

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

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DELIBERATION SESSION

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TUESDAY
MARCH 25, 2014

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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

ALSO PRESENT

Maria Fried, Designated Federal
Official

Janice Chayt

Dillon Fishman

Colonel Patricia Ham

Lieutenant Colonel Kelly McGovern

Terri Saunders

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

12:54 p.m.

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

1 military as compared to civilian
2 jurisdictions.

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

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

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

22 Kelly, should we talk about any

1 other logistical or administrative pieces
2 before we begin?

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

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

21 The general format of the report,
22 again, don't want you to be surprised. At

1 this point we're not looking at a long
2 narrative with just findings and
3 recommendations at the end.

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

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

19 And as we go back and revise
20 these, we will -- it may do that in DTF-SAMS,
21 we will charge those agencies or entities with
22 that responsibility rather than just saying

1 this needs further study. Really try to hit
2 it home who needs to take action.

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

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

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

21 So ambitious, but by April 1st we
22 need to be having you all reading these

1 materials for us.

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

6 LTC McGOVERN: Yes please.

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

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

15 COLONEL HAM: If you all provide
16 your written comments to Lieutenant Colonel
17 McGovern, then she'll reflect everybody's
18 comments on a document that is sent back out
19 to you. But then Dean Hillman can use it to
20 facilitate a teleconference or meeting,
21 whichever you decide. And you can go through
22 everybody's comments and asides.

1 CHAIR HILLMAN: It will be a
2 teleconference.

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

11 LTC McGOVERN: Right. And April
12 11th then will be a time for us to do a little
13 of that in person, but I think that will
14 primarily be tying up the statistical and
15 survey analysis because we have not
16 deliberated on that a lot as a group.

17 COLONEL HAM: If I can make one
18 logistical point ma'am. Dean Hillman, on the
19 5th and 6th of May, that's the next full RSP
20 meeting. That's going to be held at George
21 Washington University School of Law. Same
22 location as the meeting on January 30th for

1 those of you who were there.

2 And Dean Hillman, it's up to you
3 and the other Subcommittee Chairs on how you
4 determine to present your Subcommittee's
5 report to the full panel.

6 Whether by you briefing it by
7 having -- I mean whatever options you think of
8 having some of your Subcommittee members
9 there. However you determine to do it is up
10 to you.

11 MS. FRIED: And if I might add, on
12 April 18th when the Panel gets the report,
13 that's for purposes of the individual Panel
14 members to read it. But the deliberation
15 happens on May 5th and 6th.

16 LTC McGOVERN: Right.

17 MS. FRIED: Right. And you'll be
18 setting. Thank you.

19 COLONEL HAM: We're just trying to
20 give a couple of weekends for the full Panel
21 members to be able to digest all three
22 Subcommittee reports.

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

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

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

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

20 LTC McGOVERN: Right. And a few
21 members will be traveling and may not be as
22 available.

1 BRIGADIER GENERAL DUNN: Yes, I'm
2 out of the country until the 4th of April. I
3 leave on Saturday, so basically all of next
4 week. And then I won't be here on the 11th,
5 I'll be in Hawaii.

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

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

16 So the methodology piece that will
17 be in the report, I think that we should have
18 you know, members of the Subcommittee, if you
19 can be there on May 5th and 6th, help present
20 the findings for the parts of the report that
21 you worked on. Because that's how we set this
22 up.

1 So if you're available on the 5th
2 or 6th, if you could let Kelly know. And
3 we'll -- and we'll try to have people support
4 those parts of the briefing, because I'd like
5 for the Panel to hear from the people who have
6 been working on this throughout, because of
7 all the experiences that you've had and the
8 expertise that you bring to it. That's the
9 point of the Subcommittee is to have some
10 outside experts help the Panel with figuring
11 out what to recommend here.

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

20 Instead of Subcommittee report,
21 Subcommittee report, Subcommittee report,
22 deliberate. She thought that would make more

1 sense if the full Panel could deliberate
2 immediately after hearing from the
3 Subcommittee.

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

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

10 LTC McGOVERN: Approximately four
11 hours per Subcommittee.

12 MR. BRYANT: Four per?

13 LTC McGOVERN: Four hours per, yes
14 sir.

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

16 CHAIR HILLMAN: Ours is bigger,
17 so.

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

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

22 LTC McGOVERN: Right. So if we

1 recalls 6 May.

2 COLONEL HAM: We have how many?
3 We have received some commentary, so there
4 will be public comment presents both on the
5 5th and the 6th.

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

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

1 cover in great detail.

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

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

18 There really is at this point not
19 too much overlap.

20 CHAIR HILLMAN: Okay. So we're
21 good to go. Investigations. General Dunn?
22 Mr. Strand?

1 MR. STRAND: I'd like to thank the
2 Gentlelady from California for yielding the
3 remainder of the time for today for
4 investigation topics.

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

12 Patrol response, patrol officer
13 response, we believe that DoD has this right.
14 Basically we limit the response to responding
15 MPs, security forces, to just basically
16 providing basic services to the victim.
17 Protecting property, protecting the evidence.
18 And then referring it immediately to a
19 military criminal investigative organization.

20 So the model of limiting patrol
21 officers, we are recommending that we retain
22 that and sustain it.

1 The next one, the next area is DoD
2 policy requires all sexual assaults be
3 investigated by an MCIO. During some of our
4 visits and some of the information we received
5 from the field, particularly from some of the
6 MCIOs, they have some difficulty you know
7 doing that with the significant increase in
8 reports of things, cases they weren't working
9 before the change.

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

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

20 Special victims capability
21 response teams --

22 CHAIR HILLMAN: Sorry, Russ, just

1 one second there. So you're not recommending
2 a change in the requirement that the MCIO
3 investigate, but you're recommending
4 supplementing their resources by bringing in
5 agents from other units, is that right?

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

8 CHAIR HILLMAN: Okay, or
9 investigators, okay.

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

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

20 MR. STRAND: And we think that
21 would still maintain the spirit of the
22 requirement that they have a serious -- that

1 they have the MCIO oversight. Because in some
2 of those cases, in the grabbing and the
3 touching cases, you know as well know with sex
4 offenders, they might have other cases, there
5 might be other difficulties. And we want to
6 make sure that we have one agency meet service
7 oversees that and can look for those potential
8 other issues.

9 CHAIR HILLMAN: Thank you.

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

11 Special victims capability
12 response team. The multi-disciplinary
13 approach that civilians and many civilian
14 agencies take, we want to -- basically our
15 recommendation is, we think we're doing it
16 well. But we want the DoD to monitor what
17 works well for each service in each location.

18 That DoD be required to monitor
19 and ensure sharing of services best practices
20 and ongoing working groups. And consider
21 recommendation of changing the SVC requirement
22 to a SARC requirement.

1 LTC McGOVERN: I just want to pose
2 for the group that some of these
3 recommendations may already be things being
4 done. Such as ongoing working groups. And
5 that we might want to make -- and we know that
6 installations have SARCs and special victim
7 capabilities in the testimony that we've
8 heard.

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

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

17 So as we look at language, as we
18 look at acronyms, as we look -- so for
19 example, you know the services have all
20 established some sort of a review board for
21 sexual assault cases to see what the system
22 response is. And they all call them different

1 things. And then eventually they morph into
2 different things.

3 Even what we're calling our
4 special victim counsels in the different
5 services are called different things, and may
6 be morphing different things. Our victim
7 advocates are called different things and
8 morphing into different things.

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

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

22 BRIGADIER GENERAL DUNN: I know to

1 me that's sort of a victim focused, so that
2 victims understand then in a deployed
3 environment on a joint base, you know what is
4 available and they understand the terminology
5 across the board. Because in a joint
6 environment you may not understand other
7 service acronyms or designations.

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

15 MR. STRAND: That is going on.

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

21 Because I feel like putting our
22 imprimatur on existing practices helps improve

1 the likelihood that they'll continue to be
2 effective and would get the attention they
3 deserve. Where as if we say you really need
4 to do these other things, and we don't mention
5 the things that are currently working, then
6 the attention could swing away from them.

7 Does that makes sense?

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

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

18 LTC McGOVERN: We'll work on that.

19 MR. STRAND: Okay. Special agent
20 selection and assignment. In both military
21 and civilian agencies, their response to
22 sexual assault can be impaired by prejudices

1 and biases potentially, especially if a person
2 doesn't want to be doing that job
3 particularly. They don't feel that they are
4 well suited for the job. They are even
5 against the job.

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

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

22 So we're recommending that MCIOs

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

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

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

22 MS. CHAYT: And the supervisory

1 issue.

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

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

21 And so we just want to make sure
22 that those positions are seen as not

1 protected, but if you're in that supervisory
2 position, you should be supervising those
3 sexual assault investigations.

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

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

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

21 MR. STRAND: Yes, I'm --

22 BRIGADIER GENERAL DUNN: It's kind

1 of a -- it's kind of an issue that arose and
2 there's really no -- I mean it's more calling
3 attention to the issue. That you --

4 LTC MCGOVERN: Which site visit
5 did you see that on ma'am?

6 BRIGADIER GENERAL DUNN: Where did
7 you see that Russ?

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

10 BRIGADIER GENERAL DUNN: Okay, so.

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

14 BRIGADIER GENERAL DUNN: Okay.

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

19 BRIGADIER GENERAL DUNN: As a
20 civilian hire.

21 MR. STRAND: As a civilian hire,
22 some of them are being relegated to being a

1 team member with another person being put in
2 charge of them that doesn't have this special
3 training and special -- well the specialized
4 training and experience.

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

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

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

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

20 BRIGADIER GENERAL DUNN: Well we
21 don't want to say they shouldn't be removed.
22 Because I mean there could be cause to.

1 LTC McGOVERN: Are we talking
2 about a person in the service?

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

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

9 MR. STRAND: They do.

10 LTC McGOVERN: So is this in --

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

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

20 Are we saying like, okay we bring
21 in the civilian to supervise all the traffic
22 control people. And then one day because

1 we're short of traffic control, we take that
2 person and say, now you go out and direct
3 traffic. And then we pair them up -- is that
4 what's happening? Is sort of we need for you
5 to actually be on the ground investigating
6 these things as opposed to supervising? Is
7 that it? Is that the problem? Because I'm
8 not seeing the problem.

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

17 MR. BRYANT: Okay.

18 BRIGADIER GENERAL DUNN: And then
19 the military personnel, who are maybe senior
20 and maybe warrant officers, rotate and a new
21 person comes in, doesn't like that independent
22 over -- you know, that independence. And is

1 somehow concerned about their own
2 responsibility for you know, all the
3 investigations on the installation.

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

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

17 MR. BRYANT: Don't we run the risk
18 here if we just put this all in your
19 Subcommittee recommendation that the ultimate
20 readers and actors on this are going where the
21 heck is this going on? I want somebody's
22 head. This shouldn't be happening. It makes

1 it sound like it's a major problem and it's
2 not really a major problem.

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

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

20 But that's maybe not something for
21 the broader view of DoD, so we can remove that
22 recommendation. But I'd like to keep the

1 recommendation on assignment for voluntariness
2 and removal from you know, those positions if
3 they demonstrate negative biases and those
4 types of things.

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

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

16 BRIGADIER GENERAL DUNN: Russ, how
17 about this. How about if we say something
18 along the lines of MCIO commanders, so that
19 puts it up there at the MCIO commander level,
20 you know -- and I don't want to say will, but
21 should generally utilize investigators who
22 have -- you know with the appropriate training

1 in the positions for which they're trained or
2 something like that.

3 MR. STRAND: Right.

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

9 MR. STRAND: Right.

10 BRIGADIER GENERAL DUNN: Or
11 something like that.

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

19 Our findings are basically that
20 there's a combination of things being used and
21 ways that these colocated facilities are set
22 up. Our recommendation is to establish

1 assessment to see what works well for each
2 service and each location.

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

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

14 MR. STRAND: Okay.

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

18 MR. STRAND: Okay.

19 COLONEL HAM: Do you have any best
20 practices Mr. Strand? Or I'm not sure if it
21 would be a recommendation or a finding on the
22 -- your initial finding recognized it's

1 possible issues with privilege. Based upon
2 that finding, do you have any best practices
3 for entities that should or should not be
4 colocated? Or no?

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

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

16 And at those locations, we would
17 certainly recommend that if they understand
18 that that might be a problem, then you've got
19 to make sure that there's alternate locations
20 that they can meet in. That the public knows
21 about that. Potential victims know about
22 that, to mitigate those.

1 I think it's more of a perception.
2 I don't think it's -- I didn't see anything.
3 I don't know if anybody else did on any of the
4 site visits, where it was an actual problem.

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

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

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

22 The problem is you would have the

1 same concerns. You know, you had the victim
2 advocates that were seeing people there. But
3 the victim advocate was also seeing people
4 primarily in another location.

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

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

15 Unfortunately it also depends on
16 personalities. And emphasis on certain areas
17 at certain times. Resourcing. I think our
18 basic conclusion on this, subject to your
19 input is it can work. And it can be helpful.
20 And it can really send a good strong message.
21 But it can also send a potentially negative
22 message as well.

1 CHAIR HILLMAN: I think so long as
2 you flag that this raises issues which you
3 said first of privilege and independence, I
4 think that's what we need to do. Because
5 we're not prepared to say that colocation
6 creates unresolvable conflicts.

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

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

21 MR. STRAND: Well again, it
22 depends on the installation resources as well

1 too. Some installations are actually grouping
2 a lot of victim services together like
3 Quantico, to where even if the victim -- so if
4 the victim goes in for help, they're not seen
5 going into a sexual assault place, which can
6 also be a problem.

7 BRIGADIER GENERAL DUNN: Right.

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

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

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

21 MR. STRAND: We left the approval
22 for agents using pretext calls as was. The

1 DoD should review and standardize electronic
2 intercept requirements. We discussed this
3 during our last meeting. We left that as is.

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

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

17 The second recommendation is --

18 COLONEL HAM: On what? I'm sorry
19 Mr. Strand, a -- I just didn't hear the words.
20 Procedural limited waiver?

21 MR. STRAND: Procedural limited
22 waiver.

1 COLONEL HAM: Oh, procedural for
2 limited waiver.

3 MR. STRAND: For specified --
4 right.

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

10 MR. STRAND: Correct.

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

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

15 MR. STRAND: Correct.

16 BRIGADIER GENERAL DUNN: Right,
17 exactly. Exactly.

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

1 advisement?

2 CHAIR HILLMAN: Right. My
3 question is, what additional information do
4 you need to make the decision about what
5 should happen there?

6 MR. STRAND: That's a great
7 question Dean Hillman. I don't have a good
8 answer for that.

9 LTC McGOVERN: My question from
10 the last meeting was your finding was -- and
11 we were going to get more clarification. That
12 some NCIS agents are not reading their rights.

13 BRIGADIER GENERAL DUNN: That's
14 the second --

15 MR. STRAND: That's our second
16 finding that we're going to get into.

17 LTC McGOVERN: Okay. Okay.

18 MR. STRAND: So we have two
19 different findings. One is that it's not
20 being done, you know -- well the first finding
21 is we're reading rights to people who come in
22 to report a sexual assault for collateral

1 misconduct on a regular routine basis.

2 BRIGADIER GENERAL DUNN: And that
3 has a chilling effect.

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

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

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

13 MR. STRAND: Yes.

14 CHAIR HILLMAN: And we need to
15 study it further.

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

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

1 so.

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

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

16 MR. STRAND: I would go even
17 further to say basically just follow civilian
18 standard practice. I know the military's
19 different than civilians on collateral
20 misconduct because most prosecuting agencies
21 aren't going to prosecute. They're not going
22 to take action on collateral misconduct. It

1 doesn't effect -- or affect clearances and
2 other things.

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

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

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

21 BRIGADIER GENERAL DUNN:
22 Impossible. That's not going to happen. Like

1 not at 2:00 in the morning, that's the issue.

2 MR. STRAND: Right.

3 LTC McGOVERN: Have you considered

4 --

5 BRIGADIER GENERAL DUNN: There has

6 to be some method other than what NCIS does.

7 There's got to be some way to do it.

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

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

20 LTC McGOVERN: I guess I am just
21 concerned right now because we're -- today we
22 want to clarify and update our

1 recommendations. And based on reading the
2 previous transcripts, have gone through this
3 and down the line to say it would be very
4 difficult to articulate what the minor
5 misconduct was versus major. Military versus
6 non-military.

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

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

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

21 MR. STRAND: Who would they have
22 advised of their rights at that -- well sorry,

1 --

2 LTC McGOVERN: Well you have to
3 advise of their rights because then -- I mean
4 Philadelphia I think at PSARC informed you all
5 that they generally take it as a policy to not
6 pursue collateral misconduct for the exact
7 reasons you're saying. They want -- Captain
8 Darby has stated that in newspapers articles
9 that you all have.

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

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

21 Because the remedy -- so first of
22 all rights advisement is not a punitive

1 requirement as far as -- if an agent doesn't
2 advise right, it's not an impunitive
3 regulation that you have to provide you know
4 rights advisement. Article 31 is a UCMJ.

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

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

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

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

22 You know we could have that --

1 that could accompany the rights advisement.
2 So I think that -- I just to me this is like
3 a circuit split.

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

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

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

18 CHAIR HILLMAN: And all it is is
19 an advisement.

20 COLONEL HENLEY: That's a true --
21 that's a true statement.

22 CHAIR HILLMAN: That's a true

1 statement.

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

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

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

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

22 LTC McGOVERN: Currently the

1 service regulations say that the commander
2 will wait until the prosecution to dispose of
3 those.

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

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

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

19 COLONEL HAM: But they're going to
20 have a special victim counsel as well, which
21 could -- it's a possibility of intervening
22 even before the investigator speaks to the

1 complainant. There's a -- I don't know.

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

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

14 MR. STRAND: That's the remedy.

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

21 BRIGADIER GENERAL DUNN: That's
22 the issue though.

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

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

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

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

21 MR. BRYANT: A statutory
22 obligation.

1 COLONEL HENLEY: Yes, 31(b).

2 BRIGADIER GENERAL DUNN: Yes,
3 Article 31(b) --

4 COLONEL HENLEY: And that's not --
5 that's the impasse, there's no custody --

6 CHAIR HILLMAN: Anybody in a
7 position of authority.

8 MR. STRAND: Well an agent of the
9 government.

10 COLONEL HENLEY: Right. Obviously
11 this not an apt analogy, but sort of the
12 reverse public safety exception where your
13 prosecutor's trying to get information in when
14 there's no rights advisement under public
15 safety exception. Is there something
16 equivalent that we would approach here with
17 the public safety concerns in trying to get
18 the victim to come forward with the complaint?

19 That's why you don't have to
20 advise someone of their Article 31(b) rights
21 until it goes beyond their initial complaint.
22 And there's a public --

1 MR. STRAND: Could we determine it
2 to be an exigent circumstance?

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

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

14 COLONEL HENLEY: Right.

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

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

22 Because if you get into this

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

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

9 BRIGADIER GENERAL DUNN: Right.

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

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

19 BRIGADIER GENERAL DUNN: Correct.

20 LTC McGOVERN: Right.

21 CHAIR HILLMAN: We want it to be
22 standardized, that's what I was going to say.

1 COLONEL HAM: A, the category of
2 misconduct. And B, what collateral misconduct
3 is. How events in time were related to the
4 offense they're alleging occurred. There are
5 -- we do have definitions of collateral
6 misconduct somewhere, it's basically -- I
7 don't want to use -- it's specifically
8 defined.

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

12 COLONEL HENLEY: Yes.

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

16 CHAIR HILLMAN: Thank you. And I
17 think that -- and I also -- I wouldn't leave
18 the possibility of the alcohol and drug you
19 know, whatever treatment program as a you know
20 you can self report without being punished for
21 that misconduct. I feel like that's relevant
22 too.

1 And that's something you could do.
2 If we could make it clear that people could
3 use that right now, they could also get
4 treatment. Which to be honest from a victim's
5 perspective, because this so often triggers
6 substance abuse issues down the road, that
7 would be a positive step.

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

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

17 COLONEL HENLEY: What about the --

18 COLONEL HAM: But see the issue
19 you've identified is the barrier to reporting,
20 so the remedy you're proposing -- the barrier
21 to lift -- you want to lift the barrier to
22 reporting it sounds, but without giving any

1 additional benefit or -- I don't know what the
2 right word is -- incentive to report something
3 to avoid the consequences of your own
4 misconduct.

5 COLONEL HENLEY: Right, so isn't
6 the concern is you have to self report, but
7 then the victim goes into the CID agent, and
8 the CID agent then advises her of her Article
9 31(b) rights and she leaves. They self
10 reported, they've gone in.

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

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

20 But that would eliminate the
21 barrier to reporting then, because they've
22 already reported. I mean it causes them to

1 report, but then they get the benefit in other
2 words is what I'm saying.

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

6 BRIGADIER GENERAL DUNN: That
7 Congress authorize a limited waiver of Article
8 31(b) for certain categories of minor
9 collateral misconduct defined by the Secretary
10 of Defense.

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

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

16 MR. STRAND: As a result of
17 reports of sexual assault. I think both. I
18 think we want to encourage people to come
19 forward. And then once they've come forward,
20 we want to encourage them to continue to be
21 able to cooperate to provide information, and
22 that would do both.

1 BRIGADIER GENERAL DUNN: I don't
2 think you get a benefit from -- it's one thing
3 to say I have an alcohol problem, I need help
4 and go into the alcohol, you know the ADAP
5 program. It's another thing entirely to say
6 that if you can get to CID and report a sexual
7 assault, that you're then absolved of you
8 know, a variety of collateral misconduct.

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

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

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

20 BRIGADIER GENERAL DUNN: Right.

21 MR. STRAND: Or if they go to drug
22 and alcohol and CID or MPI has already opened

1 a case, or security forces investigators are
2 already opened a case on you know, that we've
3 got information that they're dealing with
4 drugs, using drugs, it doesn't give them a
5 pass on that, it's just that we can't use
6 their disclosure that they have been using
7 against them.

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

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

21 BRIGADIER GENERAL DUNN: But the
22 commander can refer the victim to the alcohol

1 program independent of what else is going on
2 because that's not an adverse action of any
3 sort.

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

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

13 MR. STRAND: To get help.

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

22 I guess the point being that it is

1 already being done in the instance. But
2 you're not plowing completely new ground by
3 whatever you're proposing.

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

9 CHAIR HILLMAN: Right, and that
10 was no exception that Congress made to Article
11 31, so why can't we just do that now?

12 COLONEL HAM: Right.

13 COLONEL HENLEY: Right.

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

16 MR. STRAND: Treatment.

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

20 MR. STRAND: But there is also --

21 LTC McGOVERN: But you're lightly
22 exposing.

1 BRIGADIER GENERAL DUNN: Which is
2 where you all ready have all that tied to
3 those policy protections.

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

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

12 MR. STRAND: Okay.

13 CHAIR HILLMAN: Are we close on
14 this?

15 MR. STRAND: Yes.

16 MR. BRYANT: Some of the first
17 things we're doing is just identifying the
18 fact that the collateral misconduct issue has
19 a chilling effect on victims reporting and
20 causes, I don't know, confusion and
21 consternation among the investigators
22 themselves.

1 So that's the problem. Somebody
2 else needs to fix it. We have some
3 recommendations. I -- what would be wrong
4 with the investigator starting out their
5 interview with, before we go any further, I
6 just want to advise you that, I would remind
7 you that you have the right to report drug and
8 alcohol abuse at transaction, whatever the
9 program's called, ASAP, right then. And then
10 he's done it.

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

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

21 BRIGADIER GENERAL DUNN: Yes, it
22 has to be done in the health system. Where

1 you can go -- I mean I can go -- if I'm on
2 active duty I can go into the medical system
3 and admit to all sorts of misconduct and get
4 medical treatment.

5 MR. BRYANT: Okay.

6 BRIGADIER GENERAL DUNN: And
7 that's -- none of that comes back out onto the
8 --

9 MR. BRYANT: Psychotropic drugs
10 and all of that.

11 BRIGADIER GENERAL DUNN: None of
12 that comes back out. But so what we're trying
13 to do is just remove -- I'm a victim at 2:00
14 in the morning, I've had a traumatic
15 experience and now somebody's reading my
16 rights because I had two beers and I'm only
17 19.

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

19 MR. BRYANT: I understand.

20 BRIGADIER GENERAL DUNN: I need to
21 be able to not have my rights read to me now
22 and I also need to be truthful about the

1 incident and all the collateral stuff.

2 So I think what Colonel Ham
3 suggested is that -- is look at a limited
4 waiver of the requirement to read Article
5 31(b) rights to the victims of whatever. And
6 --

7 COLONEL HENLEY: Well, certainly -
8 -

9 BRIGADIER GENERAL DUNN: I mean
10 sexual assaults and violent crime in -- for
11 certain specified categories of collateral
12 misconduct and make the SECDEF specify
13 drinking not that --

14 COLONEL HENLEY: Well, certainly
15 for the initial report, you would want to
16 remove that requirement from the agent. And
17 then you have a cooling off period if there
18 are subsequent interviews

19 Then I think someone can make
20 that determination whether or not a rights
21 advisement should be provided. Because by
22 that point they have counsel, right? I don't

1 know whether --

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

4 MR. STRAND: If they want it.

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

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

9 BRIGADIER GENERAL DUNN: Yes, yes.
10 That person will.

11 LTC McGOVERN: Yes.

12 COLONEL HENLEY: Oh, they will?
13 Okay. So at the 2:00 o'clock in the morning
14 initial interview with CID, they'll have their
15 victim's advocate there, or they're --

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

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

1 addressed at the very --

2 MR. STRAND: It will still be an
3 issue.

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

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

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

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

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

21 COLONEL HENLEY: They're still a
22 victim, they're not a criminal and by reading

1 their Article 31(b) rights, when they walk in
2 thinking they were a victim and then an agent
3 now reads me my right, I'm a criminal?

4 BRIGADIER GENERAL DUNN: Right.

5 COLONEL HENLEY: See you later.

6 BRIGADIER GENERAL DUNN: Right,
7 exactly.

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

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

20 BRIGADIER GENERAL DUNN: Well so
21 maybe instead of being so specific, maybe we
22 should say this is an issue, and the

1 recommendation is that the Secretary of
2 Defense figure out how to fix it.

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

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

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

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

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

19 LTC McGOVERN: We can flag the
20 issue. I just think we continually run into
21 the problem, okay, the SECDEF can say all
22 underage drinking, transactional immunity.

1 But then these cases do involve
2 adultery, fraternization commonly, you know,
3 or those types of disobeying regulation
4 issues. Sleeping in the dorm, and it would be
5 an exhaustive list for the SECDEF to try to
6 think of all these things.

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

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

13 COLONEL HENLEY: And I know we're
14 --

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

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

22 When the victim comes in for the

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

5 MR. BRYANT: Yes.

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

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

14 COLONEL HENLEY: Well I don't --

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

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

22 COLONEL HENLEY: I am not saying

1 that, but I'm sure there's a provision in one
2 of the other Articles.

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

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

8 MR. STRAND: Right.

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

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

20 I had a grenade a ser -- a bunch
21 of grenades that were hidden on a playground.
22 Kids were on the playground. We didn't know

1 which one. Did I advise that person of their
2 rights? No I didn't. Why? Because our
3 important thing was to save lives.

4 But that's where exigent
5 circumstances usually line up.

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

9 COLONEL HAM: Under the MRE.

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

12 MR. STRAND: But the MRE covered -
13 -

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

21 COLONEL HENLEY: You would still -
22 - could be prosecuted.

1 COLONEL HAM: Right.

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

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

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

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

20 So we really do have to do both.
21 Right? We have to change the statute so
22 there's actually room for this. And we have

1 to set out a policy that this kind of conduct
2 isn't going to be prosecuted, right?

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

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

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

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

20 BRIGADIER GENERAL DUNN: And we
21 got to flag the issue and there's got to be
22 some solution to this.

1 CHAIR HILLMAN: and then your
2 folks are going to look at this some more.
3 And how much more time do you need to get
4 through investigations Russ?

5 MR. STRAND: About another hour.

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

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

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

21 And so our recommendation is that
22 DoD implement a policy and procedures to

1 maximize that database with SARCs asking for
2 and entering offender data. That's one
3 recommendation.

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

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

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

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

22 MR. STRAND: Okay.

1 LTC McGOVERN: I just want to be
2 careful with those generalizations.

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

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

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

1 That's our recommendation.

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

4 MR. STRAND: Yes. It expands the
5 -- it expands the ability for the victim to
6 make more decisions and gives them more
7 informed decision making ability.

8 CHAIR HILLMAN: And it push, so it
9 pushes the determination of restricted or
10 unrestricted further down.

11 MR. STRAND: Yes.

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

14 MR. STRAND: Right.

15 CHAIR HILLMAN: It gives victims
16 more control.

17 MR. STRAND: Yes.

18 BRIGADIER GENERAL DUNN: and it
19 provides the opportunity for if the victim
20 decides not to go forward, but the
21 investigators can have a searchable database
22 you know, for them to run it and say you know,

1 there have been two other complaints on this
2 same guy. Let us look at that.

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

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

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

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

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

19 MR. STRAND: We do that all the
20 time with drug information, fraud information.
21 You get bits and pieces, we have raw data
22 folders and we collect information every

1 single day. Same exact kind of information.

2 We don't release it to the public.

3 We use it for our own criminal intelligence
4 procedures.

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

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

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

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

21 MR. STRAND: No. Not for the
22 criminal intelligence. I want to

1 differentiate between what we use as our
2 regular report system database and a criminal
3 intelligence database.

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

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

15 LTC McGOVERN: So the services
16 already have this capability?

17 MR. STRAND: Yes.

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

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

22 BRIGADIER GENERAL DUNN: All the

1 drug stuff. To build a --

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

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

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

14 MR. STRAND: It is good law
15 enforcement.

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

20 MR. STRAND: We do the same thing.

21 LTC MCGOVERN: And is that Army
22 wide then for CID? Is it services wide? Is

1 it DoD wide? What's the capability?

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

4 COLONEL HAM: Can defense counsel
5 access it for discovery?

6 MR. STRAND: No.

7 COLONEL HAM: then who has access
8 to it?

9 MR. STRAND: Law enforcement.

10 COLONEL HAM: Who is law
11 enforcement?

12 MR. STRAND: The MCIOs and the
13 military police security forces. But even
14 that, if the MCIO has the information, the
15 local MPs and security forces don't have that
16 access. It's in a separate database.

17 But the law enforcement, security
18 forces, MPs, naval master at arms, they have
19 their own separate criminal intelligence
20 databases as well. So what happens is if I'm
21 working a particular case, I might ask the
22 local MPs or local -- ask the security forces

1 hey, do you have any information on this
2 neighborhood, on this person, on this family?
3 And they'll look and say yes, this is what
4 we've got and share it with us.

5 And that's really the purpose for
6 this.

7 MS. FRIED: Can a military Judge
8 order?

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

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

22 MR. STRAND: We don't have any of

1 that information.

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

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

15 But if this was in place we might
16 have information from installation X, Y and Z.
17 We can go back to those MCIOs and say okay,
18 when they were at this installation, do you
19 have any crim-intel data. And you know what
20 we'd be able to do? We'd be able to identify
21 our other potential victims and other
22 potential offenses.

1 But that is not in a public
2 database where we release it and it's not used
3 of clearances. It's not used for promotions.
4 It's just not accessible for that. That's not
5 the purpose of it. The purpose is --

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

9 MR. STRAND: No, it only goes --

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

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

17 COLONEL HAM: So the answer's yes?

18 MR. STRAND: Well we don't -- we
19 don't verify you know, the veracity of the
20 report. We don't -- there is no verification,
21 it's just bits and pieces of information that
22 goes into that database.

1 And so if we -- that's why we
2 don't release the information. That's why
3 it's not used for promotions or clearances.
4 Because it is not substantiated information.

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

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

16 Can we use that information? Yes.

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

20 Now can we use that to prosecute?
21 Probably not. But we can use it for the
22 investigative piece.

1 MR. BRYANT: It's great
2 information to have when you bring him or her
3 in and start questioning them too. Like okay,
4 yeah we know what you did at Fort Hood too
5 pal.

6 COLONEL HAM: Right.

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

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

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

15 CHAIR HILLMAN: The recommendation
16 is that we shift the point at which a victim
17 decides about a restricted or unrestricted
18 report until after some information is
19 gathered by law enforcement. They get some
20 information from their special victim's
21 counsel or victim advocate about what their
22 options are going forward.

1 And if the victim at that point
2 makes a restricted report, the data already
3 collected goes into a criminal intelligence
4 database that's searchable by law enforcement
5 in the future.

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

9 COLONEL HENLEY: Right.

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

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

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

22 MR. STRAND: It also takes care of

1 another issue. Some victims don't know what
2 the law enforcement process is. They don't
3 know what the criminal investigative process
4 is. And if they're being told by a victim
5 advocate, you don't have to talk to law
6 enforcement, that might be a barrier to
7 reporting. Because what are they hearing from
8 somebody who's helpful? You don't have to do
9 this.

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

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

22 COLONEL HAM: Does the database

1 have a name?

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

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

20 And it can really be helpful. I
21 ran a criminal intelligence center for several
22 years. And it was just -- and we had criminal

1 intelligence coordinators. We have criminal
2 intelligence agents that that's all they do is
3 collect information from field interview
4 cards.

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

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

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

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

20 CHAIR HILLMAN: Okay, given
21 Colonel Ham's concerns about the database
22 itself and sort of what's happening, could we

1 just look into that and see actually where
2 it's going to end up and who would have access
3 to it, just so that we have -- we can put that
4 in here as well, in with the recommendation.

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

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

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

22 Then there's a second

1 recommendation that goes along with that to
2 address another issue. And that's where every
3 time we work a close, every time we close a
4 case, we have to get a JAG prosecutorial
5 determination. And that's going to be part of
6 our report.

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

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

21 That means --

22 CHAIR HILLMAN: So JAG doesn't

1 determinate it, the convening authority does.

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

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

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

18 BRIGADIER GENERAL DUNN: Beyond a
19 reasonable doubt.

20 MR. STRAND: Beyond a reasonable
21 doubt. And so they're often withholding
22 probable cause determinations because they

1 don't want to be responsible for saying this
2 is a founded case but now I've got to explain
3 I'm not prosecuting it. And that's a serious
4 problem.

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

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

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

14 MR. STRAND: I know they are.

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

18 MR. STRAND: Yes, but when the
19 last thing that a prosecutor gives us, and
20 these are some clear examples. The last thing
21 in a case file that I've seen that the
22 prosecutor gives us, or the magistrate gives

1 us, is there's probable cause for a search
2 authorization.

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

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

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

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

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

21 MR. STRAND: Only in the Army.
22 Also, but every single civilian police agency

1 in the United States --

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

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

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

19 And when that law enforcement
20 report goes forward as a founded report --
21 well actually whether it's founded or
22 unfounded, it still goes in the same database.

1 It is still reported. If we have credible
2 information at the beginning of the case, that
3 information still goes forward regardless.

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

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

16 So it seems a little different
17 when we've heard a lot of the best practices
18 in civilian jurisdictions are for the police
19 force to coordinate more with the prosecutor
20 early on to get the prosecutor to cover them
21 and agree that yes, this is founded or
22 unfounded before the police close a case. As

1 a matter of fact, they just have a bunch of
2 suspended open cases because they don't want
3 to unfound cases themselves.

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

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

18 LTC McGOVERN: After having 19
19 jurisdictions interviewed by the JSC-SAS, I
20 believe the majority, if not all of them, the
21 investigators were coordinating with the
22 prosecutors before making case determinations

1 on penetrative sexual assault offenses.

2 MR. STRAND: Yes. And we do that.
3 We coordinate. We get their opinion. And
4 even the DoD instruction right now says it's
5 an administrative, not a legal decision. Yet
6 we have turned it into a legal decision
7 outside of the current policy.

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

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

22 But then we would still make the

1 determination of whether from an operational
2 standpoint, we believe that person is a
3 suspect. Because that title block doesn't
4 mean and it doesn't say, in fact every report
5 says it, this is not -- this is not a
6 determination of wrongdoing. It is -- they
7 are a suspect.

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

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

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

17 MR. STRAND: Right.

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

1 flow in the civilian community.

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

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

15 But that is -- that is a myth.
16 That is a myth. It is not used for security
17 clearances.

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

22 MR. STRAND: What do you mean the

1 dirt boards?

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

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

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

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

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

22 CHAIR HILLMAN: So who is that?

1 Who's letting commanders decide?

2 MR. STRAND: The Air Force and the
3 Navy.

4 COLONEL HAM: Letting commanders
5 decide which decisions?

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

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

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

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

19 MR. STRAND: The initial titling
20 decisions.

21 COLONEL HAM: Based on credible
22 information.

1 MR. STRAND: Correct. And then to
2 close out a case, according to the DoD
3 instruction, you're supposed to have probable
4 cause to believe that occurred. And this is
5 another part of the confusion. This is one of
6 the findings.

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

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

20 COLONEL HAM: Unless I have it
21 removed because you didn't have credible
22 information in the first place.

1 MR. STRAND: No.

2 COLONEL HAM: Yes.

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

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

7 BRIGADIER GENERAL DUNN: Right,
8 but now she can recommend for credible
9 information.

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

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

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

20 MR. STRAND: It is. It is.

21 BRIGADIER GENERAL DUNN: Or
22 titled, yes. There's a huge difference.

1 Because anybody could be investigated --

2 MR. STRAND: Right.

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

7 MR. STRAND: So moving on, --

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

13 CHAIR HILLMAN: And who should
14 make it then?

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

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

21 BRIGADIER GENERAL DUNN: Oh, I
22 think it's clearly an investigative agency and

1 a lawyer issue.

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

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

6 CHAIR HILLMAN: Okay.

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

11 BRIGADIER GENERAL DUNN: With
12 legal input.

13 MR. STRAND: With legal input.

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

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

19 COLONEL HAM: Mr. Strand I just
20 want to apologize for interrupting you. I
21 don't mean to say I'm an idiot, but I think I
22 wrote the only Article 1 titling that exists.

1 So I look very deeply into these subjects a
2 few years ago. And Congress had ordered a --
3 I think it was Congress, a study of titling
4 throughout the services with the intent to
5 standardize titling on all crimes.

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

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

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

1 vast majority of detectives and police
2 officers around the world do.

3 But I would suggest that you know,
4 how many -- how many police reports do you
5 think are written every single day and
6 finalized every single day in the United
7 States on penetrative sexual assaults? I
8 would suspect that in most of those
9 jurisdictions they don't have a final okey
10 dokey from the JAG -- from the local lawyer.
11 Because they just write them, they write them,
12 they write them.

13 So I think it's something we could
14 probably take another look at.

15 Training for investigators. Do
16 agents assigned to SVUs and as lead agents on
17 sexual assault have required training and
18 experience. Have a robust training
19 requirement.

20 We put in some recommendations
21 based on the last time we met as far as some
22 defense funds, authorizations. And then

1 recommending that DoD designate a lead agency
2 for advanced sexual assault investigations
3 training.

4 CHAIR HILLMAN: Meaning what?

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

7 MR. STRAND: By DoD? Or by
8 Congress?

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

17 MR. STRAND: We're used to doing
18 that. We have a lead agency in forensic. We
19 have a lead agency in all kinds of other
20 things within the MCIOs. That's a normal way
21 to do business within our -- with our
22 groupings.

1 Well we call them executive
2 agencies. So we have an executive agency for
3 this and we have an executive agency for that.

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

6 MR. STRAND: It is.

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

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

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

21 So we could leave that in or take
22 it out. Whatever your pleasure is.

1 BRIGADIER GENERAL DUNN: But we're
2 defining best practices here. And I realize
3 that the fiscal aspects of this on some level
4 are best practice. But I don't think that
5 should be our focus. I think our focus should
6 be on how to best -- so in other words, if we
7 have a working group address the investigative
8 training which exists.

9 MR. STRAND: Right.

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

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

19 LTC McGOVERN: I just note in the
20 DoD IG report provided to the panel, that is
21 really covered a lot and they relish or
22 cherish I should say, their independence. So

1 I just wanted to raise that as an issue for
2 you to consider.

3 MR. STRAND: Right. Yes.

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

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

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

22 Or if I don't want to go to Fort

1 Belvoir for whatever reason, and General Dunn
2 brought this up, you know maybe I'd rather go
3 to Fort Belvoir, or maybe I'd rather go to the
4 civilian facility. I know it doesn't mandate
5 where victims go. But it does create
6 potential problems and issues.

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

17 CHAIR HILLMAN: Is this in the
18 NDAA already?

19 MR. STRAND: Yes.

20 BRIGADIER GENERAL DUNN: Yes.

21 CHAIR HILLMAN: So you're
22 recommending a change in what the practice

1 that's been set up there?

2 BRIGADIER GENERAL DUNN: Yes.

3 MR. STRAND: And --

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

10 MR. STRAND: Right.

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

18 CHAIR HILLMAN: Right on.

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

22 G Okay. Any other comments on

1 investigations? All right, let's stand up for
2 five minutes, okay. And we'll come back in
3 five minutes.

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

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

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

22 BG DUNN: Well, let me just say

1 for the record that Rhonni was supposed to do
2 it before she got on the plane, but I will
3 pinch-hit here and move through these. Okay.

4 CHAIR HILLMAN: You all have
5 handouts on this.

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

19 One thing that we do note or we
20 did note is that, regardless of the structure
21 in the civilian offices that we looked at,
22 each one emphasized the importance of a

1 relationship between the prosecutor's office
2 and police department investigators and victim
3 advocates in sexual assault cases.

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

10 All right. Is the military
11 special victim capability an effective
12 approach to prosecuting sexual assault cases?
13 The FY 13 NDAA required the services to
14 establish special victim capability, which is
15 different from special victim counsel,
16 although they have the same acronym.

17 Most of the services are already
18 implementing this capability. A couple of
19 them have been at it for several years. DoD
20 has published a manual with instructions that
21 oversee this. Each service has designed a
22 different approach based on the service

1 resources and the structure of the different
2 services' staff judge advocate offices.

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

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

18 The recommendation is to continue
19 to fully implement these special victim
20 capability across the services and continue to
21 develop the expertise of prosecutors,
22 investigators, victim-witness liaisons,

1 paralegals in large jurisdictions and to
2 ensure that there is a reach to smaller and
3 more remote installation.

4 MR. STRAND: A question on this.

5 BG DUNN: Yes?

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

15 BG DUNN: Well, I think all of the
16 evidence that we've all heard in terms of the
17 training, the establishment of communication
18 amongst investigators and prosecutors, the
19 focus on specific training for sexual assault
20 prosecutions to be conducted by specific
21 prosecutors and overseen by senior
22 prosecutors, whether it's handled in

1 consolidated offices that do it regionally or
2 whether it's handled in offices installation
3 by installation does seem to be trending
4 positively.

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

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

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

21 COL. MCGOVERN: We can work to
22 merge.

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

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

22 CHAIR HILLMAN: Can I ask about

1 this? I don't know if we're in a position to
2 comment on this, but the undue command
3 influence, unlawful command influence issue
4 with special victims counsel, is there, we've
5 just had a ruling that special victims counsel
6 can --

7 BG DUNN: Create an issue.

8 CHAIR HILLMAN: -- can commit UCI,
9 right?

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

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

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

22 CHAIR HILLMAN: Is that true for

1 special victims, special victims counsel, too?

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

5 CHAIR HILLMAN: Everyone is
6 subject to the code.

7 COL. MCGOVERN: I can go get it.

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

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

21 CHAIR HILLMAN: In other words,
22 the Air Force's interest in ending drug abuse

1 within ranks requires that you convict this
2 individual because this is a, we can't allow
3 this problem. So it moves the focus from the
4 merits of the case and the individual at hand
5 and the conduct that's being punished to the
6 larger issues and makes it look more like a
7 show trial.

8 COL. HAM: And Article 37, Article
9 37(a) does have a section on convening
10 authorities and then no person subject to this
11 chapter may attempt to coerce or by any
12 authorized means influence reaction of any
13 convening approving or reviewing authority
14 with regard to his judicial acts. So I'm
15 trying to piece together the public reports.
16 Again, I don't have any --

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

22 COL. MCGOVERN: Right. On behalf

1 of that victim. In that case, I believe the
2 special victim counsel said my victim wants
3 this, but you also should also consider what
4 this is going to do Army-wide policy for
5 sexual assault in the military, that latter
6 consideration is inappropriate.

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

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

1 COL. HENLEY: Right.
2 Unauthorized. So can't the convening
3 authority consider general deterrence in
4 determining whether or not that's an
5 appropriate agreement to accept or not? I
6 mean, again, that's a rhetorical question, and
7 I don't know what we actually said on the
8 record.

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

17 CHAIR HILLMAN: I'd just like to
18 flag that, in the special victims counsel, I
19 think we should say we need to interpret
20 Article 37 to give guidance going forward with
21 respect to what special victims counsel can
22 do. And I'd recommend that they be able to

1 argue on behalf of the overall deterrence and
2 encouraging victims to report part of it, as
3 well as the particulars of the case. I mean,
4 this is a new thing. I mean, we haven't --

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

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

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

15 COL. HENLEY: Well, that's how you
16 would define unauthorized. To me, that's the
17 --

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

20 COL. HENLEY: I don't know, but
21 I'm sure the judge said I don't know but, in
22 the interest of fairness, I'm going to give

1 the parties a chance to think about it, go
2 ahead and take a week, and then that's where
3 they come up with a -- I mean, I don't think
4 he definitively ruled that there was unlawful
5 command influence.

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

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

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

19 CHAIR HILLMAN: Sure. Yes, I
20 think it would. Yes, more work. All right.
21 Sorry to derail you on this stuff.

22 COL. MCGOVERN: No, that's a key

1 point that we had included.

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

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

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

17 COL. HENLEY: And what special
18 victims counsel can do that would not be
19 unauthorized. I mean, again, I'm not sure you
20 have to amend 37 but give clarification as to
21 what unauthorized means in the context of new
22 special victims counsel. So at least the

1 parties, the military judge, the defense
2 counsel, the trial counsel know what the rules
3 are, and that issue can be fleshed out in
4 pretrial litigation.

5 BG DUNN: All right. In terms of
6 both prosecutor and, in terms of prosecutor
7 interaction with the victim in the civilian
8 jurisdictions that we visited, the consensus
9 is that the sooner the prosecutor begins to
10 form a relationship with the victim the
11 better. And in the military, there is now a
12 24-hour standard for notifying the prosecutor
13 of a case. And then after that, the sooner
14 the prosecutor can meet with the victim the
15 better.

16 So the recommendation is we should
17 sustain the military 24-hour standard and
18 encourage that interaction as soon as
19 possible. Again, with the presence of the
20 special victim counsel, that will play into
21 this process, as well, and we haven't had the
22 time to see how that will play out.

1 Okay. Should there be
2 investigators assigned to prosecutors? In the
3 civilian world, it appears from the evidence
4 that the Subcommittee has when the police
5 close a case they close a case, and the case
6 subsequently moves to the prosecutors. The
7 prosecutors generally have investigators who
8 they use to flesh out the case, so to speak.

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

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

1 addressed later.

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

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

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

20 BG DUNN: Okay. In the civilian
21 sector, district attorneys do have wide
22 prosecutorial discretion in charging

1 decisions. Do military prosecutions also have
2 discretion? Consensus from all the testimony
3 we heard is that, yes, military prosecutors do
4 have discretion in charging up to a point, I
5 guess, for some of the, you know -- well,
6 military prosecutors do have discretion in
7 charging.

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

11 BG DUNN: Yes, yes.

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

15 BG DUNN: No, the commander.

16 CHAIR HILLMAN: The commander?

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

1 levels before it gets to the -- yes, yes.

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

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

14 CHAIR HILLMAN: And then the SJA
15 makes a recommendation with respect to those
16 --

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

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

21 MR. FISHMAN: Well, I'm not sure
22 how it's done. And we haven't really gathered

1 information on this, but we might want to
2 collect it. On the issue of preferral, which
3 is really what we're talking about here, there
4 may be practices that vary. For instance,
5 some SJAs may require their trial counsel to
6 present them with the draft charges before the
7 action of preferral occurs, which is
8 tantamount to them having a decision. But we
9 may wish to gather information on this for
10 you.

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

18 BG DUNN: Right. In the civilian
19 world, they draft and decide whether or not to
20 prosecute. In the military, the trial counsel
21 with supervisory oversight generally drafts,
22 decides what to charge, drafts the charges,

1 but then there's a separate process in terms
2 of making the decision to go to trial. And
3 there may be --

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

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

17 BG DUNN: There are 50 sex
18 offender registries, right? Fifty-one with
19 the federal registry. Well, I don't know how
20 many states have them, but I don't think that
21 any military prosecutor actually looks, I
22 don't think we have any evidence that military

1 prosecutors look at that. The military
2 defense counsel clearly looked at it. I don't
3 think the military prosecutors looked at it
4 because the accused could be being court
5 martialled in Kansas and he could be from
6 Alaska.

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

12 CHAIR HILLMAN: That would be
13 great. Thank you.

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

19 CHAIR HILLMAN: I'll just flag on
20 that. I think that, I don't think convening
21 authorities should continue to have this. I
22 think it should be independent military

1 prosecutors, but that's not going to, if
2 there's others, that's in the role of the
3 convening authority or the role of the
4 Commander Committee's purview really rather
5 than ours. But it's a part where we just
6 overlap on this so

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

20 BG DUNN: That was a pretty lively
21 discussion on that. I mean, you know, from
22 Ms. Jaus' perspective, there was -- I don't

1 even know how to quite characterize it. It
2 was sort of rape and then there was rape with
3 a certain level of violence and then rape with
4 another level of violence, and that is just
5 not something that is contemplated in Article
6 120. It's either rape or it's not rape.

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

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

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

16 BG DUNN: Yes. And another piece,
17 I guess, which fits in here is that Article
18 120 right now does cause considerable
19 confusion, not necessarily in the
20 prosecutorial world but outside looking in.
21 And if Article 120 is going to be revised,
22 then it probably makes sense to make it clear

1 and put the non-penetrative offenses in a
2 separate category from the penetrative -- I
3 cannot say those words.

4 CHAIR HILLMAN: You just said it.
5 But you're not making any recommendation that
6 we modify 120?

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

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

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

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

20 BG DUNN: Okay, good.

21 MS. FRIED: So you might want to
22 ask them to look at this --

1 BG DUNN: Okay. So maybe --

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

7 BG DUNN: Okay. That would make
8 perfect sense. The Judicial Proceedings Panel
9 specifically look at Article 120 with a view
10 --

11 CHAIR HILLMAN: With a view
12 towards? We can punt, but I want to punt with
13 a clear mandate for them. I mean, I'd say
14 that they ought to look for, to balance the
15 harms of another change in the statute after
16 so many recent changes in the statute with the
17 possibility of optimizing the statute to
18 improve the confidence of victims, the
19 messaging regarding the types of behavior that
20 constitutes sexual assault, and the ease of
21 charging with respect to the very, the
22 spectrum of crimes that fall under this

1 umbrella because right now it's just this very
2 big umbrella that obscures as much as it
3 reveals, and it doesn't really help. Anyway,
4 but I'm not sure whether the optimization of
5 the statute is worth the disruption in the
6 system of changing it again.

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

11 BG DUNN: Yes, yes.

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

15 BG DUNN: Oh, oh, yes, I did skip
16 right over that. Okay. We do have, we have
17 heard continuous comment about cases where the
18 Article 32 investigating officer recommended
19 against trying a case, but the commander
20 decided to take the case to trial. And we're
21 going to recommend that the services take a
22 look at that and pass the information back on

1 how many times that happened, what was the
2 result in those cases.

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

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

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

15 BG DUNN: Okay, all right.
16 Forensic psychiatry experts. The military
17 does have forensic psychiatry experts. They
18 are limited. The government does have
19 resources to hire civilians when military
20 forensic experts are not available on the
21 prosecution side of cases. That's what we're
22 discussing right now is the prosecutors.

1 It has, you know, military
2 prosecutors routinely use these experts. As
3 a matter of fact, we got some comment that
4 perhaps they overuse these experts in cases
5 where it's not really required, which may, you
6 know, tie into your previous comment about the
7 one-way ratcheting. You know, everybody is
8 trying to make sure that every case is tried
9 to its fullest, shall we say, in the current
10 environment. And so this really, in the end,
11 is a resourcing issue is that it should be,
12 you know, used when necessary and not used
13 when not necessary in order to conserve
14 resources.

15 All right. Collateral misconduct,
16 I think we have discussed pretty thoroughly a
17 little earlier today. Being read your rights
18 for collateral misconduct when you're a victim
19 has a chilling effect on reporting. In
20 civilian jurisdictions, they have vast
21 flexibility with that. The military does not
22 have the flexibility in terms of reading the

1 Article 31(b) rights. However, current
2 service regulations have established policy
3 reserving action on collateral misconduct
4 until a resolution of the case.

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

19 But in terms of holding off and
20 addressing the misconduct later, the
21 recommendation is to continue to encourage
22 commanders to be sensitive to the issue,

1 establish a policy that there's a presumption
2 in favor of immunity for minor misconduct, and
3 keep the status quo with the commander, as the
4 commander's discretion at the conclusion of
5 the case.

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

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

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

13 BG DUNN: Okay.

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

22 BG DUNN: Since the defense

1 expressed the concern about the demise of
2 Article 32 investigations, so Colonel Henley
3 can address that.

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

11 So if you adopt it, some process
12 where the judge or a magistrate is involved
13 early on in the process, either pre- or
14 post-preferral of charges, to address some
15 early issues in the case, pretrial confinement
16 issues, discovery issues, subpoenas, witness
17 requests. Does it make sense to also have, at
18 the same time, an Article 32 procedure that's
19 being run by an investigating officer, rather
20 than a military judge? And I think those are
21 the two recommendations. One was, I guess
22 that was the proposal, which is don't do

1 anything and just see how the new 32 process
2 plays out, that no longer is a victim required
3 to testify, and see if that addresses some of
4 the concerns.

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

14 So, I mean, that's the proposal.
15 Is that what we were talking about?

16 COL. MCGOVERN: And I think the
17 reason that this overlapped is there were some
18 things that the prosecution, their difference
19 of opinions of how the 32, whether it will
20 actually speed up the process, whether you
21 have your victim, you'll be able to see the
22 victim take the stand or not. There's pros

1 and cons from both prosecution and defense to
2 the changes, but the consensus seemed to be
3 they don't quite know yet, it's too early to
4 tell since we haven't started it.

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

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

21 If a finding of probable cause is
22 made, then another arbitrary figure, the

1 convening authority would have 45, 60 days, 90
2 days to refer to a special general
3 court-martial. If the military judge, in his
4 or her capacity as a military judge, finds no
5 probable cause and the case is dismissed
6 without prejudice, the trial counsel can
7 re-file or re-prefer charges and go over and
8 start again. But at least there's some
9 determination that's binding upon the parties
10 without prejudice if maybe you thought you had
11 the evidence but were unable to convince the
12 military judge the probable cause standard.

13 So I guess what we were
14 discussing, and, Kelly, you can -- and Patty
15 the same -- I think the issue, initially, is
16 whether or not a military judge should be
17 involved at all to address some of the defense
18 concerns about access to information and
19 disclosing information to the convening
20 authority to get experts or subpoenas or
21 documents. And if you accept that and the
22 proposition, then why not have the judge

1 involved in other aspects of the proceeding?

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

18 And I think -- again, I didn't go
19 on any of the visits. But it appears that's
20 one of the criticisms the defense consistently
21 raises is they have to defend their requests
22 where the government does not, and this would

1 seem to at least even the playing field. But

2 --

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

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

12 MR. STRAND: The biggest
13 difference is right now they can't get
14 involved until preferral?

15 COL. HENLEY: Referral.

16 MR. STRAND: Referral. Okay.

17 COL. HAM: With some exceptions.

18 COL. HENLEY: Yes, minor
19 exceptions.

20 COL. MCGOVERN: So I probably
21 didn't set this up the best, tee it up for
22 you, sir, but the list that I just handed out

1 are those issues for the defense team, which
2 then relate also to the 32 issue. Last week
3 or two weeks ago, Colonel Morris had briefed
4 this to the Subcommittee and noted how
5 intertwined the issues of, the concerns of the
6 defense counsel to request experts, witnesses,
7 subpoena power, and all that. So we tried to
8 separate those out into findings, and it
9 continually came back to the judge
10 involvement. And that's where Judge Henley or
11 Colonel Henley has come up with some proposals
12 as to the judge involvement.

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

16 COL. HENLEY: I think that would
17 be beneficial if the focus, again, is on the
18 victim. It appears one of the criticism, from
19 the victim's perspective, is length of time
20 the process takes, and part of that, through
21 no fault of the defense or the prosecution, it
22 just takes a while to schedule these types.

1 So you have an accusation, there's a delay to
2 referral, there's a lengthy day to 32, and
3 then there's a longer delay on determining
4 whether or not to refer these charges to
5 court.

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

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

12 MR. STRAND: Right.

13 COL. HENLEY: And I guess what the
14 sense is, if you can address some of these
15 procedural concerns on discovery, subpoena,
16 funding issues, experts with getting the judge
17 involved earlier on in the process, is there
18 a benefit to having the judge involved in the
19 pretrial investigative process, as well, given
20 some of the concerns that have been raised on
21 what it's now used for. It's not reason to
22 believe to go forward with the offense or

1 whatever stand you want to apply, but it's a
2 discovery tool and there's little control over
3 the proceedings.

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

14 CHAIR HILLMAN: The judge qua
15 judge. Right.

16 COL. HENLEY: Exactly. It's a
17 judicial stamp in the middle of a process
18 between preferral and referral that we have
19 enough to go forward. That's all it is. And
20 it doesn't mean that you can't start, not
21 start over but the judge makes a determination
22 which is binding. I guess that's also one of

1 the criticisms you have with the 32
2 investigating officer making recommendations
3 and they're not being followed regularly.
4 It's not an exception, and it's not tied to
5 the status of the IO. It could be a military
6 judge who makes these recommendations, and you
7 would think, under most circumstances, the
8 recommendations would be followed.

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

12 COL. MCGOVERN: All sexual
13 assault.

14 COL. HAM: But as a point of
15 comparison, I can't remember which Federal
16 Rule of Criminal Procedure it is, but if
17 someone is confined, the government has ten
18 days to do a preliminary hearing. That's the
19 time frame. If the defendant is confined, to
20 my understanding, Mr. Bryant can confirm or
21 deny, is that it says you have 30 days to
22 indict, you have ten days to a preliminary

1 hearing. So in the federal system, most of
2 the time there will be an indictment within
3 ten days, so there will not be a preliminary
4 hearing.

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

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

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

22 COL. HAM: I only meant to address

1 the time --

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

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

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

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

21 COL. HENLEY: Yes.

22 COL. HAM: -- search

1 authorizations and --

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

4 BG DUNN: Confinement issues.

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

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

22 COL. HENLEY: Yes.

1 CHAIR HILLMAN: So it's a
2 significant shift in authority. I mean --

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

8 CHAIR HILLMAN: That's right. Its
9 binding.

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

13 BG DUNN: Gathering more evidence
14 perhaps.

15 COL. HENLEY: Yes. You know,
16 after 30 days, whatever. Is there, there's no
17 --

18 MR. BRYANT: In the civilian
19 system, if the judge at the preliminary
20 hearing dismisses the charges, you can still
21 take it to the grand jury. So you don't have
22 to start over with a warrant again.

1 COL. HENLEY: But there's no you
2 have to wait 30 days or anything. You can go
3 the next day and -- so the government still
4 has an avenue to get the case to court, but
5 the convening authority still decides whether
6 or not to refer and at what level the court
7 should be, what level of court should be
8 selected. So the command is still deciding
9 whether or not to court-martial.

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

14 COL. HENLEY: It could do admin
15 disposition. It can say, well, I understand
16 you said there's probable cause on all four
17 charges, but I'm going to only send three to
18 trial. There's still that command input, it's
19 just, to me, what started this was the
20 criticism that the defense has to explain why
21 they need experts or assistance or subpoena.
22 They don't have a subpoena authority. Okay.

1 So if the judge is involved, can the judge
2 also address the recent issues raised with how
3 the Article 32 is involved?

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

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

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

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

19 COL. HENLEY: But especially in
20 high-profile cases, if you have, you know a
21 case is probably going to end up in a
22 court-martial, it would seem beneficial to all

1 parties that you have a trial judge detailed
2 early on in the case that could then shepherd
3 the case through the entire process. Some of
4 these other cases, whatever, sexual assault or
5 not, larcenies, AWOLs, whether or not it's the
6 same judge that does the PC determination ends
7 up presiding over the trial, I'm not sure that
8 there's necessary value there.

9 The big problem if you're in
10 military justice is you can't get to the judge
11 until the referral of charges, which could be
12 months and even years down the road. And that
13 --

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

17 CHAIR HILLMAN: So if our
18 objective is to improve response to sexual
19 assault, one of the issues we run up against
20 is a lack of faith in the legitimacy of the
21 system, misplaced or not. And that lack of
22 faith could be addressed. I think we need to

1 say this. Whether we actually recommend this
2 happen I think is separate.

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

21 COL. MCGOVERN: The one other
22 significant update this week, as we worked

1 through the issues two weeks ago, Colonel
2 Henley, if you could address your proposal
3 that this work both ways for prosecution and
4 defense.

5 COL. HENLEY: I think I alluded to
6 that. So the requirements, whatever
7 requirements you have should apply equally to
8 the trial and defense counsel. So the trial
9 counsel wants witnesses, then the trial
10 counsel should go through the military judge
11 and go through the same process that a defense
12 counsel goes through following the relevant
13 case law and establishing relevance,
14 materiality, and why they're needed and what
15 they would say, and the judge makes that
16 determination for both sides, for the
17 government and the defense. So the criticism
18 that the defense has that the government has
19 unlimited resources and they don't have to
20 justify or defend their requests would be
21 addressed, and you can still have ex parte
22 requests from both sides if the government or

1 the defense didn't want to share some of their
2 justification.

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

19 BG DUNN: I've got to say that I
20 kind of see this as a two, maybe two
21 recommendations because I think that it's
22 necessary, with the changes in the 32 it is

1 necessary to address discovery for the
2 defense. And I also think it's necessary to
3 address earlier in the process the issue of
4 expert witnesses for defense counsel, other
5 witnesses for defense counsel, etcetera. And
6 I concur. And I also concur that that should
7 then go through the government for funding.

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

19 COL. HENLEY: Well, ma'am, I'll
20 tell you why I thought, if you're going to
21 address the initial concerns, access to
22 witnesses, discovery issues, and having a

1 military judge involved after preferral of
2 charges, to me, I don't know how to process
3 the work if you have a parallel Article 32
4 investigation that's presided over not by that
5 military judge. Does the judge suspend his or
6 her involvement until the 32 is complete,
7 which he or she has no control over?

8 BG DUNN: Right, right, right.
9 And I think if you do, if you back up to this
10 probable cause hearing idea, then I think that
11 has to replace an Article 32.

12 COL. HENLEY: Right.

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

21 CHAIR HILLMAN: We've had an
22 incomplete evolution. Shouldn't we just

1 complete the evolution?

2 BG DUNN: I mean, I don't know.
3 To me, if we're going to make a recommendation
4 on this, because it's a, it should be, at a
5 minimum, the judge should, there should be a
6 mechanism to get the judge involved early to
7 handle defense witness requests, defense
8 expert witnesses, those issues with defense,
9 and does that issue consider perhaps backing
10 it up to the military judge just managing
11 cases through the system. But you don't think
12 about the implications, though, in
13 assignments, in personnel, judiciary. I mean,
14 that's going to be --

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

18 CHAIR HILLMAN: Refresh my
19 recollection.

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

22 CHAIR HILLMAN: Oh, yes.

1 COL. HAM: It was just a week ago
2 or something.

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

5 COL. HAM: Very similar concept
6 that discussed --

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

11 BG DUNN: No, that's what I was
12 just saying. There would be no reason to have
13 --

14 CHAIR HILLMAN: It is. It already
15 is that.

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

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

22 COL. HENLEY: Why don't you just

1 have the judge preside as the 32 officer in
2 his or her capacity as a military judge? You
3 don't have to call it a PC determination, but
4 my thought on a PC determination is that's
5 independent of any general court-martial
6 desire. I mean, you don't, whether there's
7 probable cause or not, you could still make
8 that determination and then you can decide
9 whether or not to refer to a general special
10 court.

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

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

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

20 COL. MCGOVERN: Can they waive it?

21 COL. HENLEY: Well, sure. But do
22 you think the PC determination would be an

1 involved process in barracks larceny? I mean,
2 again, preferral of charges, you go in the
3 next day or the day after or three days, you
4 can actually go to --

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

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

17 BG DUNN: General court-martial.

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

22 MR. STRAND: Probable cause

1 determination.

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

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

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

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

1 are presented.

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

12 COL. HENLEY: Correct. So the
13 charges, for example, preferred on February
14 1st, 2014, if a judge determines no probable
15 cause on those charges and specifications, the
16 charges are dismissed without prejudice. And
17 then if the trial counsel wants to prefer
18 charges on March 1st, 2014, then they can go
19 forward with --

20 BG DUNN: A second PC hearing.

21 COL. HENLEY: -- a second PC
22 determination.

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

22 MR. STRAND: Well, would there be

1 any reason to wait? I mean, there is an
2 evolution going on, not a revolution but an
3 evolution. There's an evolution going on to
4 make this look more and feel more like
5 downtown, that you have the judiciary involved
6 earlier on, you have the prosecutors and their
7 -- so that our victims see a system
8 differently than they do now.

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

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

1 right now, right?

2 COL. HENLEY: Army does three-year
3 terms.

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

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

22 CHAIR HILLMAN: Sorry to interrupt

1 you, sir. Did we address training of judges
2 anywhere?

3 COL. MCGOVERN: No.

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

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

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

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

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

21 COL. HENLEY: Well, the initial
22 training requirement for all services is a

1 three-week military judges' course at the Army
2 JAG School for all services.

3 CHAIR HILLMAN: They all go to the
4 same place?

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

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

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

17 COL. HENLEY: Reserve judges, the
18 National Guard judges, all the services. And
19 the instructors are from all services. It's
20 run by the Army JAG School, and it's an
21 academic program split up, I think, probably
22 still about two-thirds and one-third, and

1 two-thirds sort of practical court exercises
2 and one-third judicial philosophy management,
3 temperament, scenario training. But, I mean,
4 that's the initial, before you can be
5 certified by the service judge advocate
6 general, you must be a graduate and you must
7 attain a certain grade and pass all the
8 requisite course requirements.

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

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

21 COL. HENLEY: Four and a half.

22 MR. BRYANT: Four and a half days?

1 COL. HENLEY: Yes. Depending on
2 funding, maybe a little less. But it used to
3 be a full week. So there is opportunity not
4 only for the initial training to make sure
5 everybody is on the same baseline but then
6 continuing training. And then we used to
7 have, when there was funding, each of the
8 services would be able to send judges to the
9 National Judicial College or other training
10 for evidence --

11 BG DUNN: You made a comment about
12 if we're giving judges more to do, we need to
13 make sure they're properly trained. You're
14 really not giving, even if we adopted this
15 model that Colonel Henley has proposed in toto
16 at the moment, the judges aren't doing
17 anything that they don't already do. They
18 already make those defense witness decisions.
19 They already can dismiss charges if they don't
20 find that, you know, that there's probable
21 cause. They already do all of that and make
22 all of those decisions. It's a matter of, to

1 me, it's more a matter of assignments, tenure,
2 and staffing because it's going to increase
3 their --

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

13 BG DUNN: They do have this
14 training.

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

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

21 COL. HENLEY: Yes, yes. Again,
22 some of the training --

1 MR. BRYANT: Deterrent value, all
2 of that?

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

13 MR. BRYANT: Compare.

14 COL. HENLEY: Compare. And then,
15 at the end, the seminar leader would actually
16 disclose what the sentence was from the jury
17 or the judge and you would move on to the next
18 one, and it's all services. So you'd have
19 Marines, Coast Guard, Air Force maybe, Army
20 discussing sort of general deterrence,
21 specific deterrence, the actual retribution,
22 rehabilitation. It's a helpful exercise

1 because it makes you think from different
2 perspectives. So, absolutely, there is
3 baseline training and continuing training
4 throughout your years on the bench.

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

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

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

17 CHAIR HILLMAN: If we're going to
18 have the judge involved, why shouldn't the
19 judge be the one who's -- this is a source of
20 a lot of, this distinction between the
21 civilian processes and the military processes
22 is one that generates friction.

1 COL. HENLEY: That beating the
2 deal? Yes. We didn't come up with a
3 consensus in the group.

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

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

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

22 MR. STRAND: Oh, no, I was going

1 back to the other conversation on the 32
2 process and everything else and witnesses.
3 I'm not up for that one yet. I know we move
4 forward, but I don't have any clarity on --

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

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

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

17 MR. BRYANT: And that's an area in
18 the current revised Article 32 and maybe
19 before. That's assuming a military judge is
20 now conducting it. If he should find that the
21 larceny in the barracks, and I'm going to use
22 a simple example, was, in fact -- we'll just

1 use a rape. If he should find that the rape
2 was actual simple assault, would he or she be
3 empowered to reduce that at that point and
4 find the person guilty? Because then you've
5 got, if the prosecution is, you know, having
6 a heart attack here because this is going to
7 be the end of this case, I'm just asking could
8 they do that? Because once he found that, no,
9 this is a simple assault, this is not rape,
10 and I find you guilty of simple assault, then
11 you've got all sorts of potential double
12 jeopardy problems if you were trying to bring
13 that case back again.

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

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

19 MR. BRYANT: No, but, I mean, he
20 doesn't have the power to do that because, in
21 the state system, while they almost never do
22 that because they know, you know, I'm taking

1 away the prosecution's ability to take this to
2 the grand jury if they want to, they're either
3 going to dismiss it, but they're really going
4 to say, well, I don't think this is grand
5 larceny, I think it's petty larceny, I find
6 you guilty and sentence you to 30 days because
7 they have that authority right then and there.
8 I'm just asking whether that exists in this --
9 no? Okay, good. I just want to make sure.
10 Now, if you put a judge in there instead of an
11 investigating officer, I didn't want, oh,
12 good, he's a judge, he can find Joe guilty of
13 simple assault and we'll be done.

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

18 MR. BRYANT: Okay.

19 COL. HAM: But you do envision
20 that the judge, in the position that we now
21 call the investigating officer, would be able
22 to say I do not find probable cause for rape;

1 however, I do find probable cause for the
2 lesser included offense of such and such. Do
3 you envision that?

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

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

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

14 CHAIR HILLMAN: Okay. So we'll
15 write that up and we'll see how that
16 recommendation looks. So the pretrial
17 agreement, should we talk about that piece?
18 That's on page three of the issues common to
19 prosecution and defense. It's just at the
20 bottom of that first page there, but it says
21 page three at the bottom. Difference in plead
22 guilt, civilian versus military. So the

1 difference here would be the judge would
2 accept or reject the plea instead of having
3 the accused be able to beat it essentially,
4 the pretrial agreement.

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

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

20 CHAIR HILLMAN: Right, which
21 creates a lot of doubt about what's going on
22 in this funny business? They've got some

1 secret envelope we're only going to open at
2 the end of the adversarial sentencing hearing.

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

8 BG DUNN: Right.

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

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

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

22 COL. HAM: That's permissible now

1 by pretrial agreement. However, not many
2 jurisdictions do that anymore. So I think
3 what Colonel Henley is proposing is that it
4 judicially happen.

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

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

16 COL. HENLEY: Yes, yes.

17 BG DUNN: Because the way the
18 sentencing is done, the accused does not have
19 that opportunity to get any of that
20 information, any of the extenuation or
21 mitigation in front of the convening authority
22 before doing the plea negotiation.

1 COL. MCGOVERN: And actually
2 create a pre-sentence report.

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

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

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

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

16 BG DUNN: Yes, yes, but there's no
17 mechanism now to get in all that extenuation
18 and mitigation, you know. Yes, I committed
19 this crime, my wife left me, my mother died
20 when I was six, you know, none of that goes
21 into the plea negotiations. That all goes
22 into sentencing.

1 MR. BRYANT: Can't they go to the
2 prosecutor and tell him all these facts about
3 his client?

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

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

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

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

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

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

1 BG DUNN: If you have a --

2 COL. HAM: That's a good deal.

3 BG DUNN: Then it's a good deal.

4 Right.

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

8 BG DUNN: Right. You lose your
9 credibility as a defense counsel in that
10 regard. See, I mean, I'm not sure that this
11 is an issue that warrants major changes in the
12 system without some further information. But
13 --

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

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

21 COL. MCGOVERN: Because it just
22 happened. There is definitely, there is a

1 strong perception that there's something funky
2 about --

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

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

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

12 BG DUNN: Right.

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

16 BG DUNN: In excess of that could
17 be suspended.

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

20 BG DUNN: Right, yes. And now,
21 see, first of all, now the victims have
22 special victim counsel who can better explain

1 some of the complications in the system.
2 Second, there is, as Patty said, an
3 opportunity now to have a plea agreement that
4 says, you know, five years, but I agree to
5 suspend anything in excess of what the judge
6 gives you. Not that any convening authority
7 or any prosecutor probably ever recommends
8 signing that deal, but the option is out
9 there.

10 COL. MCGOVERN: I think Ms. Jaus
11 and Mr. Bryant has voiced it, too, that a deal
12 is a deal and they enter into it in both
13 parties. The prosecution may come down a
14 little because you consider the mitigation and
15 extenuation up front. I don't know if you, I
16 just felt like I should relay what Ms. Jaus
17 was saying.

18 MR. STRAND: Is there any harm
19 with taking away the second deal? I mean, is
20 there any -- I don't see any harm with taking
21 and giving judges plea authority to be able to
22 -- you get one deal, and I think that's the

1 problem. We don't have any good statistics,
2 but just a concept of somebody being able to
3 go and get two deals and they get the better
4 of the two deals . . .

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

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

22 COL. HAM: What's the difference?

1 I mean, theoretically, philosophically, what's
2 the difference? Everybody goes in thinking
3 it's going to be one thing under the
4 guidelines, and the judge --

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

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

16 BG DUNN: What is going to happen.

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

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

1 six months.

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

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

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

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

1 20, I agree I'm not arguing for anymore than
2 12.

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

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

12 MR. BRYANT: In the federal system
13 --

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

21 Is that correct? Do you agree
22 with that? They're not doing a specific range

1 most of the time.

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

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

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

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

18 MR. STRAND: Charging decisions.

19 MR. BRYANT: But also, some of the
20 plea agreements both federally and state are
21 to put a cap on it. You've got the guidelines
22 and you've got the statutory sentence, if the

1 prosecution agrees, your cap is, I'll use the
2 12 year as an example. That's the cap. If
3 you, you know, then that binds the Judge. The
4 Judge cannot give you more than 12 years.
5 Everybody agrees to that.

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

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

14 So in the victim's mind, this guy
15 could get, you know, based on the -- say the
16 plea agreement is, you know, whatever and the
17 prosecutors agree not to argue for more than
18 18 years, could get 18 years, could get two
19 years and the victim doesn't know that.

20 Right? So how is that different from what
21 goes on in the military?

22 MR. BRYANT: But the difference is

1 you have that single agreement that she's
2 aware of and you still don't get to go to
3 trial.

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

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

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

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

19 COL HAM: Well, first of all, the
20 victim is going to know what the quote, secret
21 deal is, because they're going to be
22 conferring with the prosecutor.

1 MR. BRYANT: The other big
2 difference is, yes --

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

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

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

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

12 BG DUNN: She's going to know the
13 max. But she -- and a prosecutor, a good
14 prosecutor, all prosecutors, I'm sure at this
15 point, and Special Victims Counsel are going
16 to explain to her that's the max he can get is
17 five years, but he could get three, he could
18 get two, could get one, could get nothing.
19 You know, it doesn't mean he's going to jail
20 for five years just because he has that deal.
21 That protects him from more, it doesn't
22 protect you from less.

1 MR. BRYANT: But in this
2 beat-the-deal situation, this is the sentence
3 that the defendant has agreed upon would be
4 appropriate. But he's still -- yes, I'll take
5 that if that's what it comes to but I'm still
6 going to try deal.

7 BG DUNN: Yes, but the philosophy

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

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

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

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

21 MR. BRYANT: But what's the
22 benefit?

1 BG DUNN: But in the military, the
2 culture, you know, the culture in the military
3 is that deal protects the accused on the high
4 end and so when we have this commentary, maybe
5 the deals are too high. I mean I think that's
6 part of it is that it protects the accused on
7 the high end and that's the philosophy in the
8 military.

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

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

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

16 BG DUNN: Right. Right, you can
17 --

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

1 is your deal.

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

4 MR. STRAND: Right.

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

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

13 MR. STRAND: It depends on the
14 Judge.

15 COL HENLEY: I know, that's me.

16 The government requires a waiver
17 of witnesses, so in an agreement of five
18 years, we're not going to bring the people
19 that we would have been required to bring if
20 this had been a contested case. We'll
21 stipulate to their expected testimony or allow
22 them to testify telephonically.

1 So there is a resource benefit
2 that the government gets by entering into a
3 pre-trial agreement.

4 MR. STRAND: But why enter into a
5 pre-trial agreement and then go -- I still
6 don't understand the benefit. What I'm
7 hearing you say, General Dunn, is the benefit
8 is it protects the accused of too high of a
9 sentence.

10 BG DUNN: The benefit to the
11 accused, the benefit to the government is the
12 -- I mean the time, the money the -- yes.

13 COL HENLEY: At trial, you don't
14 know if you're going to get a conviction.

15 BG DUNN: Yes, the guaranteed
16 conviction, right.

17 MR. STRAND: True, but if I
18 pleaded guilty --

19 COL HAM: If the victim doesn't
20 have to testify, the victim's not subject to
21 cross examination. The victim may or may not
22 want to appear in the sentencing. All the

1 motions are waived. Usually, 99 out of 100
2 times, the Article 32 is waived.

3 BG DUNN: Right.

4 MR. BRYANT: But that's true in
5 all of the systems once there's a guilty. So
6 it's just a question of does the Judge know
7 that the prosecution has agreed this is the
8 maximum sentence?

9 I mean to -- it would seem to me
10 that to really take the wind -- and maybe they
11 can do it and they're good actors, to know
12 that you made a deal for five years and come
13 in and argue with a straight face for 29 with
14 your victim and her family sitting back there
15 knowing there's no way we're getting 29.

16 BG DUNN: But you can do that,
17 whether you do do that is another issue.

18 But I mean the point is there's --
19 no the prosecutor is not limited by the deal
20 to the argument. So if the deal is for eight
21 years, the prosecutor could argue for ten to
22 15 in hopes that the Judge will give seven to

1 eight, you know.

2 MR. BRYANT: I mean it's allowed
3 in the military system, but if that happened
4 in a civil world and you came and argued
5 outside the plea agreement, the Judge would be
6 calling your boss and you'd be back in the
7 lockup.

8 BG DUNN: Yes, but it's a
9 different system. Everybody is trained and
10 grown in the system and everybody practices it
11 and everybody understands it.

12 CHAIR HILLMAN: Okay, so we're
13 going to call a pause on this and our staff's
14 going to write up a proposal that sets out
15 both of these arguments, the proposal and the
16 alternative proposal. So do you feel like you
17 have enough information to do that?

18 COL MCGOVERN: I do.

19 CHAIR HILLMAN: All right, so
20 let's just -- I'm going to start to run
21 through these so that we can get through the
22 rest of this prosecution and defense piece.

1 Okay, so we talked about the
2 Article 32, we talked about the difference in
3 plea deals. We didn't talk yet about
4 mandatory minimums, so if you look at the
5 second page here, it's marked Page 4. How
6 will the new mandatory minimum requirement to
7 administratively separate service members
8 convicted of sexual assault offenses impact
9 guilty pleas? Let's talk about that when we
10 get to sentencing which we'll do in a moment.
11 So put that on hold --

12 COL MCGOVERN: Okay.

13 CHAIR HILLMAN: -- for a moment.

14 The last one, are there a high
15 number of acquittals in the military because
16 these cases are being overcharged? Is there
17 pressure to prosecute even when the
18 investigating office recommends going forward?
19 Has the pendulum swung too far?

20 There's no recommendation there.
21 Did anyone on that subcommittee want to speak
22 to a recommendation?

1 BG DUNN: I would also add because
2 it's relevant a little bit to that, it's also
3 relevant to our just-ended discussion, which
4 I'm not trying to reopen.

5 But we consistently in Norfolk,
6 and at Quantico, the defense counsel said, we
7 don't plead sexual assault clients to anything
8 because of the sex offender registration. So
9 the whole issue of changing the plea process
10 to accommodate sexual assault victims appears
11 to be -- or may be moot based on the strong
12 opinions of at least those two sets of defense
13 counsel.

14 COL HAM: We heard that, I think
15 all --

16 BG DUNN: We don't plea any of
17 them to any sex offense because of the
18 registration requirement. Registrations would
19 impact that and also --

20 MR. BRYANT: Well, one of my
21 findings from -- I didn't make Quantico, but
22 if you recall, General Dunn, in Norfolk, they

1 were very clear, both prosecutors and defense
2 agreed the defense was winning a lot more
3 cases these days and they thought it was
4 because of pressure to bring cases that
5 wouldn't have been brought before.

6 COL HENLEY: Well, again, not to
7 -- if you had -- I'll go back to -- the Judge
8 would, if it was --

9 BG DUNN: The Judges would be
10 taking all the heat for this.

11 COL HENLEY: Yes, if it was a
12 binding determination, the 32 officer
13 recommendation substitute military judge don't
14 go forward, you can't go forward. There would
15 not have been a court-martial in which there
16 would have been an acquittal. I'm all for the
17 Judge thing.

18 CHAIR HILLMAN: I'm for the Judge
19 thing here, too. The Judge thing, you've got
20 that?

21 The problem is that these high
22 number of acquittals are not helping us gain

1 confidence of victims really. I mean maybe in
2 some instances the victim does feel like, you
3 know, well-cared for throughout the process,
4 that it's been a good experience
5 notwithstanding the fact that there's not a
6 conviction at the end of the day. I'm sure
7 that happens in some cases.

8 But in general, maybe that
9 individual feels good about how it went but
10 the messaging that gets out there, it's
11 harmful.

12 I think that this transition point
13 we're in with the number of acquittals that
14 we're likely getting now, we have to figure
15 out how to account for that and continue to
16 build victim confidence.

17 COL HAM: Ma'am, I'm not sure the
18 number of acquittals is new.

19 CHAIR HILLMAN: Since 2007, the
20 number of acquittals are up.

21 MR. STRAND: But these are --
22 we're taking cases that we would never take

1 before but we're taking complicated cases.
2 We're taking tougher cases. We're taking
3 cases that we probably never would have done
4 before. We're investigating them differently,
5 we're prosecuting them differently.

6 COL HAM: Well, but the rise in
7 acquittals, I can only speak for the Army
8 statistics, those are the only ones I have
9 followed with the caveat I haven't seen them
10 in a few, you know, since I've been here. But
11 the rise in acquittals started in 2007 before
12 the Special Victim Prosecutor Program, before
13 anything else.

14 There, I think the Special Victim
15 Prosecutor Program, the Army has charges that
16 I think you all have that show success in
17 prosecutions then but I think generally
18 overall the rise in acquittals began long
19 before any of this other stuff and hasn't
20 stopped --

21 CHAIR HILLMAN: Do we have that?

22 COL HAM: -- in spite of all this

1 other stuff.

2 CHAIR HILLMAN: Do we have that
3 data?

4 COL MCGOVERN: We do, and we have
5 all the prosecution and the final disposition
6 of these cases, the conviction, which in turn
7 will be acquittal rates.

8 CHAIR HILLMAN: We should cast it
9 as acquittal rates, though actually and we
10 should just affirmatively look at that
11 actually, over time to the extent it's
12 possible.

13 COL HAM: And what you don't hear
14 about are the 20-25 years sentences which we
15 had the -- the Victims Services Subcommittee
16 had some victims here I think it was last
17 week, five victims. All five cases went to
18 trial, two were acquittals and they were
19 satisfied with the system.

20 One was a 20-25 years sentence for
21 domestic abuse. I mean you don't hear about
22 those and just saying anecdotally from being

1 a defense appellate division, there are a
2 number of those 20-plus year sentences. We
3 don't hear about any of those. We don't hear
4 about any of those.

5 MR. BRYANT: That was from a
6 panel? Twenty-seven years?

7 COL MAN: Contested cases, not
8 guilty would get 20-plus year sentences.
9 Again, I don't know that we have empirical
10 stuff on that but I can tell you we saw them
11 more than every so often at defense appellate.

12 MR. STRAND: I wasn't surprised to
13 hear defense attorneys almost in total say
14 we're taking too many of these cases to court,
15 I wasn't surprised with that. But I wouldn't
16 have been surprised.

17 I look at this like, I'm going to
18 pick a physician. Okay? And I've got cancer,
19 so I'm going to go to one physician who
20 doesn't take hardly any tough cases and he has
21 a really good success rate and I got another
22 pick for another physician who has a really

1 horrible success rate, but takes the tougher
2 cases. I think that physician I'm going to go
3 to is the second one because they're the ones
4 really hard.

5 And we've been telling our
6 prosecutors, we've been telling our
7 investigators for several years now, actually
8 we started in 2005 with the push to look at
9 alcohol-facilitated, and look at some of these
10 more complicated cases to, you know, work
11 these cases, take the tough ones to court and
12 try them. So I see that's not always a
13 negative on the acquittals.

14 But I don't want to go too far. I
15 just, I don't think it's a negative. I think
16 we don't know why we're getting all the
17 acquittals.

18 COL MCGOVERN: But I think one of
19 the concerns raised was the fact that the IOs
20 are recommending against it and is there a
21 relationship then with the number of cases IOs
22 recommended against that are also resulting in

1 acquittals maybe that's --

2 MR. STRAND: But there are some
3 that the IOs recommended that resulted in a
4 conviction as well and I think we have to be
5 fair there.

6 COL HAM: Lieutenant Colonel
7 McGovern, on the JCS Sexual Assault
8 Subcommittee, was the subcommittee able to
9 obtain conviction rates on not guilty cases in
10 any of the jurisdictions?

11 The site visit that comes to mind
12 is Everett where I believe they said they have
13 a 50 percent loss rate in trials, not guilty
14 plea contested cases.

15 So I guess that's another question
16 for the subcommittee is it really -- is the
17 acquittal rate different then in civilian
18 jurisdiction that will release statistics to
19 Department of Defense?

20 COL MCGOVERN: There were not a
21 lot of statistics released to the JSC-SAS, as
22 it can go back and find a few threw out some

1 estimated numbers but there wasn't enough to
2 compile a chart or anything to say, look here
3 are the average conviction rates to even make
4 a comparison to the military rates.

5 So that's why we're stuck with we
6 know what the military rates are and we can
7 look at the number or possibly recommend
8 further study, see if there's a correlation
9 between those recommended or the IO
10 recommended against and acquittals versus, you
11 know, that the IO recommended and were
12 convictions.

13 And is there an issue there? We
14 don't know if that is an issue but it seemed
15 to be evidence to some of the -- on the site
16 visits that there is political pressure to go
17 forward because there's not harm for a
18 convening authority to say go forward. There
19 is harm if you say don't go forward. That's
20 what I heard.

21 MR. BRYANT: Some of the
22 conviction rates at the state and national

1 level are known and right off the top of my
2 head, I don't know whether they come from the
3 National District Attorneys Association or
4 from a statistics group at the Department of
5 Justice, but this average in the civilian
6 community is like a 74, right in there,
7 conviction rate. Harvey, does that include
8 guilty pleas? I don't know, General, but
9 that's what they say.

10 COL HAM: For sexual assault cases
11 or for all cases?

12 MR. BRYANT: No, this is all. All
13 felonies, all felonies, yes.

14 COL MCGOVERN: Okay and it goes
15 back --

16 COL HAM: Well is it in your
17 experience lower or do you know if it's lower
18 on sexual assault cases?

19 MR. BRYANT: I don't know. I
20 don't know whether that's ever been --
21 probably at this point somebody has broken
22 that down, but I don't know that as I sit

1 here. It's a very interesting question to see
2 whether we're higher or lower.

3 MR. STRAND: But that includes
4 immigration and all those other cases that are
5 fairly easy to get the conviction rate up.

6 MR. BRYANT: Well, I'm not so much
7 talking about the Feds and I am, you know, the
8 local prosecutors who are doing the grunt work
9 on the crimes of violence, you know, doing the
10 dirty work on those. But the federal would
11 include those, yes.

12 COL MCGOVERN: The red ones were
13 the ones we had definitely had not addressed
14 yet as a group, so.

15 MR. BRYANT: I think there's a --
16 excuse me -- but I think on that one sentence
17 it says on Page 5 where we're talking about
18 the IO recommends. I realize this is a draft
19 but do the words recommend against going
20 forward -- did we leave out the word against?
21 Is this the pressure to prosecute these cases
22 even when the IO recommends --

1 BG DUNN: Against, yes.

2 MR. BRYAN: Okay.

3 CHAIR HILLMAN: I think we should
4 embed that concern in the discussion of how to
5 help defense counsel manage their case better
6 from the start because that's really, that's
7 about the fairness of the trial process to the
8 accused and I think we're seeking to address
9 that through the role of a military Judge so
10 I'd roll that and those concerns into that
11 other recommendation.

12 COL MCGOVERN: Okay.

13 CHAIR HILLMAN: The other things
14 that we didn't talk about here, the problems
15 with seating a panel due to military sexual
16 assault training, I'd also roll that into the
17 military judge. The military judge already
18 manages the voir dire process and I feel like
19 that that is -- we can recognize there that is
20 a longstanding issue but the military Judge
21 has to seat the panel. So and that's always
22 been an issue.

1 It is -- the recommendation here
2 is revise training. I think it should be
3 cyclical. I mean the training shouldn't -- if
4 there's -- training needs to be effective and
5 that's sort of a separate. We're going to
6 move to talk about training of prosecutors and
7 defense counsel now.

8 But in terms of the training
9 that's happening service-wide, it is a problem
10 if this is likely a point in the evolution of
11 that training that they're taking a -- they're
12 distilling a message from the training that's
13 not effective. The training needs to be
14 cyclical and that is they're going to return
15 to the same lessons to get a more nuanced
16 portrait of this as time goes on.

17 MR. STRAND: It also has to be
18 accurate. I would add to this recommendation
19 or actually change this recommendation that
20 the training, when you talk about what is an
21 what isn't sexual assault, should not be done
22 by Victim Advocates on a generic definition.

1 It should be done or designed and
2 created by lawyers and investigators who know
3 Article 120. It should be designed around 120
4 offenses and scenarios should be designed
5 around Article 120 offenses and that's what
6 should be trained to the force. That's not
7 what's being done.

8 COL MCGOVERN: And I apologize,
9 that was actually General Dunn's
10 recommendation this morning, it wasn't updated
11 into this version, but the prosecution was
12 that --

13 BG DUNN: The lawyers get involved
14 in what's put out --

15 COL MCGOVERN: Lawyers vet that
16 training.

17 BG DUNN: Lawyers vet the
18 training, right.

19 CHAIR HILLMAN: Okay, so we're
20 going to set aside the red pages now. Is that
21 okay?

22 COL MCGOVERN: Yes, certainly.

1 CHAIR HILLMAN: All right, so we
2 didn't do the Good Soldier stuff, if you have
3 strong feelings we can talk about it the next
4 time.

5 A couple of things on here we
6 didn't get to, the -- do defense counsel need
7 their own investigators? If we could knock
8 that off, that would be helpful and then we
9 should go to training before we lose Russ.

10 COL MCGOVERN: And I think we had
11 a consensus on that before.

12 CHAIR HILLMAN: Okay, is there any
13 objection, they need investigators?

14 MR. STRAND: The bit of a sticky
15 wicket on that on is, do they get CID or do
16 they get authorizations and funding to fund
17 their own?

18 BG DUNN: This is up to somebody
19 else to sort that out.

20 COL HENLEY: We didn't make a
21 recommendation on that.

22 BG DUNN: They just need their own

1 investigators that work for them.

2 COL MCGOVERN: In the discussion,
3 I outlined the possible models based on the
4 transcript from last time, so please feel free
5 to edit that, but again, not dictating how the
6 SECDEF do that.

7 COL HAM: I think the final
8 recommendation was SECDEF directs services to
9 provide.

10 CHAIR HILLMAN: Okay, General
11 Dunn, Colonel Henley, thank you.

12 So we're going to set aside
13 prosecution of defense and let's go to
14 training prosecutors and defense counsel which
15 is Mr. Strand and Mr. Bryant, right? Because
16 Russ, you won't be here the next time we
17 deliver it and so I want to get through that
18 before we get on to the sentencing piece.

19 Okay, so it looks like we start
20 with defining what the baseline is for
21 civilian prosecutors and for civilian defense
22 counsel. Kelly, do you need more from us on

1 that or do you feel?

2 COL MCGOVERN: No, again, I think
3 a lot of this is background discussion
4 information, Dillon, do you think?

5 CHAIR HILLMAN: Right and so
6 you're going to drop in. So those are good.

7 And then the basic military legal
8 training here then. We have a recommendation
9 that the Judge Advocate training should be
10 sustained and specify that its funding not be
11 cut and the emphasis on adult sexual assault
12 cases, actually, in terms of the litigation
13 training that Judge Advocates are getting,
14 that should be maintained or encouraged. That
15 seems pretty uncontroversial.

16 BG DUNN: It is a good summary.

17 CHAIR HILLMAN: Okay. Next we
18 have sort of the SVP and HQE, TCAP and then
19 other service correlates to the Army's special
20 training.

21 MR. STRAND: The big distinctions
22 we brought out here is that it needs to

1 reprogram and we discussed this a little bit
2 the last time is it's designed to be a
3 temporary program which would be okay if --

4 COL MCGOVERN: Sir, could you go
5 back, you said --

6 MR. STRAND: The HQE program is
7 designed to be temporary.

8 COL MCGOVERN: Oh, I thought you
9 said the SVP.

10 BG DUNN: Yes, intended to be
11 temporary.

12 MR. STRAND: It's designed to be
13 temporary which would work if we had a stable
14 workforce but we don't have a stable
15 workforce, we have military officers coming
16 and going and so I think we need that
17 consistent outside look in there.

18 So we made a recommendation that
19 they look at making these permanent programs,
20 the HQE, so that there's some stability within
21 the SVP and the TCAP programs.

22 CHAIR HILLMAN: So my -- does the

1 career litigation track make -- does that have
2 potential to replace the capacity of the HQE?

3 MR. STRAND: It could. Right now,
4 only the Navy has that. But again, you've got
5 people coming and going even in that career
6 litigation.

7 COL HAM: Well, that addresses one
8 of your concerns about judges, too, ma'am,
9 because, if you recall, at Bremerton the
10 witnesses -- people discussed, I'm trying not
11 to say witnesses testified in that, all the
12 judges come out of that litigation track as
13 well.

14 CHAIR HILLMAN: So we need them to
15 be judges, not to be HQE equivalents actually
16 as they get experience.

17 COL HAM: The military folks.

18 CHAIR HILLMAN: Right, right.

19 COL HAM: And all the services
20 have an HQE program now except the Air Force.

21 CHAIR HILLMAN: And why don't they
22 have it?

1 COL HAM: I don't know if we have
2 -- well you had Lieutenant Colonel
3 Christiansen in the August prep session speak
4 about that and I'd have to look at the
5 minutes. If you remember, I think he's -- he
6 did give a reason, I don't remember what it
7 was.

8 BG DUNN: We also have the Marine
9 HQE tell us that she was there but she
10 couldn't travel.

11 COL MCGOVERN: That was defense.

12 BG DUNN: Oh, that was the defense
13 HQE, but it was -- okay, but still.

14 MR. STRAND: But the HQE program
15 in itself is problematic because it's a
16 Department of Defense program, it's not just
17 for sexual assault. There's 2,500 HQEs in
18 Department of Defense Secretary of Defense has
19 and there's only so many to go around.

20 So when several years ago, the
21 Secretary of the Army said he knew about the
22 program, he said what do you want? What do

1 you need and that's why we got some HQEs. But
2 it's, by intent five, to six years, you can
3 get five years, you can get an extension for
4 six.

5 And so, even currently with the --
6 I'm losing my HQE permanently. I'm not going
7 to get a replacement so that's gone.

8 The JAG, the Army JAG has lost two
9 of theirs but they've rolled them into term
10 divisions and that's not an enduring solution.
11 And then I know they're hiring another one.

12 And then when the Defense HQE
13 positions are going away, you know,
14 eventually, I don't know if the Defense is
15 going to have money.

16 So there's --

17 COL HAM: They're not HQE
18 position, they're GS-15s.

19 BG DUNN: They are Defense
20 positions.

21 COL HAM: They're Defense
22 positions and the, again, I can only speak of

1 Army, so they may be different but they were
2 different terms for the different --

3 The one at the JAG school was a
4 two year term. So there were different terms
5 and there were different things and I think
6 they were turning them into regular not
7 permanent GS-15 positions.

8 MR. STRAND: Right.

9 COL HAM: The other services might
10 be handling it differently.

11 COL MCGOVERN: So are you trying
12 -- in here it says the recommendation is the
13 HQE program should be funded permanent and
14 during requirement?

15 MR. STRAND: Yes.

16 BG DUNN: Yes, either permanent
17 positions or I mean there might be some
18 benefit in leaving it as a -- as leaving the
19 access to the HQEs because that would mean
20 every six years you'd get somebody with
21 fresher experience coming right out of --

22 COL MCGOVERN: The benefit in the

1 turnover.

2 BG DUNN: Right and I think there
3 may be a benefit rather than, you know,
4 although by nature, at least in the Army, the
5 HQEs who are initially hired were well along
6 in their careers.

7 COL MCGOVERN: So how would you
8 word that, ma'am so that you could still have
9 the term positions?

10 BG DUNN: I would just leave it
11 the way it is and they can sort it out. But
12 --

13 MR. STRAND: The problem is if you
14 keep the HQE, you can't, unless you get --

15 BG DUNN: Unless you can get a
16 reauthorization for another HQE position.

17 MR. STRAND: Right and that goes
18 through another bureaucracy.

19 COL MCGOVERN: So --

20 BG DUNN: I would just leave it
21 because HQEs by their very nature should be
22 older, more experienced people not likely to

1 hang around for 30 years.

2 CHAIR HILLMAN: Let's just try to
3 make clear that the HQE programs in military
4 sexual assaults serve a critical function and
5 they ought to be reauthorized

6 BG DUNN: Yes.

7 CHAIR HILLMAN: -- on a regular
8 basis.

9 MR. STRAND: Yes.

10 COL MCGOVERN: Can I also ask, the
11 recommendation here is the Navy's career
12 litigation track should be encouraged and
13 codified. That sounds like we've flagged and
14 softened it which is what we did. So --

15 BG DUNN: Why do we codify there,
16 their litigation track?

17 COL MCGOVERN: Do you want to
18 address that recommendation to make it a
19 firmer thing or do you want that all the --

20 BG DUNN: That they should
21 continue their career in litigation track
22 period.

1 COL MCGOVERN: Should the other
2 services --

3 BG DUNN: Because each service has
4 their own, you know, the Army SVP program has
5 been -- already addresses being extremely
6 effective. Why would we now say Army, you've
7 got to do career litigation track like the
8 Navy. That makes no sense to me.

9 COL HENLEY: Do we have our own
10 equivalent ASI, I mean the Army's Additional
11 Skill Identifier?

12 BG DUNN: There is within that SVP
13 process, yes. You cannot become and SVP until
14 you have met many gates.

15 COL HENLEY: Yes.

16 BG DUNN: Exactly. I mean it's
17 effectively the similar.

18 COL HENLEY: Right, yes, I think
19 it's misleading that the other services don't
20 have a focus on litigation like the Navy may
21 actually call something a career litigation
22 track

1 COL HAM: The Army's appears to be
2 qualitatively distinct. They do not hold
3 other positions I believe was the testimony.
4 They give up the opportunity to reach the
5 highest ranks in the --

6 BG DUNN: The Navy.

7 COL HAM: -- Navy JAG Corps by,
8 theoretically.

9 COL MCGOVERN: So it's essentially
10 a career track.

11 MR BRYANT: Well, suppose we just
12 say the Navy's career litigation track should
13 be encouraged or the Navy's career litigation
14 track and other similar programs in the
15 services, would that satisfy what we're doing
16 here?

17 CHAIR HILLMAN: I'd like to
18 encourage the other services to consider a
19 career litigation track but I don't want to
20 mandate a career litigation track because I
21 think poses too many problems for
22 implementation.

1 So the Navy's career litigation
2 track allows the development of expertise in
3 a way that benefits the prosecution of sexual
4 assault. The other services should continue
5 to consider ways to do likewise and we can
6 then footnote to the ways that the Air Force
7 and the Army, whatever they told us about how
8 they're actually doing this.

9 BG DUNN: Right. Because you -- I
10 mean, frankly, this addresses a cultural issue
11 in the Navy. In the Army, the more you
12 litigate, the more you're going to be
13 promoted. In the Navy, that was apparently
14 not the case. So that's --

15 COL MCGOVERN: And in the Marines,
16 they seem to think there is no way they could
17 do a career track.

18 BG DUNN: Right, because of the
19 size of the Marines Corps JAG Corps.

20 COL HAM: So the Navy folks were
21 only doing this intensive military justice
22 defense prosecution and then they go up to the

1 defense, provides trial advocacy working in an
2 Assistant U.S. Attorney's Office, being an
3 appellant litigator, it was extraordinarily
4 intense and they were very, very impressive.

5 CHAIR HILLMAN: It's developing,
6 you know core expertise, it seems to be
7 working but I'm not sure we want to do that
8 and there are probably costs attached to that
9 model.

10 Okay, then the next one is defense
11 counsel.

12 MR. BRYANT: Yes, the issue was
13 assessing the advanced training of military
14 defense counsel handling adult sexual assault
15 cases for comparison with their civilian
16 counterparts. I'm not going to read through
17 all the findings unless somebody wants to just
18 sort of keep up with that.

19 But our recommendation was that
20 current training efforts and programs be
21 sustained to ensure that their military
22 counsel are competent, prepared and equipped.

1 That sounds pretty vanilla.

2 But funding should be reviewed to
3 ensure the defense counsel training for adult
4 sexual assault cases are on par with that of
5 prosecutors.

6 Then this next sentence accounts
7 for our general understanding that those who
8 are going into the defense of sexual assault
9 cases have already been through the
10 prosecution track in the military.

11 And so to ensure standard for
12 training and experience is maintained for the
13 defense counsel who may be assigned to adult
14 sexual assault cases, it is recommended that
15 no Judge Advocates be permitted to serve in
16 defense counsel billet without having been a
17 trial counsel prosecutor.

18 COL HENLEY: Would you want to be
19 so definitive and not allow for some --

20 MR. BRYANT: Excuse me?

21 COL HENLEY: There could be
22 circumstances where you would have someone who

1 maybe did not serve as a trial counsel
2 prosecutor but has significant --

3 BG DUNN: Civilian expertise
4 before they came in.

5 MR. BRYANT: Civilian experience,
6 yes.

7 COL HENLEY: So I think like
8 absent extraordinary circumstances, no -- I
9 mean I would qualify --

10 MR. BRYANT: Yes, maybe be
11 permitted is too strong.

12 COL HENLEY: Or should not be
13 permitted or --

14 MR. STRAND: In the absence of
15 other extensive litigation experience.

16 MR. BRYANT: In the absence of
17 equivalent training?

18 COL HENLEY: Right. Training and
19 experience.

20 MR. BRYANT: Or experience.

21 MR. STRAND: And the reason we
22 looked at that is because, you know, the

1 defense attorneys, rightly so, complained that
2 they didn't have the budget, that, you know,
3 the HQE from one of the services couldn't
4 travel because she didn't have enough money.
5 And they certainly don't have the same money.

6 So if you have hypothetically,
7 800,000 going to one service for prosecution
8 training and 400,000 going to defense, that
9 would not seem fair. But if you have the vast
10 majority of your defense attorneys already
11 taking a part of that 800,000 already before
12 they go to defense, it does seem more fair.

13 So, you know, looking at cost for
14 cost, I don't think we should do that. But
15 what we should do is look for the fact that
16 most of them already have had the advantage of
17 all that great training before they become
18 that defense attorney and so they don't need
19 as much, they just need what's different.

20 CHAIR HILLMAN: We didn't make any
21 recommendations with respect to the HQEs for
22 the defense the way we did for the

1 prosecution. Do you want to say anything about
2 HQEs?

3 MR. STRAND: We should probably do
4 the same thing.

5 MR. BRYANT: Yes, we didn't make
6 that didn't -- that wasn't on our radar back
7 there.

8 CHAIR HILLMAN: They did come at
9 us with their resource limitations in their
10 testimony.

11 MR. STRAND: I think if we
12 replicated the same HQE recommendations for
13 defense that we did for prosecution, it'd be
14 fair.

15 COL MCGOVERN: Do you want to have
16 just a separate finding and similar
17 recommendation regarding HQEs in general?

18 MR. STRAND: Probably yes.

19 MR. FISHMAN: We've talked about
20 that but whatever y'all prefer. That's been
21 discussed.

22 CHAIR HILLMAN: Yes, however it --

1 it seems that -- I mean we could do it that
2 way. I guess let's do it that way and let's
3 say we want to -- let's separate it and so
4 that way we're saying the training of the
5 military personnel who are doing this and then
6 the way we're leveraging civilian resources to
7 fill in any gaps and ensure knowledge of
8 contemporary and, you know, the dynamic
9 science and social science that underlies
10 these complex prosecutions.

11 So, let's make a leverage civilian
12 resources effectively, if that's important and
13 we do it for the HQE program primarily.

14 Do you have a training part where
15 we talk about sending people to -- is that
16 here -- like that could go with -- the
17 leverage piece of it could go to sending
18 people to civilian training.

19 Like for instance, you have best
20 practices here, right, civilian or military
21 training of prosecutors.

22 BG DUNN: You could have a whole

1 list here, the basic and the advanced.

2 CHAIR HILLMAN: Right, which is
3 the military generally, right, rather than the
4 civilian. And then sometimes we send them to
5 civilian programs too.

6 COL MCGOVERN: Right, I think
7 that's the second recommendation on Page 3
8 about the SVPS and Rhonni Jaus, it said to
9 extend that.

10 CHAIR HILLMAN: Okay.

11 MR. STRAND: Yes, we added
12 actually that they should spend time in
13 civilian prosecution offices at least six
14 months optimally one year or more.

15 BG DUNN: Yes, this says here in
16 the HQE program should be part of program
17 during --

18 MR. STRAND: This is on Page 3 in
19 the recommendation, the first recommendation
20 in the middle.

21 COL HAM: One thing that's not --

22 COL HENLEY: But I think that's in

1 another paragraph --

2 BG DUNN: There should be a

3 COL HENLEY: -- to apply just to
4 prosecutors.

5 BG DUNN: It should be in the
6 defense part, too.

7 COL HENLEY: Yes, yes.

8 COL HAM: I'm looking at Page 4
9 and maybe what you just cited on Page 3 is the
10 answer but identifying best practices in
11 civilian or military training, there is no
12 recommendation -- I'm looking -- no
13 recommendation to collaborate and reach out to
14 civilian prosecutors and defense counsel to
15 collaborate, using the same word.

16 But that identifying best
17 practices is all within the services. Was
18 there a discussion of looking outward for best
19 practices and looking outward for more
20 sustained integration and --

21 CHAIR HILLMAN: There should be.

22 COL HAM: -- collaboration with

1 civilian jurisdictions and --

2 COL MCGOVERN: I know we send
3 people to civilian conferences all the time.

4 COL HENLEY: Would that be part of
5 like the MOUs that the SJA office develops
6 with the local prosecutor? You would just add
7 a provision dealing with training -- joint
8 training.

9 COL HAM: Not -- I'm --

10 MR. STRAND: We only covered it in
11 the training piece, but not necessarily as the
12 best practice piece.

13 COL HAM: Okay, not every
14 jurisdiction has those MOUs, I think, I'm not
15 sure, and that they're in the minority, I
16 think, of the site visits that we were able to
17 do.

18 I know, I guess I'm just asking a
19 more global question is -- is there
20 recommendations to look outside the military
21 for best practices and best training and
22 training opportunities?

1 BG DUNN: But there's extensive --

2 MR. STRAND: We did talk about
3 that we're always sending them to a lot of
4 civilian training programs.

5 COL MCGOVERN: Right, but I think
6 maybe and a way you could do it also would be
7 articulate that the TCAPS coordinate with
8 those civilian agencies in developing the
9 training because we're already requiring the
10 trial counsel and defense counsel to so much
11 training pulling them away from doing their
12 cases that, in my experience, the TCAPS were
13 sending their folks to a lot of the capital
14 litigation cases, the NCMEC and other things
15 to ensure that they had the latest training
16 methods and down to the NAC.

17 COL HENLEY: Yes, I think that's a
18 good point to have somebody above coordinating
19 training because you don't want local SJAs and
20 counsel developing their own training programs
21 that may not be consistent with what you're
22 trying to develop at the higher end Court

1 level. Is that --

2 COL MCGOVERN: Well, and like TCAP
3 has the money and the resources and they're
4 the focus.

5 BG DUNN: But for the Army SVP
6 program there are delineated training that are
7 required for those counsels. So that's not up
8 to the SJA to do.

9 COL HENLEY: Right, I guess my --
10 if you develop these relationships with DA
11 Offices on SVP six months to one year training
12 programs, you should assure that whatever
13 training is developed it's standardized. I
14 would imagine --

15 BG DUNN: Oh, you mean in other
16 words, when you're talking about putting
17 people in local prosecutor offices --

18 COL HENLEY: Yes.

19 BG DUNN: -- so you want to make
20 sure that it's in a jurisdiction where they're
21 --

22 COL HENLEY: Right, you're talking

1 about --

2 COL MCGOVERN: Right, no I just
3 thought --

4 BG DUNN: Yes, you're talking
5 about training conferences.

6 COL HENLEY: Oh, Okay.

7 COL MCGOVERN: -- to make sure
8 that they're --

9 BG DUNN: Not to cause the
10 District Attorneys all that kind of stuff is
11 what we're talking about.

12 COL HENLEY: Okay. I thought we
13 were talking about six months to one year in
14 a civilian prosecution office.

15 MR. BRYANT: Well, that's one of
16 the recommendations but there's also a later
17 recommendation that establishes a DoD Joint
18 Training Working Group to assess, oversee and
19 optimize the sharing of best practices and
20 expertise. That's very, very general language
21 and I think --

22 BG DUNN: And training.

1 MY BRYANT: -- and training --
2 and I think we could maybe get a little more
3 specific in that in terms of taking advantage
4 of some of the civilian training.

5 Which -- that's in here, I know we
6 put that sentence in here.

7 BG DUNN: I mean all the services
8 do that.

9 CHAIR HILLMAN: I think we should
10 -- the military Judge training piece, I just
11 want -- in that sentence where we say while
12 recommending consolidation -- this is in the
13 best practices -- while recommending
14 consolidation, all these things render it too
15 costly and onerous -- can't we just please say
16 how come military Judges can all go to the
17 same school and no one else can? So let's
18 just --

19 COL MCGOVERN: We put the Judges
20 training in this section.

21 BG DUNN: It's because of
22 throughput is so much smaller.

1 CHAIR HILLMAN: Fair enough.
2 Let's just make that distinction. Let's say
3 the volume, you know, the volume of training
4 that's required at the -- I just that's fine.
5 There are answers to these. I'm not
6 contesting that conclusion. I concur in that
7 conclusion but we need to explain why there's
8 not a uniform system.

9 BG DUNN: Yes, because they can
10 get them all together in one place and
11 effective --

12 MR. STRAND: What I heard you
13 saying is can't we all just get along?

14 CHAIR HILLMAN: All right, we have
15 -- are we -- is there anything else with
16 training you think that our training people
17 want us to focus on?

18 MR BRYANT: I don't see anything
19 that's on fire in here that we haven't poured
20 water on.

21 COL HAM: Ma'am, did you want, in
22 addition to that sentence, did you want what

1 was discussed about judicial training added to
2 the training block that --

3 CHAIR HILLMAN: It should be
4 somewhere.

5 COL HAM: Your mandate is assess
6 -- I can't remember what your mandate is. But
7 one of you said training prosecutors and
8 defense counsel but you want to add the --

9 CHAIR HILLMAN: I do because we're
10 talking about muscling up the military Judge
11 and so --

12 COL HAM: So that would go in this
13 section as well?

14 COL MCGOVERN: I think so, the way
15 the flow of the -- because the training of
16 prosecutors and defense counsel is going to go
17 before prosecution and defense of sexual
18 assault cases. So if we mention there the
19 Judges training, it will justify or help
20 validate your proposals for the Judge
21 involvement.

22 COL HENLEY: Well, in comparative

1 systems, it's -- I don't think we have any
2 speakers on this, but it's my understanding
3 civilian and federal judiciaries do not have
4 similar training programs. I mean you're
5 appointed to the Bench and that's it. You're
6 left to your devices when whoever the
7 presiding Judge is on training.

8 So, I think the military is unique
9 in training their Judges on core competencies.

10 COL MCGOVERN: We can research
11 that and then advise --

12 COL HENLEY: But you've got --
13 General Cooke could certainly tell you.

14 COL MCGOVERN: And Judge Jones.

15 COL HENLEY: And Judge Jones. I
16 mean you can get that what she went through
17 when she went through when she was appointed
18 to the Bench, or confirmed to the Bench. So
19 and I think we do a pretty good job training.

20 MR. BRYANT: Some of this harkens
21 back to the investigators, each service don't,
22 you know, they're traditionally -- they don't

1 want to join with anybody else in joint
2 training. But the Judges are -- I understand
3 your point, like well there's a lot more
4 investigators, there's a lot more prosecutors,
5 attorneys than there are Judges.

6 But they don't have to all go at
7 the same time. There's a way to -- you can
8 train hundreds and thousands.

9 BG DUNN: But you have -- no but
10 you've got environmental law, you've got labor
11 law, you've got operational law, you've got --

12 CHAIR HILLMAN: All right, pause.
13 Pause. Okay, so --

14 BG DUNN: -- and so many
15 classrooms, so many instructors, so much --

16 CHAIR HILLMAN: We're not going to
17 finish this sentencing piece, but I want to
18 get your reactions to at least to some of
19 this.

20 So we fronted the biggest
21 recommendations, I think, the most global
22 recommendations of the sentencing review and

1 that's sentencing -- we recommended sentencing
2 by military Judges rather than panel members
3 and recommended that unitary sentencing be
4 abolished in favor of sentencing tied to
5 specified charges.

6 COL HENLEY: So that would be the
7 maximum sentence would be the maximum for the
8 highest -- the top charge? So if there's --

9 MR. STRAND: No, they charge for
10 each offense, right?

11 COL HENLEY: So you have
12 consecutive sentences?

13 MR. BRYANT: We could still have
14 them concurrent. I don't think that's what
15 we're saying. We just want to see -- this
16 would mean that for each specification, there
17 would be a separate sentence whether -- we're
18 not getting into whether the Judge can run
19 them concurrently or do they have to be
20 consecutive. I don't think that was our
21 concept.

22 We just want to know, okay, for

1 the smoke and dope, you've got -- what was
2 your sentence and what was the sentence for
3 rape? Don't just tell me it was, you know
4 five years, thank you very much.

5 COL HAM: So when there's a
6 25-page charge sheet with 87 charges, what do
7 you do?

8 COL HENLEY: Or a 25-page charge
9 sheet for bad checks and you have to sentence
10 for each bad check.

11 BG DUNN: Each bad check.

12 COL HAM: You sentence for each
13 bad check.

14 MR. FISHMAN: You probably need a
15 better prosecutor.

16 BG DUNN: That's easy.

17 COL HAM: But why is that --

18 BG DUNN: Determine the -- you
19 divide by the charges for the bad checks. I
20 sentence you to one year, one month and three
21 days for each check.

22 COL HAM: With a maximum sentence

1 of 875 years, I sentence you to three months
2 of --

3 MR. BRYANT: You're still writing
4 checks? I thought they were using credit
5 cards.

6 COL HENLEY: It would be one day,
7 it would be one day for each check.

8 MR. BRYANT: How many forged
9 checks are they doing in the military, really?

10 COL HAM: There'd be multiple
11 larcenies and multiple ATM thefts.

12 BG DUNN: Right, right. You know,
13 we steal your ATM card and use it 14 times,
14 filing of 14 charges and the Judge has to
15 sentence on each one separately?

16 MR. FISHMAN: So the prosecutors
17 who think they're getting paid by the charge.

18 COL HAM: On various occasions.

19 COL MCGOVERN: It is how you
20 charge on those.

21 MR. BRYANT: I mean when push
22 comes to shove, aren't they going to say well

1 if you plead guilty to five, we'll knock off
2 nine?

3 COL HAM: Yes.

4 BG DUNN: No, that's not what we
5 do.

6 CHAIR HILLMAN: Okay, I want to be
7 respectful of the transcript. Okay, so let's
8 talk one at a time.

9 Any comments on the -- are we
10 doing okay here -- what comments on the
11 sentencing by Judges or the unitary sentencing
12 recommendations?

13 COL MCGOVERN: On a serious note,
14 do we -- should we explore or at least address
15 the issue that it will need to be contemplated
16 about concurrent or consecutive? I mean here
17 we are informing them, but I mean should that
18 be something we address?

19 BG DUNN: It says for different
20 offenses they can pick consecutive or
21 concurrently. Is that what you said? Sorry.

22 COL MCGOVERN: Do we need any

1 additional detail since that was laughable?

2 CHAIR HILLMAN: We need more
3 additional -- we need -- I mean this is our
4 sketch of --

5 COL MCGOVERN: Okay.

6 CHAIR HILLMAN: --
7 recommendations. I mean you have to make us
8 sound legitimate. So yes, we need some more
9 help with what actually needs to be in there.
10 So this is just our first glance at it,
11 definitely.

12 BG DUNN: Maybe we should allow
13 grouping of -- a group sentence on like
14 charges, for example, multiple uses of an ATM
15 card.

16 COL HENLEY: And you would still
17 have the exception for capital cases.

18 CHAIR HILLMAN: Well, we'd have to
19 recommend the -- I mean that's a separate
20 process. I wouldn't recommend any changes to
21 the capital sentencing process, so we'd carve
22 that out.

1 MS. FRIED: Plus, we're still
2 talking about sexual assault.

3 MR. STRAND: I mean the
4 prosecution you've got a whole charge sheet
5 full of stuff and --

6 COL MCGOVERN: Right, with a lot
7 of these --

8 MR. STRAND: -- you get a
9 conviction on it, you go twice these
10 convictions?

11 MR. BRYANT: Yes, for the
12 sentencing?

13 COL MCGOVERN: General Cooke has
14 pointed out a lot of these proposals would --

15 MS. FRIED: That's true but that's
16 what I believe.

17 CHAIR HILLMAN: We're having two
18 conversations at once and it's making it tough
19 for the court reporter to do this. So what
20 were you on over here?

21 MS. FRIED: I was just going to
22 say, the mandate that this response and this

1 panel is limited to sexual assault. So
2 whatever recommendations come out of that, I
3 think the purpose of the report it would be
4 this panel, sexual assault. Now what happens
5 to the greater picture, I think, is going to
6 be up to DoD or whoever, Congress.

7 But I think, you know, we talked
8 about larceny and the other cases but I was
9 just trying to bring us back to the sexual
10 assault.

11 COL MCGOVERN: I think General
12 Cooke has raised the issue in previous
13 meetings that we'll need to address the fact
14 that these proposals would probably need to be
15 explored system-wide because you couldn't just
16 do a unitary sentencing eliminating for sexual
17 assault because these are -- include multiple
18 charges.

19 BG DUNN: Right. These
20 recommendations have to apply to the entire
21 system just like the military Judge
22 recommendations, they're not just sexual

1 assault cases it has to fly through the entire
2 system. So we may be outside our mandate.

3 MR. STRAND: Well, I don't think
4 we're outside our mandate, it's just that
5 we're recommending to fix sexual assault to
6 make sexual assault better, to make
7 prosecutions and reports and defense of these
8 cases.

9 These are the recommendations and
10 you can't separate them, even on a typical
11 sexual assault case, you might have the sexual
12 assault defense, rape. You might have
13 adultery and you might have, you know, using
14 your charge card, you know for TDYs and things
15 like that. It's going to encompass the whole
16 thing.

17 And so I mean, I think there's an
18 understanding any of these recommendations we
19 make for -- in this area especially, is going
20 to impact the whole system.

21 MR. BRYANT: I think it would look
22 and sound worse in response to you, Maria, if

1 we said should sentencing by military members
2 in sexual assault cases be eliminated. That's
3 like what, just that one? That's going to
4 raise more questions than in just saying
5 broadly that we need to eliminate -- we
6 recommend eliminating unitary sentencing and
7 we recommend eliminating sentencing by panel
8 members.

9 MS. FRIED: Right. I agree with
10 that, Mr. Bryant. The only thing I was trying
11 to do was kind of bring back the focus to
12 sexual assault and we can also footnote or
13 note that this would have broader UCMJ
14 implications for other offenses without
15 getting wrapped up right here with how's this
16 going to work with larceny? How's this going
17 to work with other offenses?

18 MR. BRYANT: Okay, all right.

19 MR. FISHMAN: Just to be clear,
20 since we don't have it in front of us, the
21 discussion section addresses all the
22 information that gives rise to this. So, that

1 highlights these perception issues and the
2 issues that have --

3 COL MCGOVERN: Pertained to sexual
4 assault.

5 MR. FISHMAN: -- urged the
6 discussion from the sexual assault vantage
7 point.

8 CHAIR HILLMAN: So the other --
9 this is also, the sentencing guideline and the
10 mandatory minimum questions are raised here.
11 So we did not recommend sentencing guidelines
12 be adopted and we did not recommend mandatory
13 minimums other than what is already out there
14 actually, which is referenced in the
15 recommendations of the prosecution here about
16 mandatory minimums which is we now have the
17 requirement in the NDAA that persons convicted
18 of a sexual assault be administratively
19 separated.

20 So we need to -- the prosecution
21 folks, if you look back at this, they
22 recommended that we tell Congress to amend the

1 mandatory minimum requirement because it
2 includes low-level sexual assault cases as
3 well as penetrative offenses and that Congress
4 should repeal that law for lower-level
5 non-penetrative offenses, reconsider the
6 requirement there.

7 So that's the recommendation from
8 -- that we bracketed from before. Here we
9 opted in the Sentencing Subcommittee to, what
10 did we say, given the current lack of reliable
11 evidence regarding the effectiveness of
12 mandatory minimum sentences and improving
13 outcomes. We probably should say, they should
14 not be established to improve the military's
15 response to adult sexual crimes any more than
16 what we actually already have. But we didn't
17 recommend repealing that piece.

18 BG DUNN: But this is not really a
19 mandatory minimum sentence. That is an
20 administrative process that must occur after
21 the trial.

22 CHAIR HILLMAN: Correct.

1 BG DUNN: So it's actually, it's a
2 fine line, but it is a line. You know, I mean
3 I don't even know if we should actually
4 characterize this as a mandatory minimum
5 sentence because it is --

6 COL MCGOVERN: I think it's being
7 perceived as a mandatory minimum.

8 BG DUNN: Well maybe perceived,
9 but I think we need to make it clear that this
10 is an administrative process that occurs after
11 a conviction, if there is no discharge.
12 Correct? It's not -- I mean the Judge does
13 not discharge, does not administratively
14 separate the individual.

15 MR. FISHMAN: I'm sorry, I'm
16 confused. I'm confused.

17 What we were intending to talk
18 about was under this, the new NDAA where it
19 does mandate an actual punitive discharge,
20 that's what we were trying to raise.

21 BG DUNN: Oh, okay, I'm sorry.

22 COL HAM: That's not what this

1 says.

2 BG DUNN: That's not what this
3 says. Right.

4 MR. FISHMAN: Which part are we
5 referring to? I'm sorry, I lost it.

6 COL HAM: The mandatory discharge
7 requirement builds upon a system that already
8 requires administrative processing. That's
9 what we're discussing. Right?

10 BG DUNN: Right.

11 CHAIR HILLMAN: Okay, I'll tell
12 you what, we're not going to get through this
13 right now. I think it's actually a little too
14 complex. We need to make sure that we get
15 this. Okay?

16 BG DUNN: I'm sorry, we're talking
17 about the mandatory dishonorable discharge.

18 MR. STRAND: I agree with these
19 recommendations and what I see we're not doing
20 is we're not punting to the next panel. We're
21 saying that we have enough information right
22 now that we're not even recommending this be

1 explored anymore. This is our recommendation
2 and I think that's a good thing.

3 CHAIR HILLMAN: Okay, so Russ, is
4 there anything else? We're going to lose you
5 for the next time. I think the rest of you --
6 are you here next time Colonel Henley?

7 COL HENLEY: Yes.

8 CHAIR HILLMAN: Okay, so you will
9 not be here. So General Dunn, is there
10 anything you want to add then?

11 Of course, you'll have the
12 opportunity to respond on this but if there's
13 something that you should add now at sort of
14 the drafting point as we go forward as
15 everybody works this out.

16 MR. STRAND: Just a procedural
17 question. Because we went through a lot of
18 verbal stuff on our subcommittee today, we
19 haven't seen the write-up. And before they go
20 out to the whole committee, is that going to
21 come out from you just to us first?

22 COL MCGOVERN: No, the teams' prep

1 sessions were permissible because we briefed
2 it out at the subcommittee meetings. From
3 here on out, our drafts will be provided to
4 the entire committee. Is that accurate?

5 BG DUNN: But we can still make
6 our corrections and stuff like that --

7 MR. STRAND: Yes, our comments.

8 BG DUNN: -- just in a more
9 public venue, though.

10 COL MCGOVERN: You may have more
11 because you've explored the subject in greater
12 depth than some of the other folks but at this
13 point we will send the e-mail out to all ten
14 members.

15 CHAIR HILLMAN: General Dunn, any
16 other thoughts?

17 BG DUNN: No.

18 CHAIR HILLMAN: Okay, thanks
19 everybody. We got through everything but for
20 statistics and surveys at least in a
21 preliminary sense, some of it more in-depth
22 and we're going to count on our brilliant

1 staff to shape this into a report that we will
2 look at again when we come back.

3 If there are particular things as
4 you think about, we covered a lot of ground
5 today, that you want to flag to make sure we
6 actually discuss, for those of us who are here
7 on the 11th, send that to Colonel McGovern and
8 we'll make sure that we flag those things.

9 BG DUNN: And we're going to have
10 some e-mail review back to the staff.

11 COL HAM: Please remember to
12 e-mail directly to Colonel McGovern and not to
13 each other.

14 BG DUNN: Yes, yes.

15 COL HAM: And then I guess the
16 final item is if there are things that are not
17 -- my brain is dying -- if there are subject
18 matter areas that have not already been
19 addressed, regardless of whether they fit into
20 one of these buckets, if there are any other
21 items that you would like to engage the
22 subcommittee on, please let Lieutenant Colonel

1 McGovern know so that we're not missing any
2 big picture or small picture items that you
3 might want to discuss and make recommendations
4 on just because they didn't fit into a bucket.

5 CHAIR HILLMAN: Okay, thanks
6 Colonel Ham. Thanks Colonel McGovern. I
7 think we're done.

8 MS. FRIED: Okay, thanks everyone.
9 The meeting is closed.

10 (Whereupon, the foregoing matter
11 went off the record at 4:59 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual
Assault Crimes Panel

Before: US Department of Defense

Date: Tuesday, March 25, 2014

Place: Arlington, Virginia (teleconference)

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my direction; further, that said transcript is a
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