UNITED STATES DEPARTMENT OF DEFENSE

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

CONFERENCE CALL

FRIDAY
APRIL 25, 2014

The Subcommittee met via teleconference at 12:00 p.m. Eastern Daylight Time, Elizabeth Hillman, Chair, presiding.

PRESENT:

PROFESSOR ELIZABETH HILLMAN, Chair
COLONEL (Ret.) STEPHEN HENLEY
RHONNIE JAUS
COLONEL (Ret.) LARRY MORRIS
COLONEL (Ret.) DAWN SCHOLZ

ALSO PRESENT:

MARIA FRIED, Designated Federal Official
COLONEL PATRICIA HAM, Staff Director
LIEUTENANT COLONEL KELLY McGOVERN
JANICE CHAYT
DILLON FISHMAN
JOANNE GORDON
TERRI SAUNDERS

Neal R. Gross and Co., Inc.
202-234-4433
12:09 p.m.

MS. FRIED: Okay. This meeting is open.

LTCOL McGOVERN: Okay. Dean Hillman, do you have any opening comments?

CHAIR HILLMAN: No. I thought we got through a lot yesterday. I appreciated everybody's comments and responses. If Rhonnie or Dawn have comments on what we talked about yesterday, we should probably start with that, right?

LTCOL McGOVERN: Yes. Colonel Scholz, we did go through the numbers that you've highlighted, and I think we addressed your concerns. And those should be reflected in our changes, which we will be sending out tonight. If they're not, I'd just -- maybe you could just make track changes, say no, Kelly, you didn't get what I was trying to say or whatever.

COL (Ret.) SCHOLZ: That sounds
good. That sounds good. I'll look forward to
looking at what modifications were made.

LTCOL McGOVERN: Okay. But we
really appreciated all the time you put into
that.

Otherwise, I think we are ready to
begin at Item Number 32. For this one, Mr.
Bryant had a concern with the recommendation
in 32.

CHAIR HILLMAN: Kelly, this is
Beth. Harvey is not with us this morning,
right?

LTCOL McGOVERN: Right. I didn't
know if maybe someone else could identify if
-- or if they had any problems with it. If
not, I can just go back to Mr. Bryant.

CHAIR HILLMAN: This is Beth. My
guess, channeling some of his other problems,
are the funding, the way that we -- the impact
on funding streams. So the recommendation
says, "The Secretaries continue to assess and
ensure" -- it's worded a little bit awkwardly
there. We should probably correct those verbs. "To continue to provide adequate resources to maintain a sufficient number of well-trained prosecutors in the services' SVC, especially if there is a trend in increased reporting."

LTCOL McGOVERN: Okay. I'll make that change, and we'll see if he -- if that's acceptable, or if he'd like to make a further change. Thank you for interpreting Mr. Bryant's concerns.

COL HAM: This is Colonel Ham. The body, the discussion makes clear some of the services already obtained additional authorizations for personnel prior to the congressional mandate. So that's why it's worded not specifically to implement.

For example, the Army already had obtained 23 additional authorizations for special victim prosecutors prior to the NDAA authorizing or mandating the special victim capability.
LT COL McGOVERN: Whereas, the
Marines I think took it out of hide with their
whole restructuring. So that's why we
included the "services should assess," but --

CHAIR HILLMAN: This is Beth
again. As I -- every time I look at things
more closely, then I actually can see some --
for instance, 32b says, "The finding is the
services fully fund special prosecutors' case
preparation requirements." It's hard to know
what that means exactly, because I'm sure we
did in fact talk to prosecutors who wanted
some things they didn't get, for instance.

So, I don't know, and then the
first part in that first finding, too, I agree
we shouldn't make a stronger recommendation
for some more specific funding, given what
Colonel Ham and Lieutenant Colonel McGovern
just said about how the services are dealing
with this in different ways and have already
taken steps.

But in 32a, as long as I'm looking
at it, could we change "manpower" to "personnel"?

LTCOL McGOVERN: Sure.

COL HAM: Personnel authorization?

LTCOL McGOVERN: Sorry, Colonel Ham?

COL HAM: Is the right word "personnel authorizations" or --

CHAIR HILLMAN: I just don't want the gender-specific "man" in that. Whatever you can do to take that out, that would be great. Even though I know it's a term we use.

And then in B, I guess if we could just say, "fund special prosecutor's case preparation requirements," maybe just take out "fully," because we are sending additional funding there. But I -- "fully fund" would imply that they get a blank check, which I don't think that they do.

LTCOL McGOVERN: Okay.

COL (Ret.) SCHOLZ: This is Dawn Scholz. I'm a little -- is the special victim
prosecutor the same as the special victim
counsel?

LTCOL McGOVERN: No, no, no.

We're talking completely separate -- in the
services, you have a special victim
capability. I think the Air Force does it as
a team. Others just do it as a regional
capability. We have a special victim
prosecutor, special investigator, paralegal,
and victim-witness liaison.

So this section is really talking
about, are the special victim prosecutors
sufficiently funded, provided the resources
they need, and then we contrast that with our
defense counsel given everything that they
need.

COL (Ret.) SCHOLZ: Gotcha. Yes,
I understand. It's a little confusing
sometimes because we've got the SV -- what do
we call it? The special victim counsel, SVC,
and then we have the SV -- see, I mean, it's
--
LTCOL McGOVERN: Yes, Colonel Scholz, and I'm pretty sure that everybody is confused. And one of our overarching recommendations at the beginning of the report is to standardize terms throughout the services to avoid this confusion, and then, again, for the special victim capability, having the same acronym as SVC being the counsel. It's just a disaster, so --

COL (Ret.) SCHOLZ: It is. It is. Okay. Good. I'm glad I'm not the only one that was, like, ah ha, God, this is going to be --

(Simultaneous speaking.)

CHAIR HILLMAN: Go ahead Beth.

LTCOL McGOVERN: All right.

Number 33.

MS. JAUS: This is Rhonnie. I have a problem with 33c, unless somebody wants to talk about a and b of the findings.

LTCOL McGOVERN: There was a concern with -- I have it listed as 33 and
33b. So I'm not sure if that includes a as well. If we can just take a minute and read through these?

CHAIR HILLMAN: This is Beth. I had a question about 33b, and then some concerns about the recommendation here. So maybe I'll start, since b is first there. So the first finding seems fine. We are just transmitting that DoD has established some criteria, which seems unobjectionable to me. But b is just a statistic. We haven't generally made findings that are simply excerpted statistics from sort of individual things. And this feels out of place here.

This feels like evidence to support a finding of there is adequate resources or that there is not -- but it doesn't -- by itself, it seems -- it's just a statistic. I couldn't understand why it was there by itself.

LTCOL McGOVERN: Sure. Once you have the opportunity to see the discussion,
DoD has listed a number of things for their criteria, and then all of the services provided RFIs for what they are going to do to assess their special victim prosecutors.

The Army is using the dropout rate as one of the measures. It is not one of the measures required by DoD. And so part of the recommendation is that that should be a measure, because two years ago the Air Force reported that they had 96 victims drop out.

That's one of the reasons that they became -- they came up with special victims counsel, where the Army didn't have the special victims counsel, but they said because of special victim program they saw a dramatic decrease in victim fatigue. So only six percent of victims actually declined to continue to cooperate.

So in the context, I can even just drop it and move it to only be part of the discussion, but, really, otherwise you're saying DoD has proposed some good criteria.
One additional measure could be the dropout rate or the number of victims who stop cooperating in order to assess the special victim prosecutor, and, at the same time, the special victim counsel program, to see if those are helping.

CHAIR HILLMAN: This is Beth. May I propose that we just add to the finding in 33a, which is first we set up the criteria, then we add a statement that says those criteria have been implemented, those criteria have been addressed by special programs across the services, including the Army's SVP program and the Air Force's SVC -- or whatever we're going to call the standardized name for the special victim counsel, and followed by the other services that have demonstrated -- that have shown promise so far or, you know, we -- because this just feels like this is evidence of that conclusion. Does that make sense to others on the call, too?

LTCOL McGOVERN: Right. And this
is testimony from Colonel Mulligan. Say why
the special victim prosecutor, not the special
victim counsel, but the special victim
prosecutor program. It is helpful. It is a
measure of a difference that they saw. So I
can delete 33b and add that general language
to 33a, but at the same time I think it's
important to stay focused that here we are
talking about the special victim prosecutors,
not the special victim counsel. And that this
is criteria just to address special victim
prosecutors.

COL (Ret.) SCHOLZ: And, Kelly,
this is Dawn again, Dawn Scholz. I think what
you said is -- 33 is already -- is in the
recommendation, to keep that as a metric, the
dropout rate. So it's kind of addressed in
your recommendation. I don't know if you --
I see what you're saying. I'm thinking -- I'm
kind of agreeing with Dean Hillman that maybe
we don't need it, because you do talk about
keeping that metric in your recommendation.
MS. JAUS: This is Rhonnie. And it does help support what she says in the recommendation, what's said in the recommendation.

LTCOL McGOVERN: It's like if you don't say it in a finding, it's like, well, where did you come up with that? Because our findings and recommendations may be all that people read.

COL (Ret.) SCHOLZ: Oh, I gotcha. Okay.

MS. JAUS: I actually agree with Kelly. This is Rhonnie. I actually agree with Kelly. I think this should say, you know, whatever everybody else has said.

LTCOL McGOVERN: I could put it in context a little bit better, so that it doesn't look like we're just throwing a statistic around, if that's what your concern is, Dean Hillman.

COL (Ret.) MORRIS: This is Larry Morris. I generally agree, too. I just think
that a couple of things might help there. When you -- however you say the statistic, six percent of sexual assault victims who had what -- who had identified themselves and come forward, because this is --

LTCOL McGOVERN: Yes. An unrestricted report. Correct. But it had started the process.

COL (RET.) MORRIS: Right. Because otherwise we could have looked at it and said you're still -- you're not answering the unreported masses who don't trust your system to begin with. But so long as that's -- we acknowledge the limitations of this piece of information.

But also, it seems like we might be setting up like a false tension between conviction rates and the dropout rate. I mean, I don't want that dropout rate to look like some Soviet number that is so favorable that once people report they love the system.

So dropout rate can also -- or,
correction, the conviction rate is not irrelevant. I mean, I think we say here conviction rates are not an adequate measure. Maybe we should say, like, conviction rates should not serve as the sole measure of the success, yada, yada, because if you end up with -- if you have a five percent conviction rate, I think it makes sense to say, hey, you know, are we -- is there something about our system here? It's not working quite right.

It's one thing to say yes, we try the hard cases, but you would look at it -- you just don't look at it to the exclusion of all other factors, because you could still end up with, you know, relatively high -- you know, relatively low dropout rate and a conviction rate that still fills in other information that you want to have when you're doing a whole comprehensive evaluation of the program.

COL HAM: So, Colonel Morris -- this is Colonel Ham -- would that be -- if we
follow that thought, we should kind of move that 33c into the recommendation, and say conviction rates should not serve as the sole measure --

   LTCOL McGOVERN: But I think --
   COL HAM: -- pass or failure.
   LTCOL McGOVERN: -- conviction rates are within this list of DoD criteria.
   COL (RET.) MORRIS: So, and I guess the way, Colonel Ham, I would address the recommendations, the finding would just be, you know, can't serve as the sole measure, and then the finding -- at the end of your recommendation say -- you know, develop metrics at the dropout rate, in addition to the conviction rates, or something.
   MS. FRIED: This is Maria Fried. Kelly, I'm not sure what document you're referring to when you say the conviction rate is a metric or a source of measurement. I think the intent is to capture, you know, maybe case dispositions, but not have it as a
metric, because of the cases on -- you know, on a case-by-case basis, based on the facts, so on and so forth.

So while I think DoD -- and this is just for the panel's information -- may track conviction outcomes, it's not through metrics. It's usually through information. Does that make sense?

LTCOL McGOVERN: Yes. And, again, I'm referring to the report to Congress in the DTM where they list out the actual criteria. I can pull that up. But, I mean, again, all of the -- I think all of the services' TJAGs have captured exactly what Colonel Morris was saying, that this should not be a full criteria. You can't get around using it as some sort of measurement, but it is one thing among several that I believe DoD -- because these were coming from direct quotes from the DoD report.

MS. FRIED: Right. I think it's information that's useful and should be paid
attention to. But I thought -- and I could --
you know, my understanding was there was
resistance because if you have a chart that
shows, you know, one year you're down at five
percent in conviction rate, and then next year
you're at 100 percent, what are you really --
what does that metric show?

LTCOL McGOVERN: Right.

MS. FRIED: So what I think the
department has said -- and, again, this is
just background information, if it helps at
all -- is that's good information to capture,
but not necessarily as a metric. But if the
panel obviously thinks that needs to be
captured in the metric, that's -- that's the
panel's call as well. But I was just trying
to shed some light on the term "metric" versus
"information" I guess.

MS. JAUS: Okay. Well, I think
it's important. I certainly don't -- this is
Rhonnie, and I don't think it's the sole
criteria, but I think the conviction rate is
something important to look at.

MS. FRIED: Can I make a point about 33c?

LTCOL McGOVERN: Okay.

MS. FRIED: Do you see where it says, "Conviction rates are not an adequate measure of the success or the failure of the special victims due to the inherently difficult nature of sexual assault prosecutions, many of which have no physical evidence and involve alcohol?" I really don't think that we should highlight the use of alcohol as the only problem with the case.

It's like saying that that -- I don't think it should be highlighted in that place. We can say "due to the inherently difficult nature of sexual assault prosecutions." That's it. Or "many of which have no physical evidence and involve no other witnesses beyond the victim" or something like that.

But just to highlight alcohol, I
think that is unfair and problematic. Some of
the cases involve drugs, some of the cases
involve other things. I don't think we should
be highlighting it.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: This is Beth. I
agree with that. Let's just -- let's strike
that last clause.

I also -- I have some doubts about
stating it that way so strongly, "Conviction
rates are not an adequate measure." I mean,
really, what we want to say is, "Conviction
rates aren't enough. We need to continue to
assess in a broad gauge fashion." And,
really, these issues about data run to the
statistics and the first section of our whole
report, which runs to do comparisons between
military justice outcomes, civilian criminal
justice outcomes, and then the problem
writ-large, military issues with this compared
to civilian issues with this.

So I feel like -- what do we
really want? This is measuring the
effectiveness -- this section is entitled --
this finding and recommendations, "Measuring
the Effectiveness of Military Special
Prosecutors." What we really want to say is
we need to look at -- look beyond conviction
rates, and we have some other data that is
useful, for instance, dropout rates, that can
be helpful there.

So our -- those are the key things
I think that we want to say. More than that,
just continue to assess this. I'm not sure
there is much more for us to say in the
recommendation.

LTCOL McGOVERN: And just to give
you all more background along the lines of
what Maria was saying, the conviction rate,
again, was something -- this is sort of to
send a signal to Congress, because they wanted
you all to specifically look at conviction
rates as if it is a measure of success,
whereas, the DoD is going to look at
prosecution rate, the number of SVC -- special victim capability cases preferred versus the overall number of courts-martial, the percentage of courts-martial tried with the direct assistance of a specially trained prosecutor, compliance with the special victim capability, the percentage of specially trained prosecutors who receive additional and advanced training, and the victim feedback on the effectiveness of the SVC prosecution and legal support services, again, relying on some sort of survey mechanism.

So, overall, we are saying DoD actually, then, is not looking at conviction rates. Congress wants you to look at conviction rates. They are not using that as a metric. The only one that the Army added was the dropout rate, because they see that as a way to measure when you're not necessarily going to get victim surveys at the end of the process.

So that's to put it all in
context, since you don't have the report. I mean, technically, we can just delete 33c entirely.

MS. JAUS: I think it's important to highlight -- oh, this is Rhonnie. Sorry. I think it's important to highlight that the reason the conviction rate isn't a good criteria alone is because of the inherently difficult nature of a sexual assault prosecution. I think that's a good point to emphasize and to remind people of.

LTCol McGOVERN: Okay.

COL (Ret.) SCHOLZ: How about this wording, "Conviction rates cannot serve as the sole measure of success or failure of the special victim capability due to the inherently difficult nature of sexual assault prosecutions, and other measures such as the dropout rate may be useful in assessing" --

COL (Ret.) MORRIS: "May be more useful."

COL (Ret.) SCHOLZ: "May be more
useful" or -- okay. Something like that?

MS. JAUS: To assess maybe victim satisfaction.

LTCOL McGOVERN: We'll play with it and send it to you all. Okay? Thank you.

Thirty-four, people seemed okay with having a prosecutor involved as soon as possible.

The next one was -- I'm sorry.

MS. JAUS: Kelly, this is Rhonnie. I'm not really sure -- I mean, I agree with you that the sooner the special prosecutor becomes involved in the case and meets with the victim the better, and the recommendation, does it say anything about when the prosecutor should become involved? I didn't think it said anything in the recommendation.

LTCOL McGOVERN: It says that they're involved within 48 hours.

MS. JAUS: I thought the special prosecutor has to consult with the investigator. What about the special
prosecutor meeting with the victim? I think

LTCOL McGOVERN: There is no

mandate for that.

MS. JAUS: Well, can't we

recommend that? Isn't -- I thought that that

is a good thing to recommend, that the

prosecutor should meet with the victim as soon

as possible, because not just to speak to the

investigator but to become -- the sooner the

prosecutor becomes involved in the case and

meets with the victim, which is what we said

in the finding, shouldn't that be the

recommendation, that the prosecutor should be

meeting with the victim as soon as possible,

as soon as he or she could? Not necessarily

just to speak with the investigator, but to

speak with the victim.

LTCOL McGOVERN: Okay. Can we

leave it as "as soon as possible"?

MS. JAUS: Right.

LTCOL McGOVERN: Is that okay with
you?

MS. JAUS: Yes, that's fine with me, but I just think that that's an important thing, for the prosecutor to meet and speak with the victim.

LTCOL McGOVERN: I just didn't know if you wanted to set another timeframe.

MS. JAUS: No. No, no, no.

LTCOL McGOVERN: I think "as soon as possible" is helpful, or "geographically, possibly not located at the same installation."

MS. JAUS: Right, right, right.

Okay. That's fine.

LTCOL McGOVERN: Okay. Then, Number 35a and b recommendations. This is where we're talking about whether or not Defense should have a budget, and the recommendation was against giving them a budget but ensuring that they are adequately resourced.

MS. JAUS: Oh, and also about
specialization.

CHAIR HILLMAN: This is Beth. My only question is on 35b, that second sentence. Do we need to say that? I mean, is that a specific question that was posed to us? It says the Secretary --

LTCOL McGOVERN: The defense counsel wanted their own budget to be independent.

CHAIR HILLMAN: Right, right. But, I mean, but in our terms of our -- this is Beth. In terms of our mandate, though, we don't have a proposal before us or any legislation that suggests that we are going to establish -- anybody is intending to establish a military defense counsel equivalent to special prosecutors in sexual assault cases.

In other words, there is no special defense capability that is being contemplated here anyway. So just saying, "Services continue to provide experienced counsel through regional defense organizations"
from the reserve component as they are doing now," that seems fine, without going further.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: So let's just strike that second sentence, if no one objects.

COL (Ret.) SCHOLZ: This is Dawn. I agree, as long as it hasn't been suggested or recommended anywhere along the way.

LTCOL McGOVERN: And I guess it's just contrasting the special victim prosecutor and all those resources are -- I mean, some of the theme throughout is ensuring that this is a balanced system. So here this would be an opportunity for you to say, "We recognize it's not the same, but it doesn't mean that there is necessarily an imbalance."

COL (Ret.) SCHOLZ: Did somebody suggest or recommend this on one of our trips or visits, is kind of my question. Dawn Scholz again.

LTCOL McGOVERN: No. Just that
they are not in their tour lengths long enough
to get to know the job.

COL HAM: This is Colonel Ham.

The imbalance in resources was a general
recurring concern.

CHAIR HILLMAN: This is Beth.

Right but we address that -- we address that
I think elsewhere. This just sounds too
structural in nature. For instance, if there
were some other changes that would happen,
maybe it would make sense to do this. So I
just feel like going that far here doesn't
make, but I agree with what you're saying,
that we want a balanced system and that we've
pushed back to try to realign that some in
other parts of the report.

LTCOL McGOVERN: So do you want to
delete 35c altogether?

CHAIR HILLMAN: Just the second
line, 35b, that "the SECDEF should not." I
just don't want to tell the SECDEF not to do
this when I don't think it has been proposed.
LTCOL McGOVERN: Oh, okay.

CHAIR HILLMAN: I do think we're -- that's all.

LTCOL McGOVERN: Okay. Okay. Any other concerns with 35?

All right. Moving on to 36b.

Colonel Scholz, you were concerned the finding -- the last sentence should not be part of the finding. It sounds like discussion.

COL (Ret.) SCHOLZ: Let's see, where are we, 36?

LTCOL McGOVERN: B.

CHAIR HILLMAN: This is Beth. I notice we have multiple 36a's and b's, 35a's and b's, at least on my draft. So we'll just -- Colonel Scholz, were you talking about the first 36b or the second 36b?

LTCOL McGOVERN: And I guess it's 36b finding or 36b recommendation. We tried to keep the numbers the same, so the topic was -- yes, when it breaks down into letters it's confusing.
COL (Ret.) SCHOLZ: Yes. I think I was talking about the finding there, and I -- 36b finding. And I think it's fine as long as -- if we want to say what -- kind of briefly summarize the other potential ways we found to fulfill the requirement. But otherwise I would just leave it for the discussion part of the -- because otherwise it just kind of leaves you hanging. We recognize there are other potential ways to fulfill it, and I understand it is going to be addressed in the discussion, but it just seems odd for a finding.

LTCOL McGOVERN: Okay.

COL (Ret.) SCHOLZ: I mean, can we -- is there a way to summarize those in there? "We've recognized several ways to fulfill the requirement to provide -- such as," or do we just drop it altogether?

COL HAM: Whichever you'd prefer we can do. It's Colonel Ham. Such as, hiring civilian investigators, assigning military or
criminal investigative organization

investigators, or other. I guess those are

the three.

LTCOL McGOVERN: Yes. Hiring
civilians or using current MCIO agents or
contractors.

CHAIR HILLMAN: This is Beth. I
would strike it from 36b. I would strike that
line there, and in the -- in the
recommendation, we say, "Assess the
appropriate mechanism to promptly implement
this requirement." If you'd like, we could
specify there whether contractors, MCIOs,
dedicated MCIOs, or civilians. But I would
probably not specify it there, just cut that
line and leave it out, because we do want to
leave the door open for multiple solutions to
this problem.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: Colonel Scholz,
does that sound okay to you?

COL (Ret.) SCHOLZ: That sounds
great. Sounds good.

LTCOL McGOVERN: Okay. The recommendation for Number 37. This was -- Mr. Bryant was concerned. I don't know if anyone else is.

COL (Ret.) SCHOLZ: This is Colonel Scholz. I just have a general overall question. Some of these recommendations, we were -- at some point I read that we were going to recommend setting up some sort of joint group to continually reassess and look at this. Was that only in the training arena, or is that going to be for sexual assault issues generally?

COL HAM: So far, ma'am, I think the subcommittee recommendation is only in the training area.

COL (Ret.) SCHOLZ: Okay. Okay.

COL HAM: This is Colonel Ham.

COL (Ret.) SCHOLZ: All right.

COL HAM: We're trying to figure out the right wording. Of course,
"effectiveness" in the defense counsel realm has a constitutional connotation. If there's any other -- in the body, you know, there's a footnote that says we don't mean in the constitutional sense, but if there is some other word -- I don't know. I was just brain-dead and couldn't think of another word.

LTCol McGOVERN: And when we discussed this in a team, we recognize how hard it is to come up with these. But, again, DoD SAPRO is working so hard to measure the effectiveness of the prosecutors, but there is nothing being done to look at the performance, other than their supervisors, of whether the accused are being adequately represented in these cases.

COL HAM: So maybe that's how we should -- we should use the word "performance" instead of "effectiveness." I'm open to the subcommittee's suggestion, so that somebody doesn't say, "Oh, my gosh, they're seeing if they are performing, you know, minimally under
the sixth amendment." I don't know.

COL (RET.) MORRIS: Yes.

Performance --

CHAIR HILLMAN: Colonel Morris,
"performance," does that sound okay to you?

COL (RET.) MORRIS: It does.

LTCOL McGOVERN: Okay. Number 38

--

COL (RET.) MORRIS: You know, can I -- this is Larry Morris. Can I ask you to go back -- this has been sticking in my mind, and I'm not sure -- let me just toss it to the group for a second, if you don't mind.

Back on 35a, the concern I have, but I recognize I am a little captive of my own experience here, too, is, you know, a vague statement like, "Funding and personnel means that you allocate the right number of people to handle cases," and that sort of thing.

Whether anybody would consider a sentence that gives particular attention to
the quality of supervisory personnel -- I mean, with defense counsel, Army-only experience I think sometimes is -- we assign zealots or we assign deadbeats, you know, people who can't be put somewhere else, and are kind of also-rans for other positions. I'd question whether a sentence along the lines of, you know, going with 35 Alpha, the services should give particular attention to assignments of those who supervise military defense counsel, assigning personnel who are at least as qualified as their government counterparts. Anything along those lines?

COL (Ret.) SCHOLZ: Well, this is Colonel Scholz speaking. My experience in the Air Force has been different I guess. I think we kind of strive to do the opposite in terms of putting people in the defense counsel role, and the supervisory folks are very experienced. So we don't have an issue. I don't see that as a problem, but from an Air
Force perspective.

CHAIR HILLMAN: This is Beth.

But, Colonel Scholz, you wouldn't have an objection to making a more specific recommendation here that says "adequately resource in funding and personnel, including experienced supervisors, and direct the services assessed," whether that's the case.

Would you object to that language?

COL (Ret.) SCHOLZ: No, I wouldn't. Not at all.

LTCOL McGOVERN: Okay. Okay.

Great point. Colonel Morris, thank you.

On to Number 38. One of the concerns here, Colonel Scholz had a concern with the recommendation. Why do we need a memorandum? It's done on the record. I don't think we should be recommending unnecessary change. And SVC assessment section recommends finding on the Air Force is seeing a rise in the number of cases it changed from restricted to unrestricted based on the SVC program. We
heard testimony to that effect.

COL (Ret.) SCHOLZ: Yes. Those are two different things. I think the first point was -- this is Dawn Scholz again -- on the recommendation was, you know, it says up front that we are going to require military judges or recommend that military judges acquire and get this on the record, that the trial counsel has complied with the stature and quality requirements.

So the added step of an attached memorandum just -- you know, I can remember the huge checklist we used to have to do to go to trial, making sure everything was done. And I just think adding another step is unnecessary when it's -- if we're going to require it to be done on the record. That's my opinion on that one.

The other -- the second one, the second point I was making, really kind of goes back into the assessments, the next section, the section on special victim counsel
interaction with trial and defense counsel. That's a finding that I think we don't have, but may want to consider, where the Air Force has -- has some statistics that show that special victim counsel seems to be really improving the number of unrestricted reports that -- restricted reports that convert to unrestricted reports.

So those are two -- they were two separate comments there, Kelly.

COL HAM: Colonel Scholz, this is Colonel Ham. Not wanting to go against what the subcommittee wants, just explaining why the memorandum issue was there without going into too much detail on what other subcommittees may report out.

It is a fact that the codification of victim rights in the UCMJ -- Congress directed the Secretary of Defense to come up with an enforcement mechanism. And, gosh, how do I say this? I mean, and currently, Congress didn't establish an enforcement
mechanism. Told the Secretary of Defense to come up with one.

Of course, the Victim Services Subcommittee has looked in depth at what that should be. I'll tell you, the CVRA includes enforcement mechanisms at the trial court and appellate level. So the thought behind this was similar to a post-trial and appellate rights form that limits appellate litigation on whether someone was advised of certain rights.

You're looking -- I'm asking the subcommittee if there is another mechanism to potentially limit the need for appellate litigation on victim rights issues, if there's some way to get it in the record.

LTCOL McGOVERN: And, Ms. Jaus, maybe you can help explain what is done in New York, because what they mean by an enforcement mechanism is a victim's rights are violated at some point through the process, because the prosecutor fails to inform them or give them
the opportunity to be heard. In some cases, they will be able to say, "I wasn't given my opportunity." So you need to reopen -- go back and reopen the trial. That's an enormous amount of power for a victim. So --

MS. JAUS: No. They don't get to reopen the trial. They have a right to be heard at the time of sentencing. That's what their victim --

LTCOL McGOVERN: No, no. This is -- Ms. Jaus, this is the proposal for a remedy in the military, which is a remedy in some states and the federal system, that if the -- so I guess we were just trying to help come up with ways to prevent their rights from ever being violated, and if it's documented that, "Oh, look, you were informed and given that opportunity."

In New York, when you're advising the victim as a prosecutor, do they fill out a form saying, "I have been informed"?

MS. JAUS: No. No. We don't do
that, but we -- a judge -- I saw somewhere
here, the judge will sometimes ask, "Have we
spoken with the victim about, you know,
whatever happened?" And we will say on the
record, but they don't fill out a form, no.

LTCOL McGOVERN: Okay. Because in
the federal system, I believe they do fill out
a form, and they ask on the record. So,
again, I was just trying to pull from some of
the practices in the civilian world to make
sure that these prosecutors or that anyone
does not violate the victim's rights, because
these enforcement mechanisms could be
extremely powerful.

So if you're not comfortable
creating another checklist, you know, we could
certainly relook that. But that was the
intent behind it was to make our system as
foolproof as possible to ensure you don't
violate a victim's rights.

COL (Ret.) SCHOLZ: This is
Colonel Scholz again. I'm surprised that we
-- I thought we already had a form or something that, you know, we gave victims somewhere along the way. And I don't know if it came from the investigative side of the house or from the legal office, but -- like from the VWAP program, telling them what their rights are.

So I'm just -- I'm concerned that we're layering another form, another requirement that, you know, are we sure that, you know, there's not something out there already that is used in terms of giving the victim a list of their rights? It seems to me when we set up the victim witness assistance programs, you know, quite a few years ago we did those things.

MS. GORDON: Ma'am, this is Joanne Gordon. You're right. So part of the post-trial record that you're thinking of is a form from the victim and any witnesses that may have been adverse, particularly to the defense, that they be notified, you know, when
the accused is up for clemency and parole and
that sort of thing.

And so there is a form that's
already done and is appended to the record as
part of the victim witness assistance program.
And so, you know, the short -- I guess maybe
a shorter solution might be to add to that
form rather than creating a totally new form
or a new requirement. But those are all --

COL (Ret.) SCHOLZ: But when is
that form filled out?

MS. GORDON: After trial.

COL (Ret.) SCHOLZ: See, this
would be before trial, before the victim's
rights would be violated.

MS. CHAYT: Jan Chayt here. There
are several DD forms used by the MCIOs in
various stages within contact with victims
that tell them about their rights, who their
points of contact are. The first one that I'm
aware of is the DD-2701 that is provided by
the MCIOs to all the victims and witnesses of
crime, giving them their rights. I'm sure it will be revised, but so --

MS. GORDON: And the 2701 isn't -- I mean, the MCIOs are kind of the ones that are supposed to -- but at least in Army practice, you know, prosecutors give those out. Victim witness assistance personnel give those out. Special victims counsel have them on file to give them out. You know, sometimes a witness or a victim will get that same form 15 times, if everyone -- we want to ensure that they're getting that information.

COL (Ret.) SCHOLZ: Yes. This is Colonel Scholz. You have exactly made my point. We already have that going on. It is being done. Those forms will have to be I think revised and updated to include these new victim rights that are coming down. But, you know, I just -- that was kind of my point.

It seems like this is kind of unnecessary, and it's acting like we're not already doing those things. We are already
advising the victims of their rights. And
their rights are now -- are changing, and
we'll have to update those forms.

(Simultaneous speaking.)

CHAIR HILLMAN: This is Beth.

Sorry, just let me add -- this is clearly a
complex area that I'm grateful for the
precision and expertise that you all
demonstrate on this. In terms of the -- in
terms of talking more about this right now,
are there objections to deleting that line
about a memorandum that follows the military
judge to inquire on the record? Are there any
objections to that which Colonel Scholz has
proposed?

MS. JAUS: No. No objection.

COL (RET.) MORRIS: No objections.

CHAIR HILLMAN: Okay. I would
also take out the last line there, which says
this can be done by modifying the bench book,
because I think that that's just requiring the
military judge to do something essentially in
there, and that's -- that's essentially how
they would do that, get the military judge to
do it. So --

COL (Ret.) SCHOLZ: Agree.

CHAIR HILLMAN: And is -- Kelly,
is there anything else you need, then, to wrap
up that section, do you think?

LTCOL McGOVERN: So, again, I
think just the concern here is that in light
of the victim services development that a
judge is going to need some mechanism to check
and make sure that the prosecutor has done
their job in a form to do that.

But if you're not comfortable with
that right now, that's an easy deletion. In
the discussion, though, we do talk about
modifying the judge's bench book. Are you
comfortable with that as part of the
discussion?

CHAIR HILLMAN: This is Beth.

Absolutely.

LTCOL McGOVERN: Okay. Then,
that's an easy fix.

Number 39 --

COL (Ret.) SCHOLZ: This is

Colonel Scholz.

CHAIR HILLMAN: Sorry, Dawn. So

this is just about the special victims
counsel. This is tricky for us because this
is speculative. So our language here is less
certain in some ways, not unlike actually the
military crime victim rights issues, because
this is new and we haven't seen too much. So
it's true; I think the finding that says there
is generally positive working relationships is
right.

Then, we say, "Although some trial
counsel could foresee," I think we could just
say "foresee potential issues." I don't think
we need to say "could." I think they -- the
"foresee" implies that the -- you know, that
this is sort of uncertain here going forward.

Then, in terms of the

recommendation, this directs SJA's prosecutors
and defense counsel to continue to get feedback. That doesn't seem an especially onerous requirement, so I'm fine with this.

But, Colonel Scholz, did you have concerns about this?

LTCOL McGOVERN: It's Colonel Morris as well. I'm sorry.

CHAIR HILLMAN: Okay. Colonel Scholz, and then Colonel Morris.

COL (Ret.) SCHOLZ: Sure. I don't have any concerns with the finding and recommendation. I was proposing we add another finding, because I think we had some evidence of -- and I don't know if this is in the record. Kelly and the crew will have to help me. It seemed like the Air Force had some statistics that showed that when they instituted this special victim counsel program that it showed that there was a -- you know, kind of an increase in restricted reports becoming unrestricted because they started to feel comfortable with the system and felt like
they had an advocate was the general feeling.

But I thought we had some numbers,
and I thought that might be a finding that,
you know, shows, you know, some positive
aspect of the program.

Now, there may be some controversy
because people are -- I think the services are
finding it difficult to find the
authorizations, and, you know, they're kind of
taking it out of hide, coming up with the
special victims counsel. But it seemed to me
there was some positive benefit to them, and
I just thought maybe we should make a finding
to that -- in that regard I guess.

LTCOL McGOVERN: Colonel Scholz,
here we are trying to stay focused on -- and,
again, to be totally honest, this is in light
of the General Sinclair case -- whether or not
there is problems when a victim counsel is
inserted into the process. Is it interfering
with the prosecution or defense?

So rather than, is it impacting
reporting? Is it overall a good program?

Victim services is going to, you know, explore that completely, and I think that may be a better place for those conversion rates, where here we are just trying to see -- and, again, Quantico comes to my mind where they said, "No, we haven't had a problem so far, but we can certainly see that there would be problems." And then in the Sinclair case you saw Judge Pohl had to stop the proceedings and some other concerns of UCI were raised, so -- because the victim counsel's interaction in that case.

So that's why I wanted you all to be able to address victims counsel without going too much into the victim counsel.

COL (Ret.) SCHOLZ: So, as a subcommittee, have we decided we don't want to take a position on whether we like that -- that program or not? Is that where we are?

COL HAM: Ma'am, this is Colonel Ham. That's completely up to you. The Victim
Services Subcommittee has an entire section in the report devoted to special victim counsel. That doesn't preclude you from opining on it, if you feel it fits into your report as well. It's completely up to you. We're not meaning to tell you to do or not do whatever you think is appropriate.

CHAIR HILLMAN: This is Beth. It's a great point that this is relevant to what we're doing, but, really, it's a practical decision for us not to delve into that and to leave the elaboration of that here. So this is a positive statement, the finding. I agree there is more to say. I think we'll leave it to victim services to say that, unless there is further objections on it, just because of how much we're doing in our -- in our part of the study.

COL (Ret.) SCHOLZ: That's good with me, too, because honestly I didn't realize victim services was handling that. That's good.
LTCOL McGOVERN: Okay. And,

Colonel Morris, you had flagged Number 39 as well. Do you have any concerns with it?

COL (RET.) MORRIS: All I was going to suggest, instead of "foresee potential issues" is to give a sense of what they might be, like -- so maybe say, "In fact, although trial counsel" maybe just say "although counsel," because really both sides --

LTCOL McGOVERN: Okay.

COL (RET.) MORRIS: -- potential issues and maybe whatever we think -- you know, relating to privilege and confidentiality and patient confrontation for issues such as maybe those. So you get some sense of, on first read here, what would they be talking about.

So if those "for instances" make sense, then we just suggest a clause along those lines.

LTCOL McGOVERN: Okay. I think
"delay" was another concern. Would that be okay to include?

COL (RET.) MORRIS: I agree. Yes.

LTCOL McGOVERN: Okay. Great.

Number 40? There is -- 40b is the finding. Dean Hillman and Mr. Bryant had flagged that one.

CHAIR HILLMAN: Yes. This is Beth. So I don't know what Harvey wanted here, but this is -- this intersects with the larger issue of the sort of jurisdiction and the convening authority. But, you know, my only concern here is not to unnecessarily take issue with particular provisions, but to explain what the problems are with it.

So here -- this is correct, this last line for instance of the finding. Jurisdiction is based on legal authority, not the victim's subjective mind-set. But without more in here, this sort of sets out -- this is different than our other findings. This is a sort of legal analysis, with which -- I may
even have said this very thing -- I don't disagree with this analysis, but this just -- this is different than what we have sort of said elsewhere, and I just -- it feels a little -- it's a different sort of -- type of statement for us to make here. So -- but I don't disagree with it. I just wanted to get -- to have everybody -- while we had everyone on the call, just reckon with this and think about whether this is --

LTCOL McGOVERN: Hello? This is Colonel McGovern. Can everyone please identify themselves again, to see who we may have lost?

MS. FRIED: Maria Fried, Kelly.

COL (Ret.) HENLEY: Steve Henley.

COL (RET.) MORRIS: Larry Morris.

MS. JAUS: Rhonnie Jaus.

LTCOL McGOVERN: Dean Hillman?

Dean Hillman, are you there?

(No response.)

LTCOL McGOVERN: Okay. She must
have dropped. She'll call back in, and we can reengage that discussion.

In the discussion section here, basically, DoD has responded to this provision of the Victim Protection Act and articulated quite well why this is complicated, to have a victim deciding this when the military can't even decide -- would have no power over a civilian jurisdiction, deciding they want to prosecute a case.

So if it needs to be reworded or whatever, we can go back to that when Dean Hillman joins back in.

Welcome back, Dean Hillman.

Sorry.

CHAIR HILLMAN: This is Beth. I found myself talking to myself for who knows how long there. So I'm sorry about that.

LTCOL McGOVERN: Dean Hillman,

just --

CHAIR HILLMAN: I'm sure it was brilliant.
LTCOL McGOVERN: As your further background, I don't know if this makes any difference to how you want to word things, it is a specific direction that you assess the strengths and weaknesses of current and proposed legislative initiatives in your area, which may make a difference on how you word things or may not.

CHAIR HILLMAN: It's true -- I agree that we need to do this. What I said at the end of -- I don't even know how much I was still on the line for, but I just said because this is different in tone and the type of finding, then the other things that we are writing, I just wanted, when we had everybody -- as many people as possible from the subcommittee to weigh in, just to say, "Is this how we want to make this recommendation?" That's all I wanted to say.

So if there's no objections, then I think we should move forward.

LTCOL McGOVERN: So everybody
agrees that we should be saying they should
not enact this?

CHAIR HILLMAN: Correct.

LTCOL McGOVERN: Yes, I agree with

that.

COL (Ret.) SCHOLZ: Concur, I do.

COL HAM: Can everybody identify

themselves for the Court Reporter?

COL (Ret.) SCHOLZ: Sure. Colonel

Scholz. I concur with the recommendation.

MS. JAUS: Rhonnie Jaus. I

concur.

LTCOL McGOVERN: Colonel Henley

and Colonel Morris, are you in concurrence?

COL (Ret.) HENLEY: Steve Henley.

Concur.

COL (RET.) MORRIS: Yes, I concur.

Just the only question now is the last

sentence of the finding, I mean, it's true

enough, but are we really -- are we answering

well enough why we don't think it should?

LTCOL McGOVERN: Again, I think
the discussion answers the mail really well by quoting the DoD response to Congress as the reasons why this is not a good idea. I can try to incorporate some of that into the finding.

COL (Ret.) HENLEY: This is Steve Henley. I mean, I agree "subjective mind-set" is a little undefined. Can you just change that to -- "not the victim's preferences"?

LTCOL McGOVERN: Okay.

COL (Ret.) HENLEY: "Jurisdiction, however, is based on legal authority, not necessarily the victim's preferences," something along those --


LTCOL McGOVERN: Right. That is -- sounds much better.

Okay. That brings us to Number 41. Dean Hillman?

CHAIR HILLMAN: Right. Just that first finding there on 41, that -- the first
line, another -- "touching parts of another person's body with no sexual intent." And I just -- I put a question mark there. Does it really -- there is no intent to gratify requirement in even the minor offenses? I just wanted to make sure that was accurate before we went forward.

COL HAM: That's correct, ma'am.

This is Colonel Ham. That's the finger-in-the-mouth example and --

MS. JAUS: The hair, the bun.

This is Rhonnie. Touching of the hair, somebody's ponytail or their bun. We had that --

COL HAM: Yes. I'm looking for the exact definition.

CHAIR HILLMAN: This is Beth. If that's the case, then you should press on. I just wanted to make sure there wasn't any signs or requirement for even those. I know, you know, the minor touching incidents on the spectrum, but that was my only concern there.
COL HAM: Yes. There is some touching that does require an intent to arouse or gratify the sexual desire of any person. And then there is some touching, touching of certain body parts, such as the buttocks, inner thigh, of any person with an intent to abuse, humiliate, or degrade any person. I mean, there is an intent required but no sexual intent.

LTCOL McGOVERN: Would it be easier to say, "Spans a broad spectrum from unwanted touching to forcible, penetrative offenses," to keep it more general?

MS. JAUS: Well, but if the requirement is that you don't have to have sexual gratification, I think that that's really -- that should be in there because that's kind of crazy, because the point I wanted to make -- this is Rhonnie -- is that civilian jurisdictions require sexual gratification for touching to be a sex crime. And I just wanted to make a point
about that sentence. "Civilian jurisdictions usually refer to felony level penetrative sexual assault offenses and rape cases when providing data or discussing sexual assaults."

First of all, civilian jurisdictions require touching for the purpose of sexual gratification for touching to be a sexual assault and make distinctions between sexual touchings and penetrative offenses in terms of the gradation of the crime.

But I have been trying to make this point for months that one of the movements in the civilian world regarding sexual assault is to remove penetration, is to make it contact. That's -- in New York, it's a big movement now to take out the word "penetration" or only require contact.

So we keep talking in our report about penetrative offenses, and soon they will remove the word "penetration" I think from many of the sex offense statutes throughout the country, because that seems to be the way
things are going. I just --

LTCOL McGOVERN: Can you recommend wording for that last sentence to make it more accurate?

MS. JAUS: Well, I was thinking of doing "penetrative or contact offenses," but then you're getting to -- it's not just like a hand to a breast or a hand to a buttock that would be what they're talking about. It's the -- like, for example, in New York you don't have to have a penis to anus -- you don't have to have penetration. You just need the contact for it to be a first-degree sex offense. It used to be sodomy; now it's called something else. So you don't even need -- for some of those sodomy-type offenses, there is no penetration that was ever required. So --

COL HAM: But you need -- but you still need an intent to gratify the sexual desire of --

MS. JAUS: Well, for regular
touching, yes, you need to have the intent to gratify sexual -- just plain touching is not enough. It has to be with the intent to gratify sexual desire and penetrative/contact offenses. I mean, we could leave "penetrative offenses" because it is going to become very confusing for people. But I'm just -- I just wanted to tell you that that is the way -- that is where things are going in that field, they're trying to get away from penetration.

LTCOL McGOVERN: I think that's a helpful contrast, especially specifying -- one is talking about no sexual intent, and the other one certainly requires sexual desire.

COL HAM: So just to be clear, so some of you heard of the touching of the hair bun, that would be -- you know, if that -- that is potentially criminal if it was done to arouse or gratify the sexual desire of anyone. And touching other parts of the body, some specific parts, require no intent to gratify the sexual desire. So it's a very, very broad
MS. JAUS: Yes. That's very different than civilian jurisdictions. There is always that requirement for sexual gratification. A mere touching would not be -- it would be a harassment or something else, but it is not a sexual offense.

COL HAM: Or an assault.

LTCOL McGOVERN: Okay. That was helpful.

CHAIR HILLMAN: Just one note.

Sorry, Kelly. This is Beth again. On 41b, we should also correct that language, then, about penetrative and non-penetrative offenses in the recommendation 41b to avoid that language that's too restrictive in the comparative sense, given what civilian jurisdictions are doing.

LTCOL McGOVERN: Do you have a recommendation?

CHAIR HILLMAN: Yes. I would use
Rhonnie's language on this. You know, would separate penetrative, you know, contact and non-contact offenses, or something along those lines.

LTCOL McGOVERN: Okay. All right.

Number 42, Dean Hillman and Colonel Scholz expressed concerns about that one.

CHAIR HILLMAN: Colonel Scholz, go ahead.

COL (Ret.) SCHOLZ: Sure. I'll share. Basically, we had the word the military prosecutors "generally" draft or play a significant role, and I -- I'm not -- I would take out the word "generally." I think they do -- we do draft and play a significant role in determining and drafting appropriate charges and recommending disposition. We'll talk about recommending disposition somewhere else.

CHAIR HILLMAN: 43. This is Beth. 43.

COL (Ret.) SCHOLZ: Okay? 43?
So, I mean, I just might, again, from my experience, you know, I never saw a commander draft anything, charges. We draft the charges, and then we -- we did play a big role in not only determining the type of charge, drafting the charge, but also recommending disposition. So I was just trying to include all that in that finding.

LTCOL McGOVERN: So I've deleted "generally," and I've changed "or" to "and play."

COL (Ret.) SCHOLZ: Okay.

LTCOL McGOVERN: Correct?

COL (Ret.) SCHOLZ: Right. And so we don't need to put in "recommending disposition" there because we do -- we deal with that strongly enough in the next one.

LTCOL McGOVERN: Yes. I think for keeping these somewhat compartmentalized.

COL (Ret.) SCHOLZ: Okay. Let's see. Okay. Can you show me where we talk about how the -- okay. Well, maybe we'll run
into it as we go along, but I think it's
important that -- you know, I think that is a
huge role that we play, and, you know, just
because we know that it's very rare that a
convening authority doesn't take the
recommendation of his SJA. I think it's
important to point out that rule.

LTCOL McGOVERN: Okay. I can add
it for now. And if it's --

COL (Ret.) SCHOLZ: Yes.

LTCOL McGOVERN: -- redundant --

COL (Ret.) SCHOLZ: In fact, in
the recommendation I put -- I added "drafting
appropriate charges and recommend
disposition," so, I mean --

LTCOL McGOVERN: Okay.

COL (Ret.) SCHOLZ: Okay.

LTCOL McGOVERN: Did we lose Dean
Hillman again?

(No response.)

COL (Ret.) HENLEY: Do we want to
wait for Dean Hillman, or can I ask a
question?

LTCOL McGOVERN: Go ahead, sir.

COL (Ret.) HENLEY: This is Steve Henley. And maybe you've taken care of this with the amendments to the last part of 42 finding. But it says military prosecutors, you're getting rid of "generally" -- I understand that -- "military prosecutors draft and play a significant role in drafting appropriate charges." Isn't that a bit redundant? What else is there besides drafting that we're talking about in that finding?

MS. JAUS: So do you want to say, "Military prosecutors determine and draft appropriate charges"? Or --

COL (Ret.) HENLEY: I mean, that's really what we're talking about, right? We're saying although the convening authority eventually determines disposition of allegations, the prosecutors actually draft -- or determine and draft charges.
LTCOL McGOVERN: It seems like it should read, then, "Military prosecutors determine appropriate charges, draft, and play a significant role in determining and recommending a disposition." Because you are going to determine the appropriate charges before drafting, right?

COL (Ret.) HENLEY: Well, right. I think they draft the charges and make recommendations to the convening authority on appropriate disposition.

LTCOL McGOVERN: Okay.

COL (Ret.) HENLEY: But I agree with Dawn. I'm not aware of certainly any circumstance where someone other than a trial counsel has drafted charges. You do have the occasional malcontent who swears out charges against a commander, but they definitely don't go anywhere.

So I was just confused when you say, "Military prosecutors draft and play a significant role in determining and drafting."
We either draft or don't draft. I think we, by and large, draft and then recommend appropriate disposition to the convening authority who ultimately makes that decision.

LTCOL McGOVERN: Okay. Okay. All right. Dean Hillman, are you back with us?

CHAIR HILLMAN: Yes, I am.

LTCOL McGOVERN: Oh, great.

Great.

COL (Ret.) HENLEY: Dean, what's happening in California?

(Laughter.)

You haven't paid your bill.

CHAIR HILLMAN: I think I need to talk less, because I only seem to leave when I'm talking. So maybe I'll take that strategy now.

(Laughter.)

LTCOL McGOVERN: Several people had concerns with 43b in particular.

(Pause.)

COL (Ret.) SCHOLZ: Kelly, this is
Colonel Scholz. Mine were just kind of edits, kind of minor edits actually.

COL (Ret.) MORRIS: It's Larry Morris. I have a suggestion on the findings under 43b. From an editing standpoint, I think the first sentence maybe you could omit, because I think it's pretty much said again in the second sentence.

But then consider under recommendation, you know, to -- it's one appropriate question to be concerned that you use NJP or something as a lazy out for some of these cases. But they are also worth noting and reinforcing to commanders to make use of all of these other options, either if you don't have great evidence or you have conduct that is kind of not quite.

So question whether a sentence along the lines of -- as an extra sentence in the recommendation, "Such measures, including, you know, other" -- I mean, I don't know exactly what to say, "Such measures, maybe
including administrative separations, also can provide some level of accountability when there is insufficient evidence to go to court, and also in enforcing accountability for precursor conduct," you know, for example, you know, inappropriate language or sexual harassment that does not constitute sexual assault.

On the idea of "don't just wait for sexual assault," you can still smoke somebody for conduct that's lesser on the continuum and might keep it from ripening into something worse.

LTCOL McGOVERN: Okay.

MS. JAUS: Okay. Kelly, this is Rhonnie. The line where it says, "There are numerous potential adverse actions available that do not exist in civilian jurisdictions," that's not true, because you can -- I mean, if you don't want to go ahead with criminal cases, criminal charges, if you're a teacher, you can ask for them to not teach anymore, a
police officer gets stopped in different ways, so that's really not a true statement.

LTCOL McGOVERN: Right. And I thought I had tried to change this to incorporate your -- and in the discussion the fact that if someone is a teacher you can say "either resign from your job or we are going to press charges" type of thing.

MS. JAUS: Even with the police sometimes you don't go with a criminal case, and they get docked pay or they, you know, have some kind of -- have to go to a program or something. That's not criminal. So I just think that -- I think we should take that out. Why don't we just take out the phrase "available that do not exist in civilian jurisdictions."

LTCOL McGOVERN: Okay. And, Colonel Scholz, I can incorporate the changes that you recommended with deleting "potential" and adding "options and adverse actions," those sort of recommendations.
COL (Ret.) SCHOLZ: Okay. Great.

Thank you.

LTCOL McGOVERN: Yesterday we discussed 44 as a group. For those of you who are just joining us today, we are deleting the last sentence of 44a. 44b was determined to be okay. Actually, the 44 recommendation I now have a big extra -- so --

CHAIR HILLMAN: This is Beth. We are redrafting -- Kelly is going to redraft 44, and we'll look at it again. We had a --

LTCOL McGOVERN: Right.

CHAIR HILLMAN: -- there were a lot of changes there.

LTCOL McGOVERN: This is going to be moved to the Good Soldier Defense discussion, rather than being a discussion on its own here. So that will change substantially. Probably doesn't require further conversation at this time, until you see the revision.

And then, the role of the judge,
if Colonel Scholz or Ms. Jaus, if you all
would like to weigh in with any of your
opinions. Colonel Morris has expressed that
he has some issues with it as well, but he is
going to possibly provide something in writing
for us. But do you have any strong feelings?

CHAIR HILLMAN: Let me refresh my
memory. I'm sorry. Give me a second here.

(Pause.)

LTCOL McGOVERN: Colonel Scholz,
you had flagged 46a finding and
recommendation, said that you would like to
deliberate.

COL (Ret.) SCHOLZ: Yes. Let me
look at it here, see what my problem was.

LTCOL McGOVERN: Oh. And your
question was, does the prosecutor have to go
to the judge for these requests in civilian
practice? And we discussed this as well
yesterday, whether or not we should limit this
to just the defense, rather than making it a
requirement for lay witnesses for -- the
prosecutor would not have to go through the
judge for lay witnesses or --

MS. JAUS: No. But for experts in
civilian, you do have to. Certain experts --

LTCOL McGOVERN: Right.

MS. JAUS: -- the expertise is
relevant.

COL (Ret.) HENLEY: Right. Steve
Henley. I thought for 46b, didn't we end up
with a recommendation that limits or that
allows the defense to go to the military judge
for all witness and expert requests, but no
limitation on the government, they can
continue to go and expend funds as they see
fit? Wasn't that the final recommendation?

COL HAM: Yes, sir. That was
yesterday. Dean Hillman, do you want to weigh
in on that or --

CHAIR HILLMAN: No. I mean, I
agree with that. I agree with -- I'm fine
with that.

MS. JAUS: Okay. Well, that
answers my question, then, because that's why
I was wondering why we were doing that when I
said, does the prosecution and civilian
practice have to go to the judge? So, okay.
I think that helps.

COL HAM: Is there anything we
should put in, Ms. Jaus, on civilian practice
has the prosecutor go -- some jurisdictions --
have the prosecutor go to the judge to approve
experts as well? Any -- put that anywhere or
no?

MS. JAUS: I think that that's an
important point. You can't just call it an
expert yourself in the civilian world and say,
well, I think that this is an expert that I
want to put. You have to get the permission
of the judge. The judge has to determine
whether it's an appropriate expert, whether
the expertise is something that is, you know,
generally accepted in the scientific
community, et cetera, et cetera.

COL (Ret.) HENLEY: Rhonnie, this
is Steve Henley. I think what we were talking about, and I said what we're talking about here, is a funding issue, and whether the expert is eventually allowed to testify, still has to pass the judge's approval.

And I think that that was my point originally in requiring the trial counsel to also go through the military judge for expert requests. You could address some of these issues earlier on, on relevancy. But I think, as Colonel Morris pointed out, it's the government's funding stream and they can certainly hire experts as they see fit, and then make that necessary showing at trial. So I --

MS. JAUS: Yes. Yes. Okay.

COL (Ret.) HENLEY: The government expending funds for an expert, they still have to go through the evidentiary hurdle before the judge at some point, if there is a defense objection. So --

MS. JAUS: No, I agree. Yes. You
can hire as many experts as you want. Whether
you can use them is a different question.
Okay. Yes, that's true.

LTCOL McGovern: Okay. That's the
--

COL (Ret.) Scholz: This is
Colonel Scholz. Steve, I've got a question
for you. In 46a finding, we talk about -- it
says, "Depending on service practice, the
trial counsel can deny, may determine whether
to grant or deny the request," I don't know if
this matters, or makes any difference, but in
the other courts -- it was at least the SJA.
It wasn't really the trial counsel that had
that authority, willy-nilly, to deny that
request. It had to go up to the, you know,
supervisory -- the SJA in our case. Is that
ture in the Army?

COL (Ret.) Henley: I think for
all of the --

COL Ham: Ma'am, that's -- that's
why I put "depending on service practice,"
because the -- in the Army, it's the captain trial counsel who makes the call.

COL (Ret.) SCHOLZ: And the rule states -- the rule states trial counsel.

COL HAM: Yes. The rule for courts-martial gives that authority to the trial counsel.

COL (Ret.) SCHOLZ: Okay. I don't think we ever -- I ever let my captains do that, but that's okay. All righty. I got it.

COL HAM: I mean, certainly they would consult, I mean, if that's the procedure in the office, but the rule for court-martial gives the authority to trial counsel and --

COL (Ret.) SCHOLZ: Okay. All right. Thank you.

COL (Ret.) HENLEY: This is Steve Henley. Maybe practice has changed, but I thought there was a requirement for experts that the convening authority would actually have to deny the request before the judge would entertain a motion to compel. Is that
no longer the requirement?

COL HAM: No, sir. That is -- I'm sorry. Again, this is late-night, brain-dead wording, but I tried to capture that in the sentence: "The trial counsel may determine whether to grant or deny defense witness requests other than expert witness requests"

--

COL (Ret.) HENLEY: Okay. Thanks.

COL HAM: -- "which would require the convening authority's personal decision."

COL (Ret.) HENLEY: Okay.

COL HAM: Yes. Any better way to write it is welcome.

LTCOL McGOVERN: All right. We will make those changes. On to 48a --

MS. JAUS: What happened to 47?

LTCOL McGOVERN: Oh, I apologize. That wasn't on our list, but go for it.

MS. JAUS: Here is my question: "Many public defenders have subpoena power"?

I didn't know that. I mean, certainly not in
New York. That was my question.

LTCOL McGOVERN: Yes. No, in the discussion I cite the appellate defenders who testified on December 11th and 12th, in particular. They say they go out and issue their own subpoenas all the time, and thought it was a grave injustice that we don't do that in the military.

COL (Ret.) HENLEY: What do you mean by "many," I guess is -- can we say, "Some public defenders have subpoena power"?

LTCOL McGOVERN: That's easy.

COL (Ret.) HENLEY: That is true. And then we don't have to worry about what we mean by "many," because you will probably get that question.

LTCOL McGOVERN: Okay, sir.

MS. JAUS: I was surprised to see that. I didn't realize -- I agree, we should just say "some." I didn't even realize any of them had subpoena power.

LTCOL McGOVERN: Okay.
COL (Ret.) SCHOLZ: Kelly, this is Colonel Scholz again. Before you move on to 48, I want to offer this. On the recommendation, we are making -- in several places we are saying, we recommend the Secretary of Defense propose the President to make amendments to the manual for courts-martial.

And there's a group -- and I can't remember the name -- Steve, you will probably remember, but there's a name -- you guys will know -- the name of the joint committee that we have within -- say it again.

LTCOL McGOVERN: The Joint Service Committee. The JSC, ma'am.

COL (Ret.) SCHOLZ: Yes. Thank you. Yes. That committee that annually reviews that practice and makes recommendations on changes to court-martial.

Should we not -- I just want to throw it out -- should we not consider maybe throwing these recommendations through that
committee, too, to look at or propose or study? I mean, I'm just wondering where we should be sending these recommendations.

   LTCOL McGOVERN: As a person who sat on the JSC, anything that goes to the SECDEF will go to the JSC.

   COL (Ret.) SCHOLZ: Okay. All right. Good to know. Perfect.

   LTCOL McGOVERN: And sometimes the JSC has active years, sometimes less active. So it's -- I think it's most important to make sure it gets to the SECDEF and his General Counsel to make sure whether this should go forward or does it need to be vetted through the JSC.

   COL (Ret.) SCHOLZ: Perfect.

   That's fine. Good.

   COL HAM: But you do probably want to amend some of the recommendation, because right now it addresses both prosecution and defense, which I think you are limiting it to -- would you want to limit this recommendation
to the defense as well?

CHAIR HILLMAN: Colonel Ham, this

is Beth. Colonel Ham, do you mean 47?

COL HAM: Yes, ma'am. Right now

it says, "Require both prosecution and defense

to submit requests for witnesses and other

assistants." And in the recommendation you

just discussed a few minutes ago, you were

limiting that to the defense.

CHAIR HILLMAN: Right.

COL HAM: Or is it a separate

thing, the defense can -- or the prosecution

can determine whatever witnesses they want,

but they still have to go to the judge to get

the subpoena. I guess it could be a different

thing.

LTCOL McGOVERN: Well, and trial

counsel currently, the government has its own

subpoena power. So, Colonel Henley, in this

new world where the judge will have subpoena

power, do you then see the trial counsel or

the government not having subpoena power
anymore?

COL (Ret.) HENLEY: No. I think consistent with 46, allowing the defense the opportunity to subpoena witnesses through the military judge would then allow some flexibility on not disclosing whatever -- if there is a strategy in talking --

LTCOL McGOVERN: Right.

COL (Ret.) HENLEY: I mean, I -- so if we're making -- if we're limiting the experts to defense, I think for consistency, the subpoena power should also go through the judge, but the government -- there should be no limit -- we shouldn't limit their authority, as it currently exists. So for both experts and subpoenas, I think that makes sense. Yes?

MS. JAUS: But it should say "witnesses, documents, and other assistance," correct?

COL (Ret.) HENLEY: Oh, yes. Yes, because I -- you're right. They could
subpoena documents as well.

LTCOL McGOVERN: And I will delete "both the prosecution and" --

COL (Ret.) HENLEY: I mean, I guess, Colonel Morris, is that consistent with what you view the judge's role here is --

COL (Ret.) MORRIS: Correct.

COL (Ret.) HENLEY: -- addressing defense expert requests and defense subpoena requests, documents in session, no limitations on the prosecutor's ability?

COL (Ret.) MORRIS: Yes.

LTCOL McGOVERN: Okay.

MS. JAUS: I have to sign off, Kelly. I have another conference call. This is Rhonnie.

LTCOL McGOVERN: Okay. Thank you for joining us.


CHAIR HILLMAN: Thank you, Rhonnie.

LTCOL McGOVERN: That moves us on
to 48a. Colonel Morris, you had a concern with the finding?

COL (Ret.) MORRIS: Yes. I think just to add in the second line there, "transforming it in some respects," I would say, "into a preliminary hearing."

LTCOL McGOVERN: Okay.

COL (Ret.) MORRIS: I think that's all.

CHAIR HILLMAN: Great. I circled that, too. Good catch.

LTCOL McGOVERN: All right. Then --

COL (Ret.) HENLEY: Can I make one more happy to glad change?

LTCOL McGOVERN: Sure.

COL (Ret.) HENLEY: To change "required" to "compelled"?

LTCOL McGOVERN: I'm sorry. Could you say that again?

COL (Ret.) HENLEY: "Establish and" --
(Simultaneous speaking.)

-- "not be compelled to testify."

LTCOL McGOVERN: Okay. And,

Colonel Henley, I think you had a concern with 48b.

COL (Ret.) HENLEY: I don't think so, but let me -- I didn't write anything down in my draft, so --

LTCOL McGOVERN: It's 48b discussion. This may have been the excerpt that I provided separately.

COL (Ret.) HENLEY: The 48b finding?

LTCOL McGOVERN: In your note to me, sir, it said 48b discussion.

COL (Ret.) HENLEY: Oh, okay.

LTCOL McGOVERN: If you can't think of it here, we'd welcome your written comments.

COL (Ret.) HENLEY: Yes, I -- oh, it's just a -- so the sentence in the third-to-the-last paragraph beginning, "A
practical effect of this change," so it says, "For example, statements or perhaps hearsay,"

COL (Ret.) MORRIS: Where are you now?

COL (Ret.) HENLEY: This is a discussion -- this is a -- if you're looking just at the findings and recommendations, you don't have that. I'm looking at the discussion, and there's an extra comma in there that's unnecessary. That's the first point.

LTCOL McGOVERN: Okay. Yes.

COL (Ret.) HENLEY: "For example, statements or perhaps hearsay, and," -- that comma I think should be struck.

LTCOL McGOVERN: Okay.

COL (Ret.) HENLEY: And then the last sentence of the last paragraph, "In cases where the judge finds probable cause, the convening authority retains the discretion on how best to dispose of the charges and
specifications." Or "how to best dispose" or

--

CHAIR HILLMAN: Okay. Got it.

Yes, "how best to dispose." Okay.

LTCOL McGOVERN: All right. We
got that, sir. Thank you. Next, Colonel
Scholz, you had concerns with 49a and b.

COL (Ret.) SCHOLZ: Yes. A --
just starting with A, it's really just a
question that -- on the second line it says
"may increase this pressure," and I've got a
big question mark with "this." I'm not sure
what "this" is referring to.

LTCOL McGOVERN: Maybe "the
pressure," or just "pressure"? "May increase
pressure by requiring" --

COL (Ret.) SCHOLZ: Yes. Probably
just "pressure," "may increase pressure by
requiring" -- I don't know. It seems -- it's
kind of vague and not -- it just probably
needs a little bit more --

LTCOL McGOVERN: Context?
COL (Ret.) SCHOLZ: -- thought. I don't have -- I haven't come up with any language for you, but --

CHAIR HILLMAN: This is Beth.

This is another -- you know, this is the structural issue of looking at the findings outside of the context of the discussion that you've written. I think -- I do think this is -- this is a response to our sense that the ratchet to prosecute with more intensity and effort has elevated the decision-making process, and that's the pressure, the pressure to prosecute aggressively. I think that's what we mean there. So --

COL (Ret.) SCHOLZ: Agreed.

Agreed. I think we should set that up by making that clear, what we're talking about there. So --

COL (Ret.) HENLEY: Can you say, "Victim's protection may increase this pressure to prosecute, by requiring a decision not to refer charges to court-martial, to be
reviewed by the higher GCMCA."

LTCOL McGOVERN: Yes, sir. That's good.

COL (Ret.) HENLEY: That's -- but I -- yes, so if we explain what that is.

Increases pressure, prosecute, requiring a decision not to refer charges to a court-martial.

LTCOL McGOVERN: Okay. And -- I'm sorry?

COL (Ret.) SCHOLZ: For an NB, finding -- this is Colonel Scholz again -- it's kind of the last sentence. Well, first off, I would add "sexual assault offenses" to the first -- it is missing "offenses," I think, on the first sentence. I'm not sure why we wouldn't have that, so I think "sexual assault" is missing.

But then, also, the second sentence is I just -- I'm not sure I really agree or think that maybe we want to just delete that. It says, "Senior trial
counseling overriding the SJA." The "overriding" is -- I'm not sure that's what they're really doing, but they -- and I don't really think -- I don't think it's akin to Assistant U.S. Attorney in the local office going to an Attorney General. I don't agree with that sentence.

CHAIR HILLMAN: This is Beth. I have the same suggestion. I'd strike that second sentence.

COL (Ret.) SCHOLZ: Yes. Great.

LTCOL McGOVERN: Okay. Okay.

CHAIR HILLMAN: This is Beth. I struggled with this finding, so -- in part because it's, you know, apart from the discussion, too. So trying to look at all of the findings in 49 to support the recommendation, and the -- our recommendation here is really that a -- first, we say, "Don't enact Section 2." That's the third recommendation of the VPA, which would require
this elevated review.

We also say, "Consider repealing the already enacted provision that elevates review." And then we also say, "make things more parallel to the civilian jurisdiction declination statements" that are made when there is a decline to prosecute.

So each of these findings needs to sort of lead us towards that -- those conclusions here. And this 49c is about victim confidence, and, really, victim confidence is not something we have -- it is something we have separated from what we're doing largely, and we are leaving that to Victims Services, and in some ways to the Role of the Commander, which is talking about larger climate issues related to victim confidence more than -- our focus is more on the response systems that are in place in the criminal justice part of our review.

So does this -- did this -- did 49c read convincingly to everybody else?
LTCOL McGOVERN: And, again, these were quotes taken from our discussion transcript, which may be appropriate in discussion, but not as a final finding or recommendation. But for a lot of -- not a lot, a few of the statutory reviews, I think the subcommittee's conclusion was there really isn't going to be much change, but the practical effect may be victim confidence. So it is okay.

So that's where -- victim confidence does come through in the CSS report as currently written a few times.

COL (Ret.) SCHOLZ: But you could actually -- this is Colonel Scholz again. You might able to get rid of Dean Hillman's concern. But if you just -- if you eliminated that first sentence, and just say, "The likely impact of cases being elevated based on whether the convening authority makes a decision that differs from his or her advice," is that convening authorities will simply
refer cases.

And I think -- I think we really need to change that to: "It could put inappropriate or illegal pressure on the convening authority to refer cases." And, you know, that's what I think we're trying to say there.

I don't think we want to say that they will simply refer, but they -- you know, it would put inappropriate pressure on them to refer. So we can still make that point. And then the second sentence, when we say, "Services are in no better position to make" -- I would say they are in less of -- they are in -- you know, they are less positioned to make an informed prosecutorial decision than a convening authority, because they are further removed from the -- you know, the alleged perpetrator, the victim, the unit, you know, all of those things. So I would --

LTCOL McGOVERN: Okay. And with deleting that first sentence, would it be
okay, then, to combine the first sentence of 49b, then, with the second sentence of 49c? Because the first sentence of 49b, then, is just stating what Section 2 is, right?

COL (Ret.) SCHOLZ: Yes. You might be able to merge the findings.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: This is Beth. That's a great idea.

COL (Ret.) MORRIS: Can you repeat what you're doing there, then? I'm trying to

--

LTCOL McGOVERN: Okay. Sir, rather than saying that your finding is stating what the law is --

COL (Ret.) SCHOLZ: It's not the law yet.

LTCOL McGOVERN: -- or what the proposal is -- thank you, ma'am -- the first sentence of 49b we keep, to explain your interpretation of the law, and then it would be the second sentence -- second and third
sentence of 49c, would all become the finding
of 49b.

COL (Ret.) MORRIS: You know, did
you alter that last sentence in accordance
with somebody's recommendation? "The service
Secretaries are in no better position" -- did
somebody change that somewhat?

LTCOL McGOVERN: "Service
Secretaries are somehow in lesser position,
because they are further removed" --

COL (Ret.) MORRIS: Okay.

LTCOL McGOVERN: -- is that --

COL (Ret.) SCHOLZ: I was trying
to say it -- I was trying to make it even
stronger, that I think they are even -- you
know, not in a worse position to make a
prosecutorial decision, no better position
than convening authorities. I think convening
authorities are better positioned and --

CHAIR HILLMAN: This is Beth. I
think that I -- I agree with what Colonel
Scholz is saying there. But I think, Colonel
Morris, in response to what you've pointed out before --- in some of these findings makes them more persuasive is we need to say why they're not better positioned. So I think we should cut that "are no better positioned," but maybe service Secretaries lack the established structure, information, and, you know, knowledge to make prosecutorial decisions, as compared to convening authorities with the advice of staff judge advocates.

So that seems to me that's what we want to say there. Are there objections to phrasing that would look something like that?

LTCOL McGOVERN: Would it be better to switch the sentence around, and instead of saying "no better" say "convening authorities are in a better position than service Secretaries," because they have the advice of SJAs and are not as far removed? To make it more of a positive sentence?

CHAIR HILLMAN: This is Beth.
Always in favor of active voice. That's, you know, a more positive statement. That's great. I think that we should just point out there is no -- there is exercising prosecutorial discretion, which is a grave responsibility, and the service Secretaries have a lot of things to do. Convening authorities have been doing this.

The criticism has been that they are not doing it the way that Congress might want them to all the time. But we are pushing back against this and saying, there is no evidence the service Secretary would do better here. So in that more positive way that you and Colonel Scholz put out, that's what I'd --

LTCOL McGOVERN: Okay.

COL (Ret.) MORRIS: And then in that preceding sentence, please, where we conclude that sentence with, "Will simply refer cases to a court-martial," with the idea that somebody hopefully suggested there about the specter of command influence and all.
Might we say, "On the advice of their SJA, is that convening authorities might be deterred from exercising their independent professional judgment and making -- whether to refer a case." A little bit of our normal language.

LTCOL McGOVERN: Is that softening it a little too much, though, sir? I mean --

COL (Ret.) MORRIS: I mean, I think to say "they will refer" turns them into, you know, into the kind of automatons that we're trying to say they're not.

But if we at least want to say the -- if you're trying just to game the system by forcing these guys to do that, you have a bigger concern. You know, it ties it to the long-standing concern about things like command influence when you get too results-driven.

COL (Ret.) SCHOLZ: Yes. This is Colonel Scholz. That's exactly how I feel, too. I think it could -- I think some language, just like he was suggesting, "or
could put inappropriate pressure" -- I don't know if we want to say "illegal" or, you know, some -- it really is, you know, pressure that is -- we don't want put on convening authorities to make these independent decisions.

LTCOL McGOVERN: Okay. I am looking forward to the transcript, so I can be sure we will get all this right.

(Laughter.)

49b, finding. This was a concern of Mr. Bryant, so if you don't have a problem with it, I will consult with him offline and relay his concerns.

CHAIR HILLMAN: This is Beth, Kelly. Could you follow up specifically and ask Mr. Bryant and Ms. Jaus what they think about this? Since this is really about what prosecutors do, and there are civilian prosecutors.

LTCOL McGOVERN: Will do. Okay.

Then, moving on, Number --
COL HAM: Dean Hillman, I think our information on that is from the Joint Service Committee's multi-jurisdictional comparative study that you heard about.

CHAIR HILLMAN: I'm sorry. Colonel Ham, what are we on?

COL HAM: I think that 49d, Delta, I think the information on that is from the multi-jurisdiction comparative fact-gathering --

LTCOL McGOVERN: Last summer's comparative analysis.

COL HAM: -- that Kelly was on and presented to you last summer.

LTCOL McGOVERN: Basically, they do a written declination that is fairly vague, so that they don't have any victim-blaming language, and they are not jeopardizing future prosecutions. And now that there is going to be a requirement for written justification, DoD may want to consider structuring how those written declinations are done.
CHAIR HILLMAN: That is Beth.

Agreed. Sounds great.

LTCOL McGOVERN: Colonel Scholz, you were concerned with the recommendations in 49a, b, and c.

COL (Ret.) SCHOLZ: Okay. Can I go back to 49e, just real quick, the finding? I must not have submitted that to you, but that last sentence is a little bothersome to me. It says, "In the past, if a commander dismisses charges or declines to prosecute, the commander did not write a justification or declination statement." And in the past, the truth is, I know we've got these two -- there is a couple of cases out there that became pretty hot in the media, and, those, in fact those convening authorities did write justifications for their --

LTCOL McGOVERN: Which was a disaster.

COL (Ret.) SCHOLZ: Right. It was. So I'm just -- I'm wondering if we -- in
the past they haven't provided -- the fact is we know -- I know of two big cases where they have. So do we want to say that sentence?

LTCOL McGOVERN: Not required.

COL (Ret.) HENLEY: Did not generally -- this is Steve Henley. Did not generally write a justification or declination statement.

COL (Ret.) SCHOLZ: Yes. Or not required. Either way. That would be better.

LTCOL McGOVERN: Okay.

COL (Ret.) SCHOLZ: And, actually, let me look at these. I've got --

(Pause.)

I think generally I was talking about maybe sending it to some DoD joint group to assess, but that's -- you have already answered my question on that, but let me look at this.

The recommendation B, 49b, due to the pressure it creates, or at least the perception -- you know, there is a perception
of pressure, if there isn't pressure, I was
just -- perception was a big deal to me there.
Let's see here. Let's see.

CHAIR HILLMAN: This is Beth.

Actually, I would object to that change. I
think that an individual can resist the
pressure successfully, so I don't think we're
saying that it's actually happening. But it
-- to me it undeniably creates a pressure. So
I'd rather leave it not perceived pressure.

COL (Ret.) SCHOLZ: Okay. What is
this, "Even in limited cases where the SJA and
commander disagree"?

LTCOL McGOVERN: I mean, the law
-- well, if the commander and SJA both agree
that it should not be referred, then the GCMCA
-- the higher JCMC reviews it. If the SJA and
commander disagree, so the commander wants to
refer against the SJA's advice, then it goes
to the service Secretary.

COL (Ret.) SCHOLZ: Okay. And so
we're recommending that they should consider
repealing that -- including that aspect. I've got it. Okay.

LTCOL McGOVERN: Right. So that in those cases where they do disagree, if it's going to have to go higher, just go to the next higher convening authority.

COL (Ret.) SCHOLZ: Okay. So even in those limited cases, okay. I got you. So that was dealt with in 1744e.

LTCOL McGOVERN: Correct.

COL (Ret.) SCHOLZ: Okay. I got you. All right.

Let's see. I think that was it. Again, I was talking about -- I thought maybe we should -- this says, "Congress should not" -- Section 2 of the VPA." And, again, I'd put "until further study by DoD." But I think we're not necessarily recommending some sort of group to study some of these issues further.

LTCOL McGOVERN: Right.

PARTICIPANT: And we studied it
and opined on it already.

    LTCOL McGOVERN: And their --

    COL (Ret.) SCHOLZ: Okay.

    LTCOL McGOVERN: -- opine is incorporated in your discussion.

    COL (Ret.) SCHOLZ: Okay.

    LTCOL McGOVERN: So -- which you're agreeing with them.

    COL (Ret.) SCHOLZ: Perfect.

Okay. All right. In 50a, my concern was very simply the use of we've got, "Military allows defendant to negotiate a plea agreement." And I just thought maybe that should say, "The UCMJ allows defendants to negotiate," or something. It just was a weird way to start that sentence.

    LTCOL McGOVERN: Okay.

    COL (Ret.) SCHOLZ: It's 50a, finding. I didn't mean to press on, in case anybody else had any concerns with the other ones.

    CHAIR HILLMAN: This is Beth. I'm
all for pressing on. That's good. We're --

(Laughter.)

So, 50, I wasn't a part of the subgroup that looked at this, but I was surprised that we didn't recommend any change.

We just said, you know, suggest a -- a study.

We said, you know, study this.

So anyone on the call who was on that subgroup that talked about the plea bargain, because that has been a target of --

for -- it's a big distinction in military versus civilian jurisdictions, the deal part of the way plea agreements work out.

LTCOL McGOVERN: Colonel Henley and Colonel Morris, you were part of those discussions. Do you want to weigh in?

COL (Ret.) MORRIS: I think I had to leave before we did get to it, but yes.

LTCOL McGOVERN: Colonel Henley?

COL (Ret.) HENLEY: I'm trying to -- the --

LTCOL McGOVERN: I mean, I'm happy
to refresh everyone's memory on this.

Basically, in the prosecution and defense teams, we noted that there is a difference between the two systems. And I believe it was discussed in the group as a whole as well.

Rhonnie Jaus felt that it was strange to be able to beat the deal. I didn't think -- she was not a fan. Colonel Henley, my impression was, initially, that you also thought the civilian system, where two people enter into an actual agreement and stick with that agreement may be a positive thing.

General Dunn thought that, although this could be changed, this wasn't a fight worth fighting at this time, that there may be reasons, and Colonel Ham has expressed reasons why this traditionally was done. So, as a matter of the convening authority's power -- and I think General Cooke alluded to the historic convening authority's power as well, that you're entering into this with the convening authority, but then you are later
going to have these clemency opportunities.

So those were some of the general issues
surrounding that topic.

COL (Ret.) HENLEY: Yes. I think
-- this is Steve Henley. I think when we were
discussing this, it comes down, in part, to
how a staff judge advocate or a convening
authority viewed the pretrial agreement. Was
it a cap, a true ceiling on exposure? Or were
you actually going to get some tangible
benefit to pleading guilty?

And because different SJAs and
different convening authorities approached the
deal differently, you really couldn't treat
the terms of the pretrial agreement as that's
it, that whatever the prosecutor and the
defendant or the accused agree on, that is it,
because you will have still some individuals
treated as sort of a CAAF, but there is really
no sense of how that case is valued.

And I think it is easier to try to
negotiate the terms of a pretrial agreement,
and you go in and then you have a sentence
authority, either the military judge or the
court members, if it's court members, actually
adjudge the sentence.

I think that's probably how I ended up coming down. I said, look, it would be nice if whatever the two agreed on agreed on, but that assumes that the parties are able to negotiate something in good faith. And I'm not sure that that would be possible under all circumstances, at least based on my experience with certain SJAs and defense counsel in years past.

So I think that's probably why we said examine it, to see if there is actually some benefit to changing the system. And this would be a major change. I think in addition to giving more authority to the judge earlier on, I think this would be a significant change to the military justice system. And I think people look at the system. I think this is not necessarily a bad thing, allowing -- go
ahead.

LTCOL McGOVERN: One additional point, sir, was that they looked at the fact that a lot of the sexual assault cases are contested. So this change would not necessarily be of great impact to the topic that you all were tasked to study, and that's why maybe punting this one --

CHAIR HILLMAN: Colonel McGovern, let's put that in a finding, what you just said, because, really, we are comparative systems. We are looking at the differences between civilian and military response systems, and we are looking at the sexual assault realm. So let's make a finding that says most sexual assault cases are contested, and explain why that is, because of the registrable nature of the offenses. I think we should put that in a finding.

I understand that we are not prepared, as a group, to recommend a change in this. But the way that it's phrased in that
recommendation, it's just too strong for me.

Don't change it at this time.

LTCOL McGOVERN: Okay.

CHAIR HILLMAN: Let's say, you know, "Further study of whether a change to mirror civilian plea agreements" -- "further study of whether a change to mirror civilian plea agreements would increase victim confidence is warranted, in sexual assault cases particularly," because this is -- we're not saying that -- I don't think we have enough evidence that this is actually having a very negative impact, but it's sure not having a positive impact. So I think we should look at it.

I also think that there should be -- and then I'll stop talking because the phone will go dead if I talk much longer -- so, but the -- we should say why the military system is different this way and how other changes in the system also raise the question of whether we should change plea agreements.
So, and that finding would be
clemency opportunities and the special nature
of the convening authority's role in this
process, you know, has made the plea
agreements, has negotiated, and then enforced
by a military judge. Am I still here?

COL (Ret.) HENLEY: You're still
here.

(Laughter.)

CHAIR HILLMAN: I think we should
say something to that effect. Okay. I'm
done.

LTCOL McGOVERN: All right. Thank
you, all. Unfortunately, our two hours are
up. These were very detailed and substantive
findings and recommendations. We still have
not been able to get through everything. At
this point, we do have next Tuesday set aside
to do that. And if anyone is available on
Monday, we could relook trying to get through
stuff on Monday as well. It's up to you, Dean
Hillman.
CHAIR HILLMAN: This is Beth.

Let's aim for Tuesday to go through additional things. And if there are comments from anybody who can't be on the next call that we have scheduled on the subsequent findings or -- and recommendations, or a finding and recommendation that you didn't get a chance to speak to yet, you should do that.

And, Kelly, let's get drafts out to everybody, so they can start to look at them on the discussion, too, just as you sent those partial drafts, recognizing that they are changing on the rest of it.

LTCOL McGOVERN: Okay. Super.

Sounds good. Thank you all very much.

(Whereupon, at 2:00 p.m., the proceedings in the foregoing matter were concluded.)
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: DOHA RSP CSS

Before: Elizabeth Hillman

Date: April 25, 2014

Place: Teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]
Court Reporter

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COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 234-4433 www.nealrgross.com