folks to actually issue the appropriate documents.

BG DUNN: I've got to say that I kind of see this as a two, maybe two recommendations because I think that it's necessary, with the changes in the 32 it is
necessary to address discovery for the defense. And I also think it's necessary to address earlier in the process the issue of expert witnesses for defense counsel, other witnesses for defense counsel, etcetera. And I concur. And I also concur that that should then go through the government for funding.

But then you've made a second sort of broader recommendation that would, A, pull over the whole prosecution side into that decision authority with the witnesses and, B, perhaps even back it up so that the judge is involved in that. There is no 32 perhaps and, instead, there is a probable cause hearing in front of a judge at some point in the process and there will be no reason for 32 at all, which is a much broader change to the system. And also --

COL. HENLEY: Well, ma'am, I'll tell you why I thought, if you're going to address the initial concerns, access to witnesses, discovery issues, and having a
military judge involved after preferral of charges, to me, I don't know how to process the work if you have a parallel Article 32 investigation that's presided over not by that military judge. Does the judge suspend his or her involvement until the 32 is complete, which he or she has no control over?

BG DUNN: Right, right, right.

And I think if you do, if you back up to this probable cause hearing idea, then I think that has to replace an Article 32.

COL. HENLEY: Right.

BG DUNN: And, you know, an Article 32, in some sense, what was intended, I think, to bring in an outside perspective, like you get with grand juries. It ain't the lawyers and it ain't the investigators, it's the people. But that's already gone in sexual assault cases because now lawyers must serve as Article 32 officers in those cases so --

CHAIR HILLMAN: We've had an incomplete evolution. Shouldn't we just
BG DUNN: I mean, I don't know.

To me, if we're going to make a recommendation on this, because it's a, it should be, at a minimum, the judge should, there should be a mechanism to get the judge involved early to handle defense witness requests, defense expert witnesses, those issues with defense, and does that issue consider perhaps backing it up to the military judge just managing cases through the system. But you don't think about the implications, though, in assignments, in personnel, judiciary. I mean, that's going to be --

COL. HAM: And the commander had a whole morning kind of on this same topic from the commander, all the commanders.

CHAIR HILLMAN: Refresh my recollection.

COL. HAM: With Colonel retired Val there and Mr. Bob Reed.

CHAIR HILLMAN: Oh, yes.
COL. HAM: It was just a week ago
or something.

BG DUNN: Was this the same
concept of just backing it up --

COL. HAM: Very similar concept
that discussed --

MR. STRAND: It's an interesting
question. With the 32 being changed so
significantly, is there a need for a 32 if you
have a probable cause hearing by a judge?

BG DUNN: No, that's what I was
just saying. There would be no reason to have
--

CHAIR HILLMAN: It is. It already
is that.

MR. STRAND: Well, it is, but do
we need both?

COL. HAM: You could still have
Article 32. It just would, it's still the
same article of the code, which has been
substantially amended.

COL. HENLEY: Why don't you just
have the judge preside as the 32 officer in
his or her capacity as a military judge? You
don't have to call it a PC determination, but
my thought on a PC determination is that's
independent of any general court-martial
desire. I mean, you don't, whether there's
probable cause or not, you could still make
that determination and then you can decide
whether or not to refer to a general special
court.

BG DUNN: But it would only be
required to refer cases to general
court-martial.

COL. HENLEY: No, you would have a
PC determination for both. It would not
affect the level of court. You'd still --

BG DUNN: For every barracks
larceny, you want them in there doing a PC
determination in front of you?

COL. MCGOVERN: Can they waive it?

COL. HENLEY: Well, sure. But do
you think the PC determination would be an
involved process in barracks larceny? I mean, again, preferral of charges, you go in the next day or the day after or three days, you can actually go to --

BG DUNN: Well, no, what I'm saying is, in cases that are not going to be referred to a general court-martial, you don't have an Article 32. You don't disrupt people from their work, you don't bring them in there, you don't cause the investigators to come in, you don't do all that stuff. So it seems to me you'd have to draw that line with these, as well.

COL. HENLEY: Well, I guess, conceptually, you could say a PC determination would be a prerequisite to a general --

BG DUNN: General court-martial.

COL. HENLEY: -- court referral, but my sense is, based on the 32 modification in sexual assault cases, you're going to end up in a bare-bones, you know, one-hour --

MR. STRAND: Probable cause
determination.

BG DUNN: No, no, I don't have any issue with this at all in a sexual assault case or in a general court-martial. I'm just having an issue with the --

COL. HAM: And just to refresh your recollection, Article 32 is no longer called an investigation. It's called a preliminary hearing, and it's a probable cause determination. And all of them shall be conducted by an impartial judge advocate, except in circumstances. You know, there's an exception.

COL. HENLEY: Well, you wouldn't get more impartial than a military judge, right?

COL. HAM: Well, that's still allowed. I mean, it wasn't a total gut of what the military, folks with military experience know as a 32. It's not a total gut because it allows the defense to present evidence and cross-examine those witnesses who
are presented.

COL. MCGOVERN: Can you just clarify, sir? Under your model, if the judge determines there's no probable cause, the convening authority, unlike the current process, does not have discretion to go forward? When the IO currently recommends against going forward, the convening authority can decide to go forward. Under yours, there would be no legal reason because someone has already found that there's no probable cause?

COL. HENLEY: Correct. So the charges, for example, preferred on February 1st, 2014, if a judge determines no probable cause on those charges and specifications, the charges are dismissed without prejudice. And then if the trial counsel wants to prefer charges on March 1st, 2014, then they can go forward with --

BG DUNN: A second PC hearing.

COL. HENLEY: -- a second PC determination.
COL. MCGOVERN: How would you all feel about, because this did start two weeks ago as a write-up to address the defense counsels' primary concerns, proposing a model with, as it stands now on page of the defense, that a procedure be developed by SECDEF to allow the defense capacity to build a case without it being vetted to the trial counsel, very vague, with your recommendation being a model for judge involvement for prosecution and defense early on. And like General Dunn was saying, keep the Article 32, if you're taking this step to do it right or the Subcommittee would propose the model include the preliminary hearing, the judge preside over that, so that the Secretary of Defense or DoD would have the discretion to possibly take smaller steps to implement the judge involvement, rather than having to make a drastic change all at once. Or do you want to just recommend the whole thing?

MR. STRAND: Well, would there be
any reason to wait? I mean, there is an
evolution going on, not a revolution but an
evolution. There's an evolution going on to
make this look more and feel more like
downtown, that you have the judiciary involved
earlier on, you have the prosecutors and their
-- so that our victims see a system
differently than they do now.

And so I would say I don't know
why we would wait because there's pain in
waiting. And then, as you wait, then things
get kind of watered down and, well, they
didn't really mean that, and, well, we're
going to do it this way, and then we end up
with different services doing it different
ways.

CHAIR HILLMAN: Which we have with
military judges right now. I mean, if we're
going to give this additional enhanced
authority to military judges, we need to make
sure they're independent, too. I mean, they
should have terms. They don't all do that
right now, right?

   COL. HENLEY: Army does three-year terms.

   COL. HAM: I guess a third potential option is dealing with the 32, since judge advocates are already required, if there's no probable cause it's a binding determination somewhere between --

   COL. HENLEY: Your point, Professor Hillman, about victim confidence in the system is that you have a JAG investigating officer versus a trial judge. To me, that's what's driving this recommendation. In addition to the process itself is victim confidence in the proceedings. And if you have a judge that's involved early on in the process, then that judge can be responsible for everything that happens during that process and it's not suspended while you have a preliminary hearing.

   CHAIR HILLMAN: Sorry to interrupt
you, sir. Did we address training of judges anywhere?

COL. MCGOVERN: No.

CHAIR HILLMAN: Okay. If we are going to sort of push on an enhanced judicial role, we should at least gesture at the necessity of training.

COL. HENLEY: Training in addition to what we have now or --

MR. BRYANT: Which is, that raises a question that will come up later in our subcommittee-subcommittee. What is the training for judges? Is there any cross-training with other services whatsoever? I'm sorry to bring this up now, but it came up in our --

CHAIR HILLMAN: Right. We're going to --

MR. BRYANT: -- asking that before we leave anyway.

COL. HENLEY: Well, the initial training requirement for all services is a
three-week military judges' course at the Army JAG School for all services.

CHAIR HILLMAN: They all go to the same place?

COL. HENLEY: That wasn't always the case.

COL. HAM: But it's at the Army JAG, but the judges, all the service judges, and Colonel Henley used to be the chief trial judge of the Army, would get together and have input into the curriculum.

CHAIR HILLMAN: I want that in the report, please, that everybody goes to the same school to get trained as judges now. That's just, I mean, just, you know, factual. Let's put it in there.

COL. HENLEY: Reserve judges, the National Guard judges, all the services. And the instructors are from all services. It's run by the Army JAG School, and it's an academic program split up, I think, probably still about two-thirds and one-third, and
two-thirds sort of practical court exercises
and one-third judicial philosophy management,
temperament, scenario training. But, I mean,
that's the initial, before you can be
certified by the service judge advocate
general, you must be a graduate and you must
attain a certain grade and pass all the
requisite course requirements.

And then each year, depending on
funding, there's the, I think they call it the
Joint Military Judges Training. So one time
a year, usually in Maxwell or Reno, in
conjunction with the National Judicial
College, it's a collegium. They get together
for a week and also do sentencing scenarios,
topics of interest, ethics. So that's your
judicial training, military judicial training.
And it's --

MR. BRYANT: And how long is that
one on the annual basis? Is that a day, two?

COL. HENLEY: Four and a half.

MR. BRYANT: Four and a half days?
COL. HENLEY: Yes. Depending on funding, maybe a little less. But it used to be a full week. So there is opportunity not only for the initial training to make sure everybody is on the same baseline but then continuing training. And then we used to have, when there was funding, each of the services would be able to send judges to the National Judicial College or other training for evidence --

BG DUNN: You made a comment about if we're giving judges more to do, we need to make sure they're properly trained. You're really not giving, even if we adopted this model that Colonel Henley has proposed in toto at the moment, the judges aren't doing anything that they don't already do. They already make those defense witness decisions. They already can dismiss charges if they don't find that, you know, that there's probable cause. They already do all of that and make all of those decisions. It's a matter of, to
me, it's more a matter of assignments, tenure, and staffing because it's going to increase their --

CHAIR HILLMAN: That's because you're a good officer and you look at the consequences of the chain. But when we look at it from the victims' perspective, we are picking up the judge and saying the judge is the person you're going to trust to sort of control this process from the get-go. And that's why I just, I want to at least identify in the report that --

BG DUNN: They do have this training.

CHAIR HILLMAN: -- they're well prepared and that we can count on them to continue to hold this responsibility from an earlier point in the process.

MR. BRYANT: Part of the training involves sentencing philosophy or --

COL. HENLEY: Yes, yes. Again, some of the training --
MR. BRYANT: Deterrent value, all of that?

COL. HENLEY: Yes. You get a class on sentencing, I mean the actual process of sentencing, the instructions. But then, typically, in years' past, they'd be given, you know, ten scenarios, fact scenarios from real cases, and you would go ahead and write out what you would judge. And then in smaller seminars, so there's usually about 50 or 60 students, and so you break it out into 11, 12, 13. You discuss and sort of --

MR. BRYANT: Compare.

COL. HENLEY: Compare. And then, at the end, the seminar leader would actually disclose what the sentence was from the jury or the judge and you would move on to the next one, and it's all services. So you'd have Marines, Coast Guard, Air Force maybe, Army discussing sort of general deterrence, specific deterrence, the actual retribution, rehabilitation. It's a helpful exercise.
because it makes you think from different perspectives. So, absolutely, there is baseline training and continuing training throughout your years on the bench.

COL. MCGOVERN: I think we can incorporate that into the prosecutor and defense counsel training and the training of judges because they've also had the prosecutor and defense training, and it will also then play into the additional role you're contemplating for sentencing. So --

CHAIR HILLMAN: And what about pretrial agreements? This alternate proposal, pleas should be between the parties, as in --

COL. MCGOVERN: Right. That is one that we have not discussed as a group.

CHAIR HILLMAN: If we're going to have the judge involved, why shouldn't the judge be the one who's -- this is a source of a lot of, this distinction between the civilian processes and the military processes is one that generates friction.
COL. HENLEY: That beating the deal? Yes. We didn't come up with a consensus in the group.

MR. STRAND: Is there a reason not to take the big step in bringing judges on board to do these things? Obviously, it's going to require more authorizations, more judges. I don't think the current judiciary probably can do it. I don't know. I might be wrong. But is there a reason why not to take the big step that we're already evolving towards and say, okay, this is what our recommendation is, that judges should do all these things, and be done with it?

BG DUNN: Well, I wouldn't do the pretrial agreements. I think that would still remain between the --

COL. HENLEY: Are you talking about judge sentencing? Yes, we're talking about if there's an agreement between an accused or a convening authority --

MR. STRAND: Oh, no, I was going
back to the other conversation on the 32
process and everything else and witnesses.
I'm not up for that one yet. I know we move
forward, but I don't have any clarity on --

COL. MCGOVERN: Are there any
dissenting opinions among this group to make
it mirror the civilian model more?

MR. BRYANT: The judge in charge
of the Article 32. It's already called a
probable cause hearing now, right? A
preliminary hearing for the purposes of
probable cause.

COL. MCGOVERN: We'll write it up,
and then if Colonel Morris, General Cooke,
others have input, they can provide it, as
well. And I believe Ms. Jaus agreed --

MR. BRYANT: And that's an area in
the current revised Article 32 and maybe
before. That's assuming a military judge is
now conducting it. If he should find that the
larceny in the barracks, and I'm going to use
a simple example, was, in fact -- we'll just
use a rape. If he should find that the rape
was actual simple assault, would he or she be
empowered to reduce that at that point and
find the person guilty? Because then you've
got, if the prosecution is, you know, having
a heart attack here because this is going to
be the end of this case, I'm just asking could
they do that? Because once he found that, no,
this is a simple assault, this is not rape,
and I find you guilty of simple assault, then
you've got all sorts of potential double
jeopardy problems if you were trying to bring
that case back again.

COL. HAM: You mean at a
preliminary hearing? There's be no finding of
guilty.

COL. HENLEY: They don't find them
guilty. There's no finding.

MR. BRYANT: No, but, I mean, he
doesn't have the power to do that because, in
the state system, while they almost never do
that because they know, you know, I'm taking
away the prosecution's ability to take this to
the grand jury if they want to, they're either
going to dismiss it, but they're really going
to say, well, I don't think this is grand
larceny, I think it's petty larceny, I find
you guilty and sentence you to 30 days because
they have that authority right then and there.
I'm just asking whether that exists in this --
no? Okay, good. I just want to make sure.
Now, if you put a judge in there instead of an
investigating officer, I didn't want, oh,
good, he's a judge, he can find Joe guilty of
simple assault and we'll be done.

COL. HENLEY: Because the charge
has not yet been referred to a court-martial.
So until that's done, there's no offense upon
which a finding of guilty can be entered.

MR. BRYANT: Okay.

COL. HAM: But you do envision
that the judge, in the position that we now
call the investigating officer, would be able
to say I do not find probable cause for rape;
however, I do find probable cause for the
lesser included offense of such and such. Do
you envision that?

COL. HENLEY: Yes, I think that,
because if it's a lesser included offense,
then yes, which I think the 32 officer can do
now. And if there's additional misconduct
that arises during the course of the -- I
think you can make those determinations and --

COL. MCGOVERN: It's just a judge
doing it.

COL. HENLEY: The judge is doing
it, right. That, I think, is . . .

CHAIR HILLMAN: Okay. So we'll
write that up and we'll see how that
recommendation looks. So the pretrial
agreement, should we talk about that piece?
That's on page three of the issues common to
prosecution and defense. It's just at the
bottom of that first page there, but it says
page three at the bottom. Difference in plead
guilt, civilian versus military. So the
difference here would be the judge would
accept or reject the plea instead of having
the accused be able to beat it essentially,
the pretrial agreement.

COL. HENLEY: I think it would no
longer be what is there on adversarial
sentencing procedure. You would, the judge
would still have the ability to reject the
plea with policies; or, if the parties had
negotiated at arm's length in good faith a
pretrial agreement, the judge's involvement,
the court's involvement is actually adjudging
the sentence, and that's it.

MR. STRAND: Instead of the
current system where they can, they make plea
agreements to the convening authority, and the
convening authority has this secret squirrel
code in here and then it goes to the court and
then whichever one they get is --

CHAIR HILLMAN: Right, which
creates a lot of doubt about what's going on
in this funny business? They've got some
secret envelope we're only going to open at
the end of the adversarial sentencing hearing.

    COL. HENLEY: But what we then,
there really is, doesn't appear to be the
opportunity for an accused to present an
approved sentencing case to the convening
authority to negotiate a pretrial agreement.

    BG DUNN: Right.

    COL. HENLEY: So I think what we
also discussed was the delta, if there is a
delta, between the pretrial agreement and the
sentence adjudged. If there's a delta, that
amount would be then suspended. So if there's
a five-year sentence and the judge adjudges
three years, then three years with two years
additional, like on a --

    CHAIR HILLMAN: Oh, so you would
alter the current system to create that?

    COL. HENLEY: Yes, it would be a
five year sentence with all but three
suspended.

    COL. HAM: That's permissible now
by pretrial agreement. However, not many
jurisdictions do that anymore. So I think
what Colonel Henley is proposing is that it
judicially happen.

COL. HENLEY: Yes. Right now, in
the fact-finder, the panel cannot suspend any
part of the sentence. But we're talking about
confinement, so that would address that, at
least in part, that --

BG DUNN: It would make it a part
of the pretrial agreement, should the judge,
should the sentence adjudged be less than the
agreed-upon punishment. All punishment
excess, that would be suspended for the period
of confinement time.

COL. HENLEY: Yes, yes.

BG DUNN: Because the way the
sentencing is done, the accused does not have
that opportunity to get any of that
information, any of the extenuation or
mitigation in front of the convening authority
before doing the plea negotiation.
COL. MCGOVERN: And actually create a pre-sentence report.

BG DUNN: Yes, which is a whole -- right, right. I mean, that's an entire huge addition to the process.

CHAIR HILLMAN: But the harm in not being able to get all that information before the sentencing authority is the potential of an excessively harsh sentence for the accused? Is that the harm of --

BG DUNN: Well, because, okay, prosecutors are pushing the plea agreement.

CHAIR HILLMAN: Right. And the accused is defended by zealous counsel who are fighting the good fight for them, right?

BG DUNN: Yes, yes, but there's no mechanism now to get in all that extenuation and mitigation, you know. Yes, I committed this crime, my wife left me, my mother died when I was six, you know, none of that goes into the plea negotiations. That all goes into sentencing.
MR. BRYANT: Can't they go to the prosecutor and tell him all these facts about his client?

BG DUNN: They can say anything they want, but it doesn't make any difference in the plea.

CHAIR HILLMAN: But why do we think it's so important the convening authority hear this?

BG DUNN: We don't. We think that, because he doesn't hear it, there's got to be a mechanism to give credit for that, I think.

COL. HAM: If the accused are consistently beating the deal, which we don't have --

BG DUNN: Right, we don't have it that they are consistently beating the deal.

COL. HAM: Well, again, in the defense counsel world, if you beat the deal it wasn't a good deal. It's only a good deal if, you know, you have a --
BG DUNN: If you have a --

COL. HAM: That's a good deal.

BG DUNN: Then it's a good deal.

Right.

COL. HAM: It's not a good deal if you have a ten-year deal and the judge gives you six months.

BG DUNN: Right. You lose your credibility as a defense counsel in that regard. See, I mean, I'm not sure that this is an issue that warrants major changes in the system without some further information. But --

COL. MCGOVERN: But what further information would you want, ma'am? Because, again --

BG DUNN: How often are people beating the deal in sexual assault cases? We're having a lot of acquittals. So why is this even an issue?

COL. MCGOVERN: Because it just happened. There is definitely, there is a
strong perception that there's something funky about --

COL. HENLEY: If this had been adopted, then that 18-month period would be a period of suspended confinement. So, conceivably, it could be --

BG DUNN: As long as the accused behaves, they wouldn't have to worry about that.

COL. HAM: And, again, which the convening authority could have done anyway.

BG DUNN: Right.

COL. HAM: So you could do it judicially, or you could make it a requirement on pretrial agreement that anything --

BG DUNN: In excess of that could be suspended.

COL. HAM: You could put it in the rule, or you could do it judicially.

BG DUNN: Right, yes. And now, see, first of all, now the victims have special victim counsel who can better explain
some of the complications in the system.

Second, there is, as Patty said, an

opportunity now to have a plea agreement that

says, you know, five years, but I agree to

suspend anything in excess of what the judge
gives you. Not that any convening authority

or any prosecutor probably ever recommends

signing that deal, but the option is out

there.

COL. MCGOVERN: I think Ms. Jaus

and Mr. Bryant has voiced it, too, that a deal

is a deal and they enter into it in both

parties. The prosecution may come down a

little because you consider the mitigation and

extenuation up front. I don't know if you, I

just felt like I should relay what Ms. Jaus

was saying.

MR. STRAND: Is there any harm

with taking away the second deal? I mean, is

there any -- I don't see any harm with taking

and giving judges plea authority to be able to

-- you get one deal, and I think that's the
problem. We don't have any good statistics, but just a concept of somebody being able to go and get two deals and they get the better of the two deals...

COL. HAM: Well, what's the difference between -- let me throw it out. What's the difference between that and what you heard on guideline sentencing, which is the judges are, I forget the percentage, the vast majority of time sentencing under the guidelines. So does that mean the judges are sentencing too low, or does that mean the guidelines are too high? But it means the same thing. Well, I'm asking if Mr. Bryant is the right person. Is there an analogy here that you look at the guidelines and everybody goes in thinking it's going to be something. If the judge sentences below the guidelines, they, quote, beat the deal. What's the --

MR. STRAND: But they only had one plea agreement.

COL. HAM: What's the difference?
I mean, theoretically, philosophically, what's the difference? Everybody goes in thinking it's going to be one thing under the guidelines, and the judge --

MR. BRYANT: Well, the guidelines are a range anyway. First of all, there's going to be a range there, and it may be a pretty broad range, depending. So if you go in and your agreement is the prosecutor is going to recommend that you be sentenced, quote, within the guidelines, that can be anywhere to six months to 12 years for a particular crime. So --

COL. HAM: So the analogy to us is the victim doesn't know what --

BG DUNN: What is going to happen.

COL. HAM: -- what's going to happen.

MR. BRYANT: Nor does the defendant for sure. He might get the 12, he might get the six months, and where they're discretionary then the judge may go even below
six months.

COL. MCGOVERN: But if they enter into a deal, both parties know what they're going into, unless the judge rejects it outright; isn't that true?

MR. BRYANT: That's true. You only get to withdraw your plea, at least in Virginia and the federal system, if the prosecution makes a specific sentence. Eight years. The judge says, eight years, no, I'm not doing it, whether he thinks it's too much or too little. And then you get to withdraw your plea and start over.

COL. HAM: So, again, the way that most, that would be not the norm that a prosecutor goes in with a specific number?

MR. BRYANT: No, that's not, I wouldn't say that it's not the norm. That's as normal as the prosecutor saying we agree that you should be sentenced within the guidelines, meaning if the cap of the guideline is 12 years but the statutory max is
20, I agree I'm not arguing for anymore than 12.

MR. FISHMAN: But sir, Mr. Bryant, just to clarify, Mr. Burress, when he testified, he said that around the country, those type of agreements, the Rule 12(c)(1)(C) agreements that provide for a specific range, those are the exception.

So typically, just so we're comparing apples and apples here, around the country, what the -- in the federal system --

MR. BRYANT: In the federal system --

MR. FISHMAN: -- what the prosecutors are doing is saying, I will agree not to argue for X or we will dismiss this charge or we agree that, you know, you will be, in exchange for your cooperation, you know, at the mercy of the Court on whatever the specific charge is.

Is that correct? Do you agree with that? They're not doing a specific range
most of the time.

MR. BRYANT: In the federal system, I don't -- the Eastern District of Virginia is probably a little different from the rest of the country. But I'll take his word for that.

And I think it was the Federal Judges, as you said, were going under the guidelines more often than anything we've heard from the State guidelines people.

COL MCGOVERN: But that was when there wasn't a deal. I guess I just don't quite understand the analogy. The guidelines, but the guidelines aren't usually part of the deal.

MR. FISHMAN: Well, I just want to make sure that we're clear is it under Rule --

MR. STRAND: Charging decisions.

MR. BRYANT: But also, some of the plea agreements both federally and state are to put a cap on it. You've got the guidelines and you've got the statutory sentence, if the
prosecution agrees, your cap is, I'll use the
12 year as an example. That's the cap. If
you, you know, then that binds the Judge. The
Judge cannot give you more than 12 years.
Everybody agrees to that.

BG DUNN: So how is it any
different for a victim in the civilian world
than it is in the military world in this case?

In the civilian world, the victim
goes in and presumably, well, you know, if she
-- victim advocates and she doesn't have a
Special Victim Counsel which she's now going
to have in the military.

So in the victim's mind, this guy
could get, you know, based on the -- say the
plea agreement is, you know, whatever and the
prosecutors agree not to argue for more than
18 years, could get 18 years, could get two
years and the victim doesn't know that.
Right? So how is that different from what
goes on in the military?

MR. BRYANT: But the difference is
you have that single agreement that she's aware of and you still don't get to go to trial.

BG DUNN: Yes, but somebody needs just to explain it to her.

CHAIR HILLMAN: To explain to her that, here's the secret envelope that will determine your fate?

BG DUNN: No, there is a deal for five years, the Judge could sentence under that just like the Judge can sentence under the Federal Guidelines. The Judge can sentence under that deal and if that happens, that happens.

MR. STRAND: What's the benefit of having, you know, have a deal with the convening authority and then a Judge and then you take which ever one? What's the benefit?

COL HAM: Well, first of all, the victim is going to know what the quote, secret deal is, because they're going to be conferring with the prosecutor.
MR. BRYANT: The other big
difference is, yes --

COL HAM: What she can't do is
tell the Judge what it is in her pre-victim --

MR. BRYANT: Up front, you're
going to hand up in writing to the Judge --

BG DUNN: But she's going to know
that the -- she's going to know the deal for
five years.

COL MCGOVERN: She's going to know
the maximum.

BG DUNN: She's going to know the
max. But she -- and a prosecutor, a good
prosecutor, all prosecutors, I'm sure at this
point, and Special Victims Counsel are going
to explain to her that's the max he can get is
five years, but he could get three, he could
get two, could get one, could get nothing.
You know, it doesn't mean he's going to jail
for five years just because he has that deal.
That protects him from more, it doesn't
protect you from less.
MR. BRYANT: But in this beat-the-deal situation, this is the sentence that the defendant has agreed upon would be appropriate. But he's still -- yes, I'll take that if that's what it comes to but I'm still going to try deal.

BG DUNN: Yes, but the philosophy

MR. BRYANT: And that Judge doesn't know that he's already made this particular agreement. Whereas in the civilian system, the Judge always knows this guy, this gal agreed to this sentence somewhere in here.

BG DUNN: But the Judge in the military knows there is a plea agreement, so he or she knows there's an agreement, doesn't know what the maximum sentence is.

MR. BRYANT: Doesn't know what the deal is.

BG DUNN: But understand, but you know, but understand the system.

MR. BRYANT: But what's the benefit?
BG DUNN: But in the military, the culture, you know, the culture in the military is that deal protects the accused on the high end and so when we have this commentary, maybe the deals are too high. I mean I think that's part of it is that it protects the accused on the high end and that's the philosophy in the military.

COL HAM: And the trial counsel's permitted to argue for whatever sentence regardless of what the cap is.

BG DUNN: And trial counsel can argue for 29 years.

COL HAM: He can argue for 25 years and knowing there's a five year cap.

BG DUNN: Right. Right, you can

MR. STRAND: I'm confused because the purpose of a pre-trial deal, in my feeble mind, is that you don't go to trial and you don't have to do all these things and you're saving the government a lot of money and this
is your deal.

COL HENLEY: It is because you end up -- there's no merits phase.

MR. STRAND: Right.

COL HENLEY: So you go through the inquiry, the Judge enters a finding of guilty on the offenses and usually, the sentencing proceeding, if there is one, is streamlined because it's also a part of the pre-trial agreement, not in all cases.

COL MCGOVERN: I thought they were a lot of work in front you, sir.

MR. STRAND: It depends on the Judge.

COL HENLEY: I know, that's me.

The government requires a waiver of witnesses, so in an agreement of five years, we're not going to bring the people that we would have been required to bring if this had been a contested case. We'll stipulate to their expected testimony or allow them to testify telephonically.
So there is a resource benefit that the government gets by entering into a pre-trial agreement.

MR. STRAND: But why enter into a pre-trial agreement and then go -- I still don't understand the benefit. What I'm hearing you say, General Dunn, is the benefit is it protects the accused of too high of a sentence.

BG DUNN: The benefit to the accused, the benefit to the government is the -- I mean the time, the money the -- yes.

COL HENLEY: At trial, you don't know if you're going to get a conviction.

BG DUNN: Yes, the guaranteed conviction, right.

MR. STRAND: True, but if I pleaded guilty --

COL HAM: If the victim doesn't have to testify, the victim's not subject to cross examination. The victim may or may not want to appear in the sentencing. All the
motions are waived. Usually, 99 out of 100
times, the Article 32 is waived.

BG DUNN: Right.

MR. BRYANT: But that's true in
all of the systems once there's a guilty. So
it's just a question of does the Judge know
that the prosecution has agreed this is the
maximum sentence?

I mean to -- it would seem to me
that to really take the wind -- and maybe they
can do it and they're good actors, to know
that you made a deal for five years and come
in and argue with a straight face for 29 with
your victim and her family sitting back there
knowing there's no way we're getting 29.

BG DUNN: But you can do that,
whether you do do that is another issue.

But I mean the point is there's --
no the prosecutor is not limited by the deal
to the argument. So if the deal is for eight
years, the prosecutor could argue for ten to
15 in hopes that the Judge will give seven to
eight, you know.

MR. BRYANT: I mean it's allowed
in the military system, but if that happened
in a civil world and you came and argued
outside the plea agreement, the Judge would be
calling your boss and you'd be back in the
lockup.

BG DUNN: Yes, but it's a
different system. Everybody is trained and
grown in the system and everybody practices it
and everybody understands it.

CHAIR HILLMAN: Okay, so we're
going to call a pause on this and our staff's
going to write up a proposal that sets out
both of these arguments, the proposal and the
alternative proposal. So do you feel like you
have enough information to do that?

COL MCGOVERN: I do.

CHAIR HILLMAN: All right, so
let's just -- I'm going to start to run
through these so that we can get through the
rest of this prosecution and defense piece.
Okay, so we talked about the Article 32, we talked about the difference in plea deals. We didn't talk yet about mandatory minimums, so if you look at the second page here, it's marked Page 4. How will the new mandatory minimum requirement to administratively separate service members convicted of sexual assault offenses impact guilty pleas? Let's talk about that when we get to sentencing which we'll do in a moment.

So put that on hold --

COL MCGOVERN: Okay.

CHAIR HILLMAN: -- for a moment.

The last one, are there a high number of acquittals in the military because these cases are being overcharged? Is there pressure to prosecute even when the investigating office recommends going forward? Has the pendulum swung too far?

There's no recommendation there.

Did anyone on that subcommittee want to speak to a recommendation?
BG DUNN: I would also add because it's relevant a little bit to that, it's also relevant to our just-ended discussion, which I'm not trying to reopen.

But we consistently in Norfolk, and at Quantico, the defense counsel said, we don't plead sexual assault clients to anything because of the sex offender registration. So the whole issue of changing the plea process to accommodate sexual assault victims appears to be -- or may be moot based on the strong opinions of at least those two sets of defense counsel.

COL HAM: We heard that, I think all --

BG DUNN: We don't plea any of them to any sex offense because of the registration requirement. Registrations would impact that and also --

MR. BRYANT: Well, one of my findings from -- I didn't make Quantico, but if you recall, General Dunn, in Norfolk, they
were very clear, both prosecutors and defense agreed the defense was winning a lot more cases these days and they thought it was because of pressure to bring cases that wouldn't have been brought before.

COL HENLEY: Well, again, not to -- if you had -- I'll go back to -- the Judge would, if it was --

BG DUNN: The Judges would be taking all the heat for this.

COL HENLEY: Yes, if it was a binding determination, the 32 officer recommendation substitute military judge don't go forward, you can't go forward. There would not have been a court-martial in which there would have been an acquittal. I'm all for the Judge thing.

CHAIR HILLMAN: I'm for the Judge thing here, too. The Judge thing, you've got that?

The problem is that these high number of acquittals are not helping us gain
confidence of victims really. I mean maybe in
some instances the victim does feel like, you
know, well-cared for throughout the process,
that it's been a good experience
notwithstanding the fact that there's not a
conviction at the end of the day. I'm sure
that happens in some cases.

But in general, maybe that
individual feels good about how it went but
the messaging that gets out there, it's
harmful.

I think that this transition point
we're in with the number of acquittals that
we're likely getting now, we have to figure
out how to account for that and continue to
build victim confidence.

COL HAM: Ma'am, I'm not sure the
number of acquittals is new.

CHAIR HILLMAN: Since 2007, the
number of acquittals are up.

MR. STRAND: But these are --
we're taking cases that we would never take
before but we're taking complicated cases.

We're taking tougher cases. We're taking cases that we probably never would have done before. We're investigating them differently, we're prosecuting them differently.

COL HAM: Well, but the rise in acquittals, I can only speak for the Army statistics, those are the only ones I have followed with the caveat I haven't seen them in a few, you know, since I've been here. But the rise in acquittals started in 2007 before the Special Victim Prosecutor Program, before anything else.

There, I think the Special Victim Prosecutor Program, the Army has charges that I think you all have that show success in prosecutions then but I think generally overall the rise in acquittals began long before any of this other stuff and hasn't stopped --

CHAIR HILLMAN: Do we have that?

COL HAM: -- in spite of all this
other stuff.

CHAIR HILLMAN: Do we have that data?

COL MCGOVERN: We do, and we have all the prosecution and the final disposition of these cases, the conviction, which in turn will be acquittal rates.

CHAIR HILLMAN: We should cast it as acquittal rates, though actually and we should just affirmatively look at that actually, over time to the extent it's possible.

COL HAM: And what you don't hear about are the 20-25 years sentences which we had the -- the Victims Services Subcommittee had some victims here I think it was last week, five victims. All five cases went to trial, two were acquittals and they were satisfied with the system.

One was a 20-25 years sentence for domestic abuse. I mean you don't hear about those and just saying anecdotally from being
a defense appellate division, there are a
number of those 20-plus year sentences. We
don't hear about any of those. We don't hear
about any of those.

MR. BRYANT: That was from a
panel? Twenty-seven years?

COL MAN: Contested cases, not
guilty would get 20-plus year sentences.
Again, I don't know that we have empirical
stuff on that but I can tell you we saw them
more than every so often at defense appellate.

MR. STRAND: I wasn't surprised to
hear defense attorneys almost in total say
we're taking too many of these cases to court,
I wasn't surprised with that. But I wouldn't
have been surprised.

I look at this like, I'm going to
pick a physician. Okay? And I've got cancer,
so I'm going to go to one physician who
doesn't take hardly any tough cases and he has
a really good success rate and I got another
pick for another physician who has a really
horrible success rate, but takes the tougher cases. I think that physician I'm going to go to is the second one because they're the ones really hard.

And we've been telling our prosecutors, we've been telling our investigators for several years now, actually we started in 2005 with the push to look at alcohol-facilitated, and look at some of these more complicated cases to, you know, work these cases, take the tough ones to court and try them. So I see that's not always a negative on the acquittals.

But I don't want to go too far. I just, I don't think it's a negative. I think we don't know why we're getting all the acquittals.

COL MCGOVERN: But I think one of the concerns raised was the fact that the IOs are recommending against it and is there a relationship then with the number of cases IOs recommended against that are also resulting in
acquittals maybe that's --

MR. STRAND: But there are some

that the IOs recommended that resulted in a

conviction as well and I think we have to be

fair there.

COL HAM: Lieutenant Colonel McGovern, on the JCS Sexual Assault

Subcommittee, was the subcommittee able to

obtain conviction rates on not guilty cases in

any of the jurisdictions?

The site visit that comes to mind

is Everett where I believe they said they have

a 50 percent loss rate in trials, not guilty

plea contested cases.

So I guess that's another question

for the subcommittee is it really -- is the

acquittal rate different then in civilian

jurisdiction that will release statistics to

Department of Defense?

COL MCGOVERN: There were not a

lot of statistics released to the JSC-SAS, as

it can go back and find a few threw out some
estimated numbers but there wasn't enough to
compile a chart or anything to say, look here
are the average conviction rates to even make
a comparison to the military rates.

So that's why we're stuck with we
know what the military rates are and we can
look at the number or possibly recommend
further study, see if there's a correlation
between those recommended or the IO
recommended against and acquittals versus, you
know, that the IO recommended and were
convictions.

And is there an issue there? We
don't know if that is an issue but it seemed
to be evidence to some of the -- on the site
visits that there is political pressure to go
forward because there's not harm for a
convening authority to say go forward. There
is harm if you say don't go forward. That's
what I heard.

MR. BRYANT: Some of the
conviction rates at the state and national
level are known and right off the top of my head, I don't know whether they come from the National District Attorneys Association or from a statistics group at the Department of Justice, but this average in the civilian community is like a 74, right in there, conviction rate. Harvey, does that include guilty pleas? I don't know, General, but that's what they say.

COL HAM: For sexual assault cases or for all cases?

MR. BRYANT: No, this is all. All felonies, all felonies, yes.

COL MCGOVERN: Okay and it goes back --

COL HAM: Well is it in your experience lower or do you know if it's lower on sexual assault cases?

MR. BRYANT: I don't know. I don't know whether that's ever been -- probably at this point somebody has broken that down, but I don't know that as I sit
here. It's a very interesting question to see whether we're higher or lower.

MR. STRAND: But that includes immigration and all those other cases that are fairly easy to get the conviction rate up.

MR. BRYANT: Well, I'm not so much talking about the Feds and I am, you know, the local prosecutors who are doing the grunt work on the crimes of violence, you know, doing the dirty work on those. But the federal would include those, yes.

COL MCGOVERN: The red ones were the ones we had definitely had not addressed yet as a group, so.

MR. BRYANT: I think there's a -- excuse me -- but I think on that one sentence it says on Page 5 where we're talking about the IO recommends. I realize this is a draft but do the words recommend against going forward -- did we leave out the word against? Is this the pressure to prosecute these cases even when the IO recommends --
BG DUNN: Against, yes.

MR. BRYAN: Okay.

CHAIR HILLMAN: I think we should embed that concern in the discussion of how to help defense counsel manage their case better from the start because that's really, that's about the fairness of the trial process to the accused and I think we're seeking to address that through the role of a military Judge so I'd roll that and those concerns into that other recommendation.

COL MCGOVERN: Okay.

CHAIR HILLMAN: The other things that we didn't talk about here, the problems with seating a panel due to military sexual assault training, I'd also roll that into the military judge. The military judge already manages the voir dire process and I feel like that that is -- we can recognize there that is a longstanding issue but the military Judge has to seat the panel. So and that's always been an issue.
It is -- the recommendation here is revise training. I think it should be cyclical. I mean the training shouldn't -- if there's -- training needs to be effective and that's sort of a separate. We're going to move to talk about training of prosecutors and defense counsel now.

But in terms of the training that's happening service-wide, it is a problem if this is likely a point in the evolution of that training that they're taking a -- they're distilling a message from the training that's not effective. The training needs to be cyclical and that is they're going to return to the same lessons to get a more nuanced portrait of this as time goes on.

MR. STRAND: It also has to be accurate. I would add to this recommendation or actually change this recommendation that the training, when you talk about what is an what isn't sexual assault, should not be done by Victim Advocates on a generic definition.
It should be done or designed and created by lawyers and investigators who know Article 120. It should be designed around 120 offenses and scenarios should be designed around Article 120 offenses and that's what should be trained to the force. That's not what's being done.

COL MCGOVERN: And I apologize, that was actually General Dunn's recommendation this morning, it wasn't updated into this version, but the prosecution was that --

BG DUNN: The lawyers get involved in what's put out --

COL MCGOVERN: Lawyers vet that training.

BG DUNN: Lawyers vet the training, right.

CHAIR HILLMAN: Okay, so we're going to set aside the red pages now. Is that okay?

COL MCGOVERN: Yes, certainly.
CHAIR HILLMAN: All right, so we didn't do the Good Soldier stuff, if you have strong feelings we can talk about it the next time.

A couple of things on here we didn't get to, the -- do defense counsel need their own investigators? If we could knock that off, that would be helpful and then we should go to training before we lose Russ.

COL MCGOVERN: And I think we had a consensus on that before.

CHAIR HILLMAN: Okay, is there any objection, they need investigators?

MR. STRAND: The bit of a sticky wicket on that on is, do they get CID or do they get authorizations and funding to fund their own?

BG DUNN: This is up to somebody else to sort that out.

COL HENLEY: We didn't make a recommendation on that.

BG DUNN: They just need their own
investigators that work for them.

    COL MCGOVERN: In the discussion,

I outlined the possible models based on the
transcript from last time, so please feel free
to edit that, but again, not dictating how the
SECDEF do that.

    COL HAM: I think the final
recommendation was SECDEF directs services to
provide.

    CHAIR HILLMAN: Okay, General
Dunn, Colonel Henley, thank you.
    
So we're going to set aside
prosecution of defense and let's go to
training prosecutors and defense counsel which
is Mr. Strand and Mr. Bryant, right? Because
Russ, you won't be here the next time we
deliver it and so I want to get through that
before we get on to the sentencing piece.
    
Okay, so it looks like we start
with defining what the baseline is for
civilian prosecutors and for civilian defense
counsel. Kelly, do you need more from us on
that or do you feel?

    COL MCGOVERN: No, again, I think
a lot of this is background discussion
information, Dillon, do you think?

    CHAIR HILLMAN: Right and so
you're going to drop in. So those are good.

And then the basic military legal
training here then. We have a recommendation
that the Judge Advocate training should be
sustained and specify that its funding not be
cut and the emphasis on adult sexual assault
cases, actually, in terms of the litigation
training that Judge Advocates are getting,
that should be maintained or encouraged. That
seems pretty uncontroversial.

    BG DUNN: It is a good summary.

    CHAIR HILLMAN: Okay. Next we
have sort of the SVP and HQE, TCAP and then
other service correlates to the Army's special
training.

    MR. STRAND: The big distinctions
we brought out here is that it needs to
reprogram and we discussed this a little bit
the last time is it's designed to be a
temporary program which would be okay if --

COL MCGOVERN: Sir, could you go
back, you said --

MR. STRAND: The HQE program is
designed to be temporary.

COL MCGOVERN: Oh, I thought you
said the SVP.

BG DUNN: Yes, intended to be
temporary.

MR. STRAND: It's designed to be
temporary which would work if we had a stable
workforce but we don't have a stable
workforce, we have military officers coming
and going and so I think we need that
consistent outside look in there.

So we made a recommendation that
they look at making these permanent programs,
the HQE, so that there's some stability within
the SVP and the TCAP programs.

CHAIR HILLMAN: So my -- does the
career litigation track make -- does that have potential to replace the capacity of the HQE?

MR. STRAND: It could. Right now, only the Navy has that. But again, you've got people coming and going even in that career litigation.

COL HAM: Well, that addresses one of your concerns about judges, too, ma'am, because, if you recall, at Bremerton the witnesses -- people discussed, I'm trying not to say witnesses testified in that, all the judges come out of that litigation track as well.

CHAIR HILLMAN: So we need them to be judges, not to be HQE equivalents actually as they get experience.

COL HAM: The military folks.

CHAIR HILLMAN: Right, right.

COL HAM: And all the services have an HQE program now except the Air Force.

CHAIR HILLMAN: And why don't they have it?
COL HAM: I don't know if we have
-- well you had Lieutenant Colonel Christiansen in the August prep session speak
about that and I'd have to look at the
minutes. If you remember, I think he's -- he
did give a reason, I don't remember what it
was.

BG DUNN: We also have the Marine
HQE tell us that she was there but she
couldn't travel.

COL MCGOVERN: That was defense.

BG DUNN: Oh, that was the defense
HQE, but it was -- okay, but still.

MR. STRAND: But the HQE program
in itself is problematic because it's a
Department of Defense program, it's not just
for sexual assault. There's 2,500 HQEs in
Department of Defense Secretary of Defense has
and there's only so many to go around.

So when several years ago, the
Secretary of the Army said he knew about the
program, he said what do you want? What do
you need and that's why we got some HQEs. But it's, by intent five, to six years, you can get five years, you can get an extension for six.

And so, even currently with the --
I'm losing my HQE permanently. I'm not going to get a replacement so that's gone.

The JAG, the Army JAG has lost two of theirs but they've rolled them into term divisions and that's not an enduring solution. And then I know they're hiring another one.

And then when the Defense HQE positions are going away, you know, eventually, I don't know if the Defense is going to have money.

So there's --

COL HAM: They're not HQE position, they're GS-15s.

BG DUNN: They are Defense positions.

COL HAM: They're Defense positions and the, again, I can only speak of
Army, so they may be different but they were
different terms for the different --

The one at the JAG school was a
two year term. So there were different terms
and there were different things and I think
they were turning them into regular not
permanent GS-15 positions.

MR. STRAND: Right.

COL HAM: The other services might
be handling it differently.

COL MCGOVERN: So are you trying
-- in here it says the recommendation is the
HQE program should be funded permanent and
during requirement?

MR. STRAND: Yes.

BG DUNN: Yes, either permanent
positions or I mean there might be some
benefit in leaving it as a -- as leaving the
access to the HQEs because that would mean
every six years you'd get somebody with
fresher experience coming right out of --

COL MCGOVERN: The benefit in the
turnover.

BG DUNN: Right and I think there may be a benefit rather than, you know, although by nature, at least in the Army, the HQEs who are initially hired were well along in their careers.

COL MCGOVERN: So how would you word that, ma'am so that you could still have the term positions?

BG DUNN: I would just leave it the way it is and they can sort it out. But --

MR. STRAND: The problem is if you keep the HQE, you can't, unless you get --

BG DUNN: Unless you can get a reauthorization for another HQE position.

MR. STRAND: Right and that goes through another bureaucracy.

COL MCGOVERN: So --

BG DUNN: I would just leave it because HQEs by their very nature should be older, more experienced people not likely to
hang around for 30 years.

CHAIR HILLMAN: Let's just try to
make clear that the HQE programs in military
sexual assaults serve a critical function and
they ought to be reauthorized

BG DUNN: Yes.

CHAIR HILLMAN: -- on a regular
basis.

MR. STRAND: Yes.

COL MCGOVERN: Can I also ask, the
recommendation here is the Navy's career
litigation track should be encouraged and
codified. That sounds like we've flagged and
softened it which is what we did. So --

BG DUNN: Why do we codify there,
their litigation track?

COL MCGOVERN: Do you want to
address that recommendation to make it a
firmer thing or do you want that all the --

BG DUNN: That they should
continue their career in litigation track
period.
COL MCGOVERN: Should the other services --

BG DUNN: Because each service has their own, you know, the Army SVP program has been -- already addresses being extremely effective. Why would we now say Army, you've got to do career litigation track like the Navy. That makes no sense to me.

COL HENLEY: Do we have our own equivalent ASI, I mean the Army's Additional Skill Identifier?

BG DUNN: There is within that SVP process, yes. You cannot become and SVP until you have met many gates.

COL HENLEY: Yes.

BG DUNN: Exactly. I mean it's effectively the similar.

COL HENLEY: Right, yes, I think it's misleading that the other services don't have a focus on litigation like the Navy may actually call something a career litigation track.
COL HAM: The Army's appears to be qualitatively distinct. They do not hold other positions I believe was the testimony. They give up the opportunity to reach the highest ranks in the --

BG DUNN: The Navy.

COL HAM: -- Navy JAG Corps by, theoretically.

COL MCGOVERN: So it's essentially a career track.

MR BRYANT: Well, suppose we just say the Navy's career litigation track should be encouraged or the Navy's career litigation track and other similar programs in the services, would that satisfy what we're doing here?

CHAIR HILLMAN: I'd like to encourage the other services to consider a career litigation track but I don't want to mandate a career litigation track because I think poses too many problems for implementation.
So the Navy's career litigation track allows the development of expertise in a way that benefits the prosecution of sexual assault. The other services should continue to consider ways to do likewise and we can then footnote to the ways that the Air Force and the Army, whatever they told us about how they're actually doing this.

BG DUNN: Right. Because you -- I mean, frankly, this addresses a cultural issue in the Navy. In the Army, the more you litigate, the more you're going to be promoted. In the Navy, that was apparently not the case. So that's --

COL MCGOVERN: And in the Marines, they seem to think there is no way they could do a career track.

BG DUNN: Right, because of the size of the Marines Corps JAG Corps.

COL HAM: So the Navy folks were only doing this intensive military justice defense prosecution and then they go up to the
defense, provides trial advocacy working in an Assistant U.S. Attorney's Office, being an appellant litigator, it was extraordinarily intense and they were very, very impressive.

CHAIR HILLMAN: It's developing, you know core expertise, it seems to be working but I'm not sure we want to do that and there are probably costs attached to that model.

Okay, then the next one is defense counsel.

MR. BRYANT: Yes, the issue was assessing the advanced training of military defense counsel handling adult sexual assault cases for comparison with their civilian counterparts. I'm not going to read through all the findings unless somebody wants to just sort of keep up with that.

But our recommendation was that current training efforts and programs be sustained to ensure that their military counsel are competent, prepared and equipped.
That sounds pretty vanilla.

But funding should be reviewed to ensure the defense counsel training for adult sexual assault cases are on par with that of prosecutors.

Then this next sentence accounts for our general understanding that those who are going into the defense of sexual assault cases have already been through the prosecution track in the military.

And so to ensure standard for training and experience is maintained for the defense counsel who may be assigned to adult sexual assault cases, it is recommended that no Judge Advocates be permitted to serve in defense counsel billet without having been a trial counsel prosecutor.

COL HENLEY: Would you want to be so definitive and not allow for some --

MR. BRYANT: Excuse me?

COL HENLEY: There could be circumstances where you would have someone who
maybe did not serve as a trial counsel
prosecutor but has significant --

BG DUNN: Civilian expertise

before they came in.

MR. BRYANT: Civilian experience,
yes.

COL HENLEY: So I think like
absent extraordinary circumstances, no -- I
mean I would qualify --

MR. BRYANT: Yes, maybe be

permitted is too strong.

COL HENLEY: Or should not be

permitted or --

MR. STRAND: In the absence of
other extensive litigation experience.

MR. BRYANT: In the absence of
equivalent training?

COL HENLEY: Right. Training and
experience.

MR. BRYANT: Or experience.

MR. STRAND: And the reason we
looked at that is because, you know, the
defense attorneys, rightly so, complained that they didn't have the budget, that, you know, the HQE from one of the services couldn't travel because she didn't have enough money. And they certainly don't have the same money.

So if you have hypothetically, 800,000 going to one service for prosecution training and 400,000 going to defense, that would not seem fair. But if you have the vast majority of your defense attorneys already taking a part of that 800,000 already before they go to defense, it does seem more fair.

So, you know, looking at cost for cost, I don't think we should do that. But what we should do is look for the fact that most of them already have had the advantage of all that great training before they become that defense attorney and so they don't need as much, they just need what's different.

CHAIR HILLMAN: We didn't make any recommendations with respect to the HQEs for the defense the way we did for the
prosecution. Do you want to say anything about HQEs?

MR. STRAND: We should probably do the same thing.

MR. BRYANT: Yes, we didn't make that didn't -- that wasn't on our radar back there.

CHAIR HILLMAN: They did come at us with their resource limitations in their testimony.

MR. STRAND: I think if we replicated the same HQE recommendations for defense that we did for prosecution, it'd be fair.

COL MCGOVERN: Do you want to have just a separate finding and similar recommendation regarding HQEs in general?

MR. STRAND: Probably yes.

MR. FISHMAN: We've talked about that but whatever y'all prefer. That's been discussed.

CHAIR HILLMAN: Yes, however it --
it seems that -- I mean we could do it that way. I guess let's do it that way and let's say we want to -- let's separate it and so that way we're saying the training of the military personnel who are doing this and then the way we're leveraging civilian resources to fill in any gaps and ensure knowledge of contemporary and, you know, the dynamic science and social science that underlies these complex prosecutions.

So, let's make a leverage civilian resources effectively, if that's important and we do it for the HQE program primarily.

Do you have a training part where we talk about sending people to -- is that here -- like that could go with -- the leverage piece of it could go to sending people to civilian training.

Like for instance, you have best practices here, right, civilian or military training.

BG DUNN: You could have a whole
list here, the basic and the advanced.

CHAIR HILLMAN: Right, which is
the military generally, right, rather than the
civilian. And then sometimes we send them to
civilian programs too.

COL MCGOVERN: Right, I think
that's the second recommendation on Page 3
about the SVPs and Rhonni Jaus, it said to
extend that.

CHAIR HILLMAN: Okay.

MR. STRAND: Yes, we added
actually that they should spend time in
civilian prosecution offices at least six
months optimally one year or more.

BG DUNN: Yes, this says here in
the HQE program should be part of program
during --

MR. STRAND: This is on Page 3 in
the recommendation, the first recommendation
in the middle.

COL HAM: One thing that's not --

COL HENLEY: But I think that's in
another paragraph --

BG DUNN: There should be a

COL HENLEY: -- to apply just to

prosecutors.

BG DUNN: It should be in the
defense part, too.

COL HENLEY: Yes, yes.

COL HAM: I'm looking at Page 4

and maybe what you just cited on Page 3 is the
answer but identifying best practices in
civilian or military training, there is no
recommendation -- I'm looking -- no
recommendation to collaborate and reach out to
civilian prosecutors and defense counsel to
collaborate, using the same word.

But that identifying best
practices is all within the services. Was
there a discussion of looking outward for best
practices and looking outward for more
sustained integration and --

CHAIR HILLMAN: There should be.

COL HAM: -- collaboration with
civillian jurisdictions and --

COL MCGOVERN: I know we send

people to civilian conferences all the time.

COL HENLEY: Would that be part of

like the MOUs that the SJA office develops

with the local prosecutor? You would just add

a provision dealing with training -- joint

training.

COL HAM: Not -- I'm --

MR. STRAND: We only covered it in

the training piece, but not necessarily as the

best practice piece.

COL HAM: Okay, not every

jurisdiction has those MOUs, I think, I'm not

sure, and that they're in the minority, I

think, of the site visits that we were able to

do.

I know, I guess I'm just asking a

more global question is -- is there

recommendations to look outside the military

for best practices and best training and

training opportunities?
BG DUNN: But there's extensive --

MR. STRAND: We did talk about

that we're always sending them to a lot of
civilian training programs.

COL MCGOVERN: Right, but I think
maybe and a way you could do it also would be
articulate that the TCAPs coordinate with
those civilian agencies in developing the
training because we're already requiring the
trial counsel and defense counsel to so much
training pulling them away from doing their
cases that, in my experience, the TCAPs were
sending their folks to a lot of the capital
litigation cases, the NCMEC and other things
to ensure that they had the latest training
methods and down to the NAC.

COL HENLEY: Yes, I think that's a
good point to have somebody above coordinating
training because you don't want local SJAs and
counsel developing their own training programs
that may not be consistent with what you're
trying to develop at the higher end Court
level. Is that --

COL MCGOVERN: Well, and like TCAP has the money and the resources and they're the focus.

BG DUNN: But for the Army SVP program there are delineated training that are required for those counsels. So that's not up to the SJA to do.

COL HENLEY: Right, I guess my -- if you develop these relationships with DA Offices on SVP six months to one year training programs, you should assure that whatever training is developed it's standardized. I would imagine --

BG DUNN: Oh, you mean in other words, when you're talking about putting people in local prosecutor offices --

COL HENLEY: Yes.

BG DUNN: -- so you want to make sure that it's in a jurisdiction where they're --

COL HENLEY: Right, you're talking
COL MCGOVERN: Right, no I just thought --

BG DUNN: Yes, you're talking about training conferences.

COL HENLEY: Oh, Okay.

COL MCGOVERN: -- to make sure that they're --

BG DUNN: Not to cause the District Attorneys all that kind of stuff is what we're talking about.

COL HENLEY: Okay. I thought we were talking about six months to one year in a civilian prosecution office.

MR. BRYANT: Well, that's one of the recommendations but there's also a later recommendation that establishes a DoD Joint Training Working Group to assess, oversee and optimize the sharing of best practices and expertise. That's very, very general language and I think --

BG DUNN: And training.
MY BRYANT: -- and training --
and I think we could maybe get a little more
specific in that in terms of taking advantage
of some of the civilian training.
Which -- that's in here, I know we
put that sentence in here.

BG DUNN: I mean all the services
do that.

CHAIR HILLMAN: I think we should
-- the military Judge training piece, I just
want -- in that sentence where we say while
recommending consolidation -- this is in the
best practices -- while recommending
consolidation, all these things render it too
costly and onerous -- can't we just please say
how come military Judges can all go to the
same school and no one else can? So let's
just --

COL MCGOVERN: We put the Judges
training in this section.

BG DUNN: It's because of
throughput is so much smaller.
CHAIR HILLMAN: Fair enough.

Let's just make that distinction. Let's say the volume, you know, the volume of training that's required at the -- I just that's fine.

There are answers to these. I'm not contesting that conclusion. I concur in that conclusion but we need to explain why there's not a uniform system.

BG DUNN: Yes, because they can get them all together in one place and effective --

MR. STRAND: What I heard you saying is can't we all just get along?

CHAIR HILLMAN: All right, we have -- are we -- is there anything else with training you think that our training people want us to focus on?

MR BRYANT: I don't see anything that's on fire in here that we haven't poured water on.

COL HAM: Ma'am, did you want, in addition to that sentence, did you want what
was discussed about judicial training added to
the training block that --

CHAIR HILLMAN: It should be

somewhere.

COL HAM: Your mandate is assess
-- I can't remember what your mandate is. But
one of you said training prosecutors and
defense counsel but you want to add the --

CHAIR HILLMAN: I do because we're
talking about muscling up the military Judge
and so --

COL HAM: So that would go in this
section as well?

COL MCGOVERN: I think so, the way
the flow of the -- because the training of
prosecutors and defense counsel is going to go
before prosecution and defense of sexual
assault cases. So if we mention there the
Judges training, it will justify or help
validate your proposals for the Judge
involvement.

COL HENLEY: Well, in comparative
systems, it's -- I don't think we have any
speakers on this, but it's my understanding
civilian and federal judiciaries do not have
similar training programs. I mean you're
appointed to the Bench and that's it. You're
left to your devices when whoever the
presiding Judge is on training.

So, I think the military is unique
in training their Judges on core competencies.

COL MCGOVERN: We can research
that and then advise --

COL HENLEY: But you've got --

General Cooke could certainly tell you.

COL MCGOVERN: And Judge Jones.

COL HENLEY: And Judge Jones. I
mean you can get that what she went through
when she went through when she was appointed
to the Bench, or confirmed to the Bench. So
and I think we do a pretty good job training.

MR. BRYANT: Some of this harkens
back to the investigators, each service don't,
you know, they're traditionally -- they don't
want to join with anybody else in joint training. But the Judges are -- I understand your point, like well there's a lot more investigators, there's a lot more prosecutors, attorneys than there are Judges.

But they don't have to all go at the same time. There's a way to -- you can train hundreds and thousands.

BG DUNN: But you have -- no but you've got environmental law, you've got labor law, you've got operational law, you've got --

CHAIR HILLMAN: All right, pause.

Pause. Okay, so --

BG DUNN: -- and so many classrooms, so many instructors, so much --

CHAIR HILLMAN: We're not going to finish this sentencing piece, but I want to get your reactions to at least to some of this.

So we fronted the biggest recommendations, I think, the most global recommendations of the sentencing review and
that's sentencing -- we recommended sentencing
by military Judges rather than panel members
and recommended that unitary sentencing be
abolished in favor of sentencing tied to
specified charges.

COL HENLEY: So that would be the
maximum sentence would be the maximum for the
highest -- the top charge? So if there's --

MR. STRAND: No, they charge for
each offense, right?

COL HENLEY: So you have
consecutive sentences?

MR. BRYANT: We could still have
them concurrent. I don't think that's what
we're saying. We just want to see -- this
would mean that for each specification, there
would be a separate sentence whether -- we're
not getting into whether the Judge can run
them concurrently or do they have to be
consecutive. I don't think that was our
concept.

We just want to know, okay, for
the smoke and dope, you've got -- what was
your sentence and what was the sentence for
rape? Don't just tell me it was, you know
five years, thank you very much.

COL HAM: So when there's a
25-page charge sheet with 87 charges, what do
you do?

COL HENLEY: Or a 25-page charge
sheet for bad checks and you have to sentence
for each bad check.

BG DUNN: Each bad check.

COL HAM: You sentence for each
bad check.

MR. FISHMAN: You probably need a
better prosecutor.

BG DUNN: That's easy.

COL HAM: But why is that --

BG DUNN: Determine the -- you
divide by the charges for the bad checks. I
sentence you to one year, one month and three
days for each check.

COL HAM: With a maximum sentence
of 875 years, I sentence you to three months
of --

MR. BRYANT: You're still writing
checks? I thought they were using credit
cards.

COL HENLEY: It would be one day,
it would be one day for each check.

MR. BRYANT: How many forged
checks are they doing in the military, really?

COL HAM: There'd be multiple
larcenies and multiple ATM thefts.

BG DUNN: Right, right. You know,
we steal your ATM card and use it 14 times,
filining of 14 charges and the Judge has to
sentence on each one separately?

MR. FISHMAN: So the prosecutors
who think they're getting paid by the charge.

COL HAM: On various occasions.

COL MCGOVERN: It is how you
charge on those.

MR. BRYANT: I mean when push
comes to shove, aren't they going to say well
if you plead guilty to five, we'll knock off nine?

COL HAM: Yes.

BG DUNN: No, that's not what we do.

CHAIR HILLMAN: Okay, I want to be respectful of the transcript. Okay, so let's talk one at a time.

Any comments on the -- are we doing okay here -- what comments on the sentencing by Judges or the unitary sentencing recommendations?

COL MCGOVERN: On a serious note, do we -- should we explore or at least address the issue that it will need to be contemplated about concurrent or consecutive? I mean here we are informing them, but I mean should that be something we address?

BG DUNN: It says for different offenses they can pick consecutive or concurrently. Is that what you said? Sorry.

COL MCGOVERN: Do we need any
additional detail since that was laughable?

CHAIR HILLMAN: We need more

additional -- we need -- I mean this is our

sketch of --

COL MCGOVERN: Okay.

CHAIR HILLMAN: --

recommendations. I mean you have to make us

sound legitimate. So yes, we need some more

help with what actually needs to be in there.

So this is just our first glance at it,

definitely.

BG DUNN: Maybe we should allow

grouping of -- a group sentence on like

charges, for example, multiple uses of an ATM

card.

COL HENLEY: And you would still

have the exception for capital cases.

CHAIR HILLMAN: Well, we'd have to

recommend the -- I mean that's a separate

process. I wouldn't recommend any changes to

the capital sentencing process, so we'd carve

that out.
MS. FRIED: Plus, we're still talking about sexual assault.

MR. STRAND: I mean the prosecution you've got a whole charge sheet full of stuff and --

COL MCGOVERN: Right, with a lot of these --

MR. STRAND: -- you get a conviction on it, you go twice these convictions?

MR. BRYANT: Yes, for the sentencing?

COL MCGOVERN: General Cooke has pointed out a lot of these proposals would --

MS. FRIED: That's true but that's what I believe.

CHAIR HILLMAN: We're having two conversations at once and it's making it tough for the court reporter to do this. So what were you on over here?

MS. FRIED: I was just going to say, the mandate that this response and this
panel is limited to sexual assault. So whatever recommendations come out of that, I think the purpose of the report it would be this panel, sexual assault. Now what happens to the greater picture, I think, is going to be up to DoD or whoever, Congress.

But I think, you know, we talked about larceny and the other cases but I was just trying to bring us back to the sexual assault.

COL MCGOVERN: I think General Cooke has raised the issue in previous meetings that we'll need to address the fact that these proposals would probably need to be explored system-wide because you couldn't just do a unitary sentencing eliminating for sexual assault because these are -- include multiple charges.

BG DUNN: Right. These recommendations have to apply to the entire system just like the military Judge recommendations, they're not just sexual assault.
assault cases it has to fly through the entire system. So we may be outside our mandate.

MR. STRAND: Well, I don’t think we're outside our mandate, it's just that we're recommending to fix sexual assault to make sexual assault better, to make prosecutions and reports and defense of these cases.

These are the recommendations and you can't separate them, even on a typical sexual assault case, you might have the sexual assault defense, rape. You might have adultery and you might have, you know, using your charge card, you know for TDYs and things like that. It's going to encompass the whole thing.

And so I mean, I think there's an understanding any of these recommendations we make for -- in this area especially, is going to impact the whole system.

MR. BRYANT: I think it would look and sound worse in response to you, Maria, if
we said should sentencing by military members
in sexual assault cases be eliminated. That's
like what, just that one? That's going to
raise more questions than in just saying
broadly that we need to eliminate -- we
recommend eliminating unitary sentencing and
we recommend eliminating sentencing by panel
members.

MS. FRIED: Right. I agree with
that, Mr. Bryant. The only thing I was trying
to do was kind of bring back the focus to
sexual assault and we can also footnote or
note that this would have broader UCMJ
implications for other offenses without
getting wrapped up right here with how's this
going to work with larceny? How's this going
to work with other offenses?

MR. BRYANT: Okay, all right.

MR. FISHMAN: Just to be clear,
since we don't have it in front of us, the
discussion section addresses all the
information that gives rise to this. So, that
highlights these perception issues and the
issues that have --

COL MCGOVERN: Pertained to sexual
assault.

MR. FISHMAN: -- urged the
discussion from the sexual assault vantage
point.

CHAIR HILLMAN: So the other --
this is also, the sentencing guideline and the
mandatory minimum questions are raised here.
So we did not recommend sentencing guidelines
be adopted and we did not recommend mandatory
minimums other than what is already out there
actually, which is referenced in the
recommendations of the prosecution here about
mandatory minimums which is we now have the
requirement in the NDAA that persons convicted
of a sexual assault be administratively
separated.

So we need to -- the prosecution
folks, if you look back at this, they
recommended that we tell Congress to amend the
mandatory minimum requirement because it includes low-level sexual assault cases as well as penetrative offenses and that Congress should repeal that law for lower-level non-penetrative offenses, reconsider the requirement there.

So that's the recommendation from -- that we bracketed from before. Here we opted in the Sentencing Subcommittee to, what did we say, given the current lack of reliable evidence regarding the effectiveness of mandatory minimum sentences and improving outcomes. We probably should say, they should not be established to improve the military's response to adult sexual crimes any more than what we actually already have. But we didn't recommend repealing that piece.

BG DUNN: But this is not really a mandatory minimum sentence. That is an administrative process that must occur after the trial.

CHAIR HILLMAN: Correct.
BG DUNN: So it's actually, it's a fine line, but it is a line. You know, I mean I don't even know if we should actually characterize this as a mandatory minimum sentence because it is --

COL MCGOVERN: I think it's being perceived as a mandatory minimum.

BG DUNN: Well maybe perceived, but I think we need to make it clear that this is an administrative process that occurs after a conviction, if there is no discharge. Correct? It's not -- I mean the Judge does not discharge, does not administratively separate the individual.

MR. FISHMAN: I'm sorry, I'm confused. I'm confused.

What we were intending to talk about was under this, the new NDAA where it does mandate an actual punitive discharge, that's what we were trying to raise.

BG DUNN: Oh, okay, I'm sorry.

COL HAM: That's not what this
BG DUNN: That's not what this says. Right.

MR. FISHMAN: Which part are we referring to? I'm sorry, I lost it.

COL HAM: The mandatory discharge requirement builds upon a system that already requires administrative processing. That's what we're discussing. Right?

BG DUNN: Right.

CHAIR HILLMAN: Okay, I'll tell you what, we're not going to get through this right now. I think it's actually a little too complex. We need to make sure that we get this. Okay?

BG DUNN: I'm sorry, we're talking about the mandatory dishonorable discharge.

MR. STRAND: I agree with these recommendations and what I see we're not doing is we're not punting to the next panel. We're saying that we have enough information right now that we're not even recommending this be
explored anymore. This is our recommendation and I think that's a good thing.

CHAIR HILLMAN: Okay, so Russ, is there anything else? We're going to lose you for the next time. I think the rest of you -- are you here next time Colonel Henley?

COL HENLEY: Yes.

CHAIR HILLMAN: Okay, so you will not be here. So General Dunn, is there anything you want to add then?

Of course, you'll have the opportunity to respond on this but if there's something that you should add now at sort of the drafting point as we go forward as everybody works this out.

MR. STRAND: Just a procedural question. Because we went through a lot of verbal stuff on our subcommittee today, we haven't seen the write-up. And before they go out to the whole committee, is that going to come out from you just to us first?

COL MCGOVERN: No, the teams' prep
sessions were permissible because we briefed it out at the subcommittee meetings. From here on out, our drafts will be provided to the entire committee. Is that accurate?

BG DUNN: But we can still make our corrections and stuff like that --

MR. STRAND: Yes, our comments.

BG DUNN: -- just in a more public venue, though.

COL MCGOVERN: You may have more because you've explored the subject in greater depth than some of the other folks but at this point we will send the e-mail out to all ten members.

CHAIR HILLMAN: General Dunn, any other thoughts?

BG DUNN: No.

CHAIR HILLMAN: Okay, thanks everybody. We got through everything but for statistics and surveys at least in a preliminary sense, some of it more in-depth and we're going to count on our brilliant
staff to shape this into a report that we will look at again when we come back.

If there are particular things as you think about, we covered a lot of ground today, that you want to flag to make sure we actually discuss, for those of us who are here on the 11th, send that to Colonel McGovern and we'll make sure that we flag those things.

BG DUNN: And we're going to have some e-mail review back to the staff.

COL HAM: Please remember to e-mail directly to Colonel McGovern and not to each other.

BG DUNN: Yes, yes.

COL HAM: And then I guess the final item is if there are things that are not -- my brain is dying -- if there are subject matter areas that have not already been addressed, regardless of whether they fit into one of these buckets, if there are any other items that you would like to engage the subcommittee on, please let Lieutenant Colonel
McGovern know so that we're not missing any
big picture or small picture items that you
might want to discuss and make recommendations
on just because they didn't fit into a bucket.

CHAIR HILLMAN: Okay, thanks
Colonel Ham. Thanks Colonel McGovern. I
think we're done.

MS. FRIED: Okay, thanks everyone.

The meeting is closed.

(Whereupon, the foregoing matter
went off the record at 4:59 p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual Assault Crimes Panel

Before: US Department of Defense

Date: Tuesday, March 25, 2014

Place: Arlington, Virginia (teleconference)

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]
Court Reporter