

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT  
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

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CONFERENCE CALL

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FRIDAY  
APRIL 25, 2014

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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

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

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

1 good. That sounds good. I'll look forward to  
2 looking at what modifications were made.

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

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

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

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

17 CHAIR HILLMAN: This is Beth. My  
18 guess, channeling some of his other problems,  
19 are the funding, the way that we -- the impact  
20 on funding streams. So the recommendation  
21 says, "The Secretaries continue to assess and  
22 ensure" -- it's worded a little bit awkwardly

1 there. We should probably correct those  
2 verbs. "To continue to provide adequate  
3 resources to maintain a sufficient number of  
4 well-trained prosecutors in the services' SVC,  
5 especially if there is a trend in increased  
6 reporting."

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

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

18 For example, the Army already had  
19 obtained 23 additional authorizations for  
20 special victim prosecutors prior to the NDAA  
21 authorizing or mandating the special victim  
22 capability.

1 LTCOL McGOVERN: Whereas, the  
2 Marines I think took it out of hide with their  
3 whole restructuring. So that's why we  
4 included the "services should assess," but --

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

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

22 But in 32a, as long as I'm looking

1 at it, could we change "manpower" to  
2 "personnel"?

3 LTCOL McGOVERN: Sure.

4 COL HAM: Personnel authorization?

5 LTCOL McGOVERN: Sorry, Colonel  
6 Ham?

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

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

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

20 LTCOL McGOVERN: Okay.

21 COL (Ret.) SCHOLZ: This is Dawn  
22 Scholz. I'm a little -- is the special victim

1 prosecutor the same as the special victim  
2 counsel?

3 LTCOL McGOVERN: No, no, no.  
4 We're talking completely separate -- in the  
5 services, you have a special victim  
6 capability. I think the Air Force does it as  
7 a team. Others just do it as a regional  
8 capability. We have a special victim  
9 prosecutor, special investigator, paralegal,  
10 and victim-witness liaison.

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

17 COL (Ret.) SCHOLZ: Gotcha. Yes,  
18 I understand. It's a little confusing  
19 sometimes because we've got the SV -- what do  
20 we call it? The special victim counsel, SVC,  
21 and then we have the SV -- see, I mean, it's  
22 --

1 LTCOL McGOVERN: Yes, Colonel  
2 Scholz, and I'm pretty sure that everybody is  
3 confused. And one of our overarching  
4 recommendations at the beginning of the report  
5 is to standardize terms throughout the  
6 services to avoid this confusion, and then,  
7 again, for the special victim capability,  
8 having the same acronym as SVC being the  
9 counsel. It's just a disaster, so --

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

14 (Simultaneous speaking.)

15 CHAIR HILLMAN: Go ahead Beth.

16 LTCOL McGOVERN: All right.

17 Number 33.

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

21 LTCOL McGOVERN: There was a  
22 concern with -- I have it listed as 33 and

1 33b. So I'm not sure if that includes a as  
2 well. If we can just take a minute and read  
3 through these?

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

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

21 LTCOL McGOVERN: Sure. Once you  
22 have the opportunity to see the discussion,

1 DoD has listed a number of things for their  
2 criteria, and then all of the services  
3 provided RFIs for what they are going to do to  
4 assess their special victim prosecutors.

5 The Army is using the dropout rate  
6 as one of the measures. It is not one of the  
7 measures required by DoD. And so part of the  
8 recommendation is that that should be a  
9 measure, because two years ago the Air Force  
10 reported that they had 96 victims drop out.  
11 That's one of the reasons that they became --  
12 they came up with special victims counsel,  
13 where the Army didn't have the special victims  
14 counsel, but they said because of special  
15 victim program they saw a dramatic decrease in  
16 victim fatigue. So only six percent of  
17 victims actually declined to continue to  
18 cooperate.

19 So in the context, I can even just  
20 drop it and move it to only be part of the  
21 discussion, but, really, otherwise you're  
22 saying DoD has proposed some good criteria.

1 One additional measure could be the dropout  
2 rate or the number of victims who stop  
3 cooperating in order to assess the special  
4 victim prosecutor, and, at the same time, the  
5 special victim counsel program, to see if  
6 those are helping.

7 CHAIR HILLMAN: This is Beth. May  
8 I propose that we just add to the finding in  
9 33a, which is first we set up the criteria,  
10 then we add a statement that says those  
11 criteria have been implemented, those criteria  
12 have been addressed by special programs across  
13 the services, including the Army's SVP program  
14 and the Air Force's SVC -- or whatever we're  
15 going to call the standardized name for the  
16 special victim counsel, and followed by the  
17 other services that have demonstrated -- that  
18 have shown promise so far or, you know, we --  
19 because this just feels like this is evidence  
20 of that conclusion. Does that make sense to  
21 others on the call, too?

22 LTCOL McGOVERN: Right. And this

1 is testimony from Colonel Mulligan. Say why  
2 the special victim prosecutor, not the special  
3 victim counsel, but the special victim  
4 prosecutor program. It is helpful. It is a  
5 measure of a difference that they saw. So I  
6 can delete 33b and add that general language  
7 to 33a, but at the same time I think it's  
8 important to stay focused that here we are  
9 talking about the special victim prosecutors,  
10 not the special victim counsel. And that this  
11 is criteria just to address special victim  
12 prosecutors.

13 COL (Ret.) SCHOLZ: And, Kelly,  
14 this is Dawn again, Dawn Scholz. I think what  
15 you said is -- 33 is already -- is in the  
16 recommendation, to keep that as a metric, the  
17 dropout rate. So it's kind of addressed in  
18 your recommendation. I don't know if you --  
19 I see what you're saying. I'm thinking -- I'm  
20 kind of agreeing with Dean Hillman that maybe  
21 we don't need it, because you do talk about  
22 keeping that metric in your recommendation.

1 MS. JAUS: This is Rhonnie. And  
2 it does help support what she says in the  
3 recommendation, what's said in the  
4 recommendation.

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

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

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

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

21 COL (Ret.) MORRIS: This is Larry  
22 Morris. I generally agree, too. I just think

1 that a couple of things might help there.  
2 When you -- however you say the statistic, six  
3 percent of sexual assault victims who had what  
4 -- who had identified themselves and come  
5 forward, because this is --

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

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

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

22 So dropout rate can also -- or,

1 correction, the conviction rate is not  
2 irrelevant. I mean, I think we say here  
3 conviction rates are not an adequate measure.  
4 Maybe we should say, like, conviction rates  
5 should not serve as the sole measure of the  
6 success, yada, yada, because if you end up  
7 with -- if you have a five percent conviction  
8 rate, I think it makes sense to say, hey, you  
9 know, are we -- is there something about our  
10 system here? It's not working quite right.

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

21 COL HAM: So, Colonel Morris --  
22 this is Colonel Ham -- would that be -- if we

1 follow that thought, we should kind of move  
2 that 33c into the recommendation, and say  
3 conviction rates should not serve as the sole  
4 measure --

5 LTCOL McGOVERN: But I think --

6 COL HAM: -- pass or failure.

7 LTCOL McGOVERN: -- conviction  
8 rates are within this list of DoD criteria.

9 COL (RET.) MORRIS: So, and I  
10 guess the way, Colonel Ham, I would address  
11 the recommendations, the finding would just  
12 be, you know, can't serve as the sole measure,  
13 and then the finding -- at the end of your  
14 recommendation say -- you know, develop  
15 metrics at the dropout rate, in addition to  
16 the conviction rates, or something.

17 MS. FRIED: This is Maria Fried.  
18 Kelly, I'm not sure what document you're  
19 referring to when you say the conviction rate  
20 is a metric or a source of measurement. I  
21 think the intent is to capture, you know,  
22 maybe case dispositions, but not have it as a

1 metric, because of the cases on -- you know,  
2 on a case-by-case basis, based on the facts,  
3 so on and so forth.

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

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

21 MS. FRIED: Right. I think it's  
22 information that's useful and should be paid

1 attention to. But I thought -- and I could --  
2 you know, my understanding was there was  
3 resistance because if you have a chart that  
4 shows, you know, one year you're down at five  
5 percent in conviction rate, and then next year  
6 you're at 100 percent, what are you really --  
7 what does that metric show?

8 LTCOL McGOVERN: Right.

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

19 MS. JAUS: Okay. Well, I think  
20 it's important. I certainly don't -- this is  
21 Rhonnie, and I don't think it's the sole  
22 criteria, but I think the conviction rate is

1 something important to look at.

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

4 LTCOL McGOVERN: Okay.

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

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

22 But just to highlight alcohol, I

1 think that is unfair and problematic. Some of  
2 the cases involve drugs, some of the cases  
3 involve other things. I don't think we should  
4 be highlighting it.

5 LTCOL McGOVERN: Okay.

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

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

22 So I feel like -- what do we

1 really want? This is measuring the  
2 effectiveness -- this section is entitled --  
3 this finding and recommendations, "Measuring  
4 the Effectiveness of Military Special  
5 Prosecutors." What we really want to say is  
6 we need to look at -- look beyond conviction  
7 rates, and we have some other data that is  
8 useful, for instance, dropout rates, that can  
9 be helpful there.

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

15 LTCOL McGOVERN: And just to give  
16 you all more background along the lines of  
17 what Maria was saying, the conviction rate,  
18 again, was something -- this is sort of to  
19 send a signal to Congress, because they wanted  
20 you all to specifically look at conviction  
21 rates as if it is a measure of success,  
22 whereas, the DoD is going to look at

1 prosecution rate, the number of SVC -- special  
2 victim capability cases preferred versus the  
3 overall number of courts-martial, the  
4 percentage of courts-martial tried with the  
5 direct assistance of a specially trained  
6 prosecutor, compliance with the special victim  
7 capability, the percentage of specially  
8 trained prosecutors who receive additional and  
9 advanced training, and the victim feedback on  
10 the effectiveness of the SVC prosecution and  
11 legal support services, again, relying on some  
12 sort of survey mechanism.

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

22           So that's to put it all in

1 context, since you don't have the report. I  
2 mean, technically, we can just delete 33c  
3 entirely.

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

12 LTCOL McGOVERN: Okay.

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

20 COL (RET.) MORRIS: "May be more  
21 useful."

22 COL (Ret.) SCHOLZ: "May be more

1 useful" or -- okay. Something like that?

2 MS. JAUS: To assess maybe victim  
3 satisfaction.

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

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

9 The next one was -- I'm sorry.

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

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

20 MS. JAUS: I thought the special  
21 prosecutor has to consult with the  
22 investigator. What about the special

1 prosecutor meeting with the victim? I think

2 --

3 LTCOL McGOVERN: There is no  
4 mandate for that.

5 MS. JAUS: Well, can't we  
6 recommend that? Isn't -- I thought that that  
7 is a good thing to recommend, that the  
8 prosecutor should meet with the victim as soon  
9 as possible, because not just to speak to the  
10 investigator but to become -- the sooner the  
11 prosecutor becomes involved in the case and  
12 meets with the victim, which is what we said  
13 in the finding, shouldn't that be the  
14 recommendation, that the prosecutor should be  
15 meeting with the victim as soon as possible,  
16 as soon as he or she could? Not necessarily  
17 just to speak with the investigator, but to  
18 speak with the victim.

19 LTCOL McGOVERN: Okay. Can we  
20 leave it as "as soon as possible"?

21 MS. JAUS: Right.

22 LTCOL McGOVERN: Is that okay with

1       you?

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

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

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

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

13                      MS. JAUS:  Right, right, right.  
14      Okay.  That's fine.

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

22                      MS. JAUS:  Oh, and also about

1 specialization.

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

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

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

18 In other words, there is no  
19 special defense capability that is being  
20 contemplated here anyway. So just saying,  
21 "Services continue to provide experienced  
22 counsel through regional defense organizations

1 from the reserve component as they are doing  
2 now," that seems fine, without going further.

3 LTCOL McGOVERN: Okay.

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

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

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

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

22 LTCOL McGOVERN: No. Just that

1 they are not in their tour lengths long enough  
2 to get to know the job.

3 COL HAM: This is Colonel Ham.  
4 The imbalance in resources was a general  
5 recurring concern.

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

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

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

1 LTCOL McGOVERN: Oh, okay.

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

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

6 All right. Moving on to 36b.  
7 Colonel Scholz, you were concerned the finding  
8 -- the last sentence should not be part of the  
9 finding. It sounds like discussion.

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

12 LTCOL McGOVERN: B.

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

18 LTCOL McGOVERN: And I guess it's  
19 36b finding or 36b recommendation. We tried  
20 to keep the numbers the same, so the topic was  
21 -- yes, when it breaks down into letters it's  
22 confusing.

1 COL (Ret.) SCHOLZ: Yes. I think  
2 I was talking about the finding there, and I  
3 -- 36b finding. And I think it's fine as long  
4 as -- if we want to say what -- kind of  
5 briefly summarize the other potential ways we  
6 found to fulfill the requirement. But  
7 otherwise I would just leave it for the  
8 discussion part of the -- because otherwise it  
9 just kind of leaves you hanging. We recognize  
10 there are other potential ways to fulfill it,  
11 and I understand it is going to be addressed  
12 in the discussion, but it just seems odd for  
13 a finding.

14 LTCOL McGOVERN: Okay.

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

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

1 criminal investigative organization  
2 investigators, or other. I guess those are  
3 the three.

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

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

19 LTCOL McGOVERN: Okay.

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

22 COL (Ret.) SCHOLZ: That sounds

1 great. Sounds good.

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

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

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

18 COL (Ret.) SCHOLZ: Okay. Okay.

19 COL HAM: This is Colonel Ham.

20 COL (Ret.) SCHOLZ: All right.

21 COL HAM: We're trying to figure  
22 out the right wording. Of course,

1 "effectiveness" in the defense counsel realm  
2 has a constitutional connotation. If there's  
3 any other -- in the body, you know, there's a  
4 footnote that says we don't mean in the  
5 constitutional sense, but if there is some  
6 other word -- I don't know. I was just  
7 brain-dead and couldn't think of another word.

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

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

1 the sixth amendment." I don't know.

2 COL (RET.) MORRIS: Yes.

3 Performance --

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

6 COL (RET.) MORRIS: It does.

7 LTCOL McGOVERN: Okay. Number 38

8 --

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

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

21 Whether anybody would consider a  
22 sentence that gives particular attention to

1 the quality of supervisory personnel -- I  
2 mean, with defense counsel, Army-only  
3 experience I think sometimes is -- we assign  
4 zealots or we assign deadbeats, you know,  
5 people who can't be put somewhere else, and  
6 are kind of also-rans for other positions.

7 I'd question whether a sentence  
8 along the lines of, you know, going with 35  
9 Alpha, the services should give particular  
10 attention to assignments of those who  
11 supervise military defense counsel, assigning  
12 personnel who are at least as qualified as  
13 their government counterparts. Anything along  
14 those lines?

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

1 Force perspective.

2 CHAIR HILLMAN: This is Beth.  
3 But, Colonel Scholz, you wouldn't have an  
4 objection to making a more specific  
5 recommendation here that says "adequately  
6 resource in funding and personnel, including  
7 experienced supervisors, and direct the  
8 services assessed," whether that's the case.  
9 Would you object to that language?

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

12 LTCOL MCGOVERN: Okay. Okay.  
13 Great point. Colonel Morris, thank you.

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

1 heard testimony to that effect.

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

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

19 The other -- the second one, the  
20 second point I was making, really kind of goes  
21 back into the assessments, the next section,  
22 the section on special victim counsel

1 interaction with trial and defense counsel.  
2 That's a finding that I think we don't have,  
3 but may want to consider, where the Air Force  
4 has -- has some statistics that show that  
5 special victim counsel seems to be really  
6 improving the number of unrestricted reports  
7 that -- restricted reports that convert to  
8 unrestricted reports.

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

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

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

1 mechanism. Told the Secretary of Defense to  
2 come up with one.

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

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

17 LTCOL MCGOVERN: And, Ms. Jaus,  
18 maybe you can help explain what is done in New  
19 York, because what they mean by an enforcement  
20 mechanism is a victim's rights are violated at  
21 some point through the process, because the  
22 prosecutor fails to inform them or give them

1 the opportunity to be heard. In some cases,  
2 they will be able to say, "I wasn't given my  
3 opportunity." So you need to reopen -- go  
4 back and reopen the trial. That's an enormous  
5 amount of power for a victim. So --

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

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

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

22 MS. JAUS: No. No. We don't do

1 that, but we -- a judge -- I saw somewhere  
2 here, the judge will sometimes ask, "Have we  
3 spoken with the victim about, you know,  
4 whatever happened?" And we will say on the  
5 record, but they don't fill out a form, no.

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

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

21 COL (Ret.) SCHOLZ: This is  
22 Colonel Scholz again. I'm surprised that we

1 -- I thought we already had a form or  
2 something that, you know, we gave victims  
3 somewhere along the way. And I don't know if  
4 it came from the investigative side of the  
5 house or from the legal office, but -- like  
6 from the VWAP program, telling them what their  
7 rights are.

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

17                   MS. GORDON: Ma'am, this is Joanne  
18 Gordon. You're right. So part of the  
19 post-trial record that you're thinking of is  
20 a form from the victim and any witnesses that  
21 may have been adverse, particularly to the  
22 defense, that they be notified, you know, when

1 the accused is up for clemency and parole and  
2 that sort of thing.

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

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

12 MS. GORDON: After trial.

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

16 MS. CHAYT: Jan Chayt here. There  
17 are several DD forms used by the MCIOs in  
18 various stages within contact with victims  
19 that tell them about their rights, who their  
20 points of contact are. The first one that I'm  
21 aware of is the DD-2701 that is provided by  
22 the MCIOs to all the victims and witnesses of

1 crime, giving them their rights. I'm sure it  
2 will be revised, but so --

3 MS. GORDON: And the 2701 isn't --  
4 I mean, the MCIOs are kind of the ones that  
5 are supposed to -- but at least in Army  
6 practice, you know, prosecutors give those  
7 out. Victim witness assistance personnel give  
8 those out. Special victims counsel have them  
9 on file to give them out. You know, sometimes  
10 a witness or a victim will get that same form  
11 15 times, if everyone -- we want to ensure  
12 that they're getting that information.

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

20 It seems like this is kind of  
21 unnecessary, and it's acting like we're not  
22 already doing those things. We are already

1     advising the victims of their rights.  And  
2     their rights are now -- are changing, and  
3     we'll have to update those forms.

4                     (Simultaneous speaking.)

5                     CHAIR HILLMAN:  This is Beth.  
6     Sorry, just let me add -- this is clearly a  
7     complex area that I'm grateful for the  
8     precision and expertise that you all  
9     demonstrate on this.  In terms of the -- in  
10    terms of talking more about this right now,  
11    are there objections to deleting that line  
12    about a memorandum that follows the military  
13    judge to inquire on the record?  Are there any  
14    objections to that which Colonel Scholz has  
15    proposed?

16                    MS. JAUS:  No.  No objection.

17                    COL (RET.) MORRIS:  No objections.

18                    CHAIR HILLMAN:  Okay.  I would  
19    also take out the last line there, which says  
20    this can be done by modifying the bench book,  
21    because I think that that's just requiring the  
22    military judge to do something essentially in

1 there, and that's -- that's essentially how  
2 they would do that, get the military judge to  
3 do it. So --

4 COL (Ret.) SCHOLZ: Agree.

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

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

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

20 CHAIR HILLMAN: This is Beth.  
21 Absolutely.

22 LTCOL McGOVERN: Okay. Then,

1 that's an easy fix.

2 Number 39 --

3 COL (Ret.) SCHOLZ: This is  
4 Colonel Scholz.

5 CHAIR HILLMAN: Sorry, Dawn. So  
6 this is just about the special victims  
7 counsel. This is tricky for us because this  
8 is speculative. So our language here is less  
9 certain in some ways, not unlike actually the  
10 military crime victim rights issues, because  
11 this is new and we haven't seen too much. So  
12 it's true; I think the finding that says there  
13 is generally positive working relationships is  
14 right.

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

21 Then, in terms of the  
22 recommendation, this directs SJA's prosecutors

1 and defense counsel to continue to get  
2 feedback. That doesn't seem an especially  
3 onerous requirement, so I'm fine with this.

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

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

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

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

1 they had an advocate was the general feeling.

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

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

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

22 So rather than, is it impacting

1 reporting? Is it overall a good program?  
2 Victim services is going to, you know, explore  
3 that completely, and I think that may be a  
4 better place for those conversion rates, where  
5 here we are just trying to see -- and, again,  
6 Quantico comes to my mind where they said,  
7 "No, we haven't had a problem so far, but we  
8 can certainly see that there would be  
9 problems." And then in the Sinclair case you  
10 saw Judge Pohl had to stop the proceedings and  
11 some other concerns of UCI were raised, so --  
12 because the victim counsel's interaction in  
13 that case.

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

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

21 COL HAM: Ma'am, this is Colonel  
22 Ham. That's completely up to you. The Victim

1 Services Subcommittee has an entire section in  
2 the report devoted to special victim counsel.  
3 That doesn't preclude you from opining on it,  
4 if you feel it fits into your report as well.  
5 It's completely up to you. We're not meaning  
6 to tell you to do or not do whatever you think  
7 is appropriate.

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

19 COL (Ret.) SCHOLZ: That's good  
20 with me, too, because honestly I didn't  
21 realize victim services was handling that.  
22 That's good.

1 LTCOL McGOVERN: Okay. And,  
2 Colonel Morris, you had flagged Number 39 as  
3 well. Do you have any concerns with it?

4 COL (RET.) MORRIS: All I was  
5 going to suggest, instead of "foresee  
6 potential issues" is to give a sense of what  
7 they might be, like -- so maybe say, "In fact,  
8 although trial counsel" maybe just say  
9 "although counsel," because really both sides  
10 --

11 LTCOL McGOVERN: Okay.

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

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

22 LTCOL McGOVERN: Okay. I think

1 "delay" was another concern. Would that be  
2 okay to include?

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

4 LTCOL McGOVERN: Okay. Great.

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

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

16 So here -- this is correct, this  
17 last line for instance of the finding.  
18 Jurisdiction is based on legal authority, not  
19 the victim's subjective mind-set. But without  
20 more in here, this sort of sets out -- this is  
21 different than our other findings. This is a  
22 sort of legal analysis, with which -- I may

1 even have said this very thing -- I don't  
2 disagree with this analysis, but this just --  
3 this is different than what we have sort of  
4 said elsewhere, and I just -- it feels a  
5 little -- it's a different sort of -- type of  
6 statement for us to make here. So -- but I  
7 don't disagree with it. I just wanted to get  
8 -- to have everybody -- while we had everyone  
9 on the call, just reckon with this and think  
10 about whether this is --

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

15 MS. FRIED: Maria Fried, Kelly.

16 COL (Ret.) HENLEY: Steve Henley.

17 COL (RET.) MORRIS: Larry Morris.

18 MS. JAUS: Rhonnie Jaus.

19 LTCOL McGOVERN: Dean Hillman?

20 Dean Hillman, are you there?

21 (No response.)

22 LTCOL McGOVERN: Okay. She must

1 have dropped. She'll call back in, and we can  
2 reengage that discussion.

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

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

14 Welcome back, Dean Hillman.

15 Sorry.

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

19 LTCOL McGOVERN: Dean Hillman,  
20 just --

21 CHAIR HILLMAN: I'm sure it was  
22 brilliant.

1 LTCOL McGOVERN: As your further  
2 background, I don't know if this makes any  
3 difference to how you want to word things, it  
4 is a specific direction that you assess the  
5 strengths and weaknesses of current and  
6 proposed legislative initiatives in your area,  
7 which may make a difference on how you word  
8 things or may not.

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

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

22 LTCOL McGOVERN: So everybody

1 agrees that we should be saying they should  
2 not enact this?

3 CHAIR HILLMAN: Correct.

4 LTCOL McGOVERN: Yes, I agree with  
5 that.

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

7 COL HAM: Can everybody identify  
8 themselves for the Court Reporter?

9 COL (Ret.) SCHOLZ: Sure. Colonel  
10 Scholz. I concur with the recommendation.

11 MS. JAUS: Rhonnie Jaus. I  
12 concur.

13 LTCOL McGOVERN: Colonel Henley  
14 and Colonel Morris, are you in concurrence?

15 COL (Ret.) HENLEY: Steve Henley.  
16 Concur.

17 COL (RET.) MORRIS: Yes, I concur.  
18 Just the only question now is the last  
19 sentence of the finding, I mean, it's true  
20 enough, but are we really -- are we answering  
21 well enough why we don't think it should?

22 LTCOL McGOVERN: Again, I think

1 the discussion answers the mail really well by  
2 quoting the DoD response to Congress as the  
3 reasons why this is not a good idea. I can  
4 try to incorporate some of that into the  
5 finding.

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

10 LTCOL McGOVERN: Okay.

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

15 MS. JAUS: Yes. "Subjective  
16 mind-set" is confusing. I agree.

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

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

21 CHAIR HILLMAN: Right. Just that  
22 first finding there on 41, that -- the first

1 line, another -- "touching parts of another  
2 person's body with no sexual intent." And I  
3 just -- I put a question mark there. Does it  
4 really -- there is no intent to gratify  
5 requirement in even the minor offenses? I  
6 just wanted to make sure that was accurate  
7 before we went forward.

8 COL HAM: That's correct, ma'am.  
9 This is Colonel Ham. That's the  
10 finger-in-the-mouth example and --

11 MS. JAUS: The hair, the bun.  
12 This is Rhonnie. Touching of the hair,  
13 somebody's ponytail or their bun. We had that  
14 --

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

17 CHAIR HILLMAN: This is Beth. If  
18 that's the case, then you should press on. I  
19 just wanted to make sure there wasn't any  
20 signs or requirement for even those. I know,  
21 you know, the minor touching incidents on the  
22 spectrum, but that was my only concern there.

1 COL HAM: Yes. There is some  
2 touching that does require an intent to arouse  
3 or gratify the sexual desire of any person.  
4 And then there is some touching, touching of  
5 certain body parts, such as the buttocks,  
6 inner thigh, of any person with an intent to  
7 abuse, humiliate, or degrade any person. I  
8 mean, there is an intent required but no  
9 sexual intent.

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

14 MS. JAUS: Well, but if the  
15 requirement is that you don't have to have  
16 sexual gratification, I think that that's  
17 really -- that should be in there because  
18 that's kind of crazy, because the point I  
19 wanted to make -- this is Rhonnie -- is that  
20 civilian jurisdictions require sexual  
21 gratification for touching to be a sex crime.

22 And I just wanted to make a point

1 about that sentence. "Civilian jurisdictions  
2 usually refer to felony level penetrative  
3 sexual assault offenses and rape cases when  
4 providing data or discussing sexual assaults."  
5 First of all, civilian jurisdictions require  
6 touching for the purpose of sexual  
7 gratification for touching to be a sexual  
8 assault and make distinctions between sexual  
9 touchings and penetrative offenses in terms of  
10 the gradation of the crime.

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

18 So we keep talking in our report  
19 about penetrative offenses, and soon they will  
20 remove the word "penetration" I think from  
21 many of the sex offense statutes throughout  
22 the country, because that seems to be the way

1 things are going. I just --

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

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

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

22 MS. JAUS: Well, for regular

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

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

15 COL HAM: So just to be clear, so  
16 some of you heard of the touching of the hair  
17 bun, that would be -- you know, if that --  
18 that is potentially criminal if it was done to  
19 arouse or gratify the sexual desire of anyone.  
20 And touching other parts of the body, some  
21 specific parts, require no intent to gratify  
22 the sexual desire. So it's a very, very broad

1 span.

2 MS. JAUS: Yes. That's very  
3 different than civilian jurisdictions. There  
4 is always that requirement for sexual  
5 gratification. A mere touching would not be  
6 -- it would be a harassment or something else,  
7 but it is not a sexual offense.

8 COL HAM: Or an assault.

9 LTCOL McGOVERN: Okay. That was  
10 helpful.

11 42?

12 CHAIR HILLMAN: Just one note.  
13 Sorry, Kelly. This is Beth again. On 41b, we  
14 should also correct that language, then, about  
15 penetrative and non-penetrative offenses in  
16 the recommendation 41b to avoid that language  
17 that's too restrictive in the comparative  
18 sense, given what civilian jurisdictions are  
19 doing.

20 LTCOL McGOVERN: Do you have a  
21 recommendation?

22 CHAIR HILLMAN: Yes. I would use

1 Rhonnie's language on this. You know, would  
2 separate penetrative, you know, contact and  
3 non-contact offenses, or something along those  
4 lines.

5 LTCOL McGOVERN: Okay. All right.  
6 Number 42, Dean Hillman and Colonel Scholz  
7 expressed concerns about that one.

8 CHAIR HILLMAN: Colonel Scholz, go  
9 ahead.

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

20 CHAIR HILLMAN: 43. This is Beth.  
21 43.

22 COL (Ret.) SCHOLZ: Okay? 43?

1       So, I mean, I just might, again, from my  
2       experience, you know, I never saw a commander  
3       draft anything, charges. We draft the  
4       charges, and then we -- we did play a big role  
5       in not only determining the type of charge,  
6       drafting the charge, but also recommending  
7       disposition. So I was just trying to include  
8       all that in that finding.

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

12              COL (Ret.) SCHOLZ: Okay.

13              LTCOL McGOVERN: Correct?

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

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

20              COL (Ret.) SCHOLZ: Okay. Let's  
21       see. Okay. Can you show me where we talk  
22       about how the -- okay. Well, maybe we'll run

1 into it as we go along, but I think it's  
2 important that -- you know, I think that is a  
3 huge role that we play, and, you know, just  
4 because we know that it's very rare that a  
5 convening authority doesn't take the  
6 recommendation of his SJA. I think it's  
7 important to point out that rule.

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

10 COL (Ret.) SCHOLZ: Yes.

11 LTCOL McGOVERN: -- redundant --

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

16 LTCOL McGOVERN: Okay.

17 COL (Ret.) SCHOLZ: Okay.

18 LTCOL McGOVERN: Did we lose Dean  
19 Hillman again?

20 (No response.)

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

1 question?

2 LTCOL McGOVERN: Go ahead, sir.

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

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

17 COL (Ret.) HENLEY: I mean, that's  
18 really what we're talking about, right? We're  
19 saying although the convening authority  
20 eventually determines disposition of  
21 allegations, the prosecutors actually draft --  
22 or determine and draft charges.

1 LTCOL McGOVERN: It seems like it  
2 should read, then, "Military prosecutors  
3 determine appropriate charges, draft, and play  
4 a significant role in determining and  
5 recommending a disposition." Because you are  
6 going to determine the appropriate charges  
7 before drafting, right?

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

12 LTCOL McGOVERN: Okay.

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

20 So I was just confused when you  
21 say, "Military prosecutors draft and play a  
22 significant role in determining and drafting."

1 We either draft or don't draft. I think we,  
2 by and large, draft and then recommend  
3 appropriate disposition to the convening  
4 authority who ultimately makes that decision.

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

7 CHAIR HILLMAN: Yes, I am.

8 LTCOL McGOVERN: Oh, great.  
9 Great.

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

12 (Laughter.)

13 You haven't paid your bill.

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

18 (Laughter.)

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

21 (Pause.)

22 COL (Ret.) SCHOLZ: Kelly, this is

1 Colonel Scholz. Mine were just kind of edits,  
2 kind of minor edits actually.

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

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

18 So question whether a sentence  
19 along the lines of -- as an extra sentence in  
20 the recommendation, "Such measures, including,  
21 you know, other" -- I mean, I don't know  
22 exactly what to say, "Such measures, maybe

1 including administrative separations, also can  
2 provide some level of accountability when  
3 there is insufficient evidence to go to court,  
4 and also in enforcing accountability for  
5 precursor conduct," you know, for example, you  
6 know, inappropriate language or sexual  
7 harassment that does not constitute sexual  
8 assault.

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

14 LTCOL McGOVERN: Okay.

15 MS. JAUS: Okay. Kelly, this is  
16 Rhonnie. The line where it says, "There are  
17 numerous potential adverse actions available  
18 that do not exist in civilian jurisdictions,"  
19 that's not true, because you can -- I mean, if  
20 you don't want to go ahead with criminal  
21 cases, criminal charges, if you're a teacher,  
22 you can ask for them to not teach anymore, a

1 police officer gets stopped in different ways,  
2 so that's really not a true statement.

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

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

18 LTCOL McGOVERN: Okay. And,  
19 Colonel Scholz, I can incorporate the changes  
20 that you recommended with deleting "potential"  
21 and adding "options and adverse actions,"  
22 those sort of recommendations.

1 COL (Ret.) SCHOLZ: Okay. Great.

2 Thank you.

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

9 CHAIR HILLMAN: This is Beth. We  
10 are redrafting -- Kelly is going to redraft  
11 44, and we'll look at it again. We had a --

12 LTCOL McGOVERN: Right.

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

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

22 And then, the role of the judge,

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

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

9 (Pause.)

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

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

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

1 prosecutor would not have to go through the  
2 judge for lay witnesses or --

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

5 LTCOL McGOVERN: Right.

6 MS. JAUS: -- the expertise is  
7 relevant.

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

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

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

22 MS. JAUS: Okay. Well, that

1       answers my question, then, because that's why  
2       I was wondering why we were doing that when I  
3       said, does the prosecution and civilian  
4       practice have to go to the judge? So, okay.  
5       I think that helps.

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

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

22                   COL (Ret.) HENLEY: Rhonnie, this

1 is Steve Henley. I think what we were talking  
2 about, and I said what we're talking about  
3 here, is a funding issue, and whether the  
4 expert is eventually allowed to testify, still  
5 has to pass the judge's approval.

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

16 MS. JAUS: Yes. Yes. Okay.

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

22 MS. JAUS: No, I agree. Yes. You

1 can hire as many experts as you want. Whether  
2 you can use them is a different question.

3 Okay. Yes, that's true.

4 LTCOL McGOVERN: Okay. That's the  
5 --

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

19 COL (Ret.) HENLEY: I think for  
20 all of the --

21 COL HAM: Ma'am, that's -- that's  
22 why I put "depending on service practice,"

1 because the -- in the Army, it's the captain  
2 trial counsel who makes the call.

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

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

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

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

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

17 COL (Ret.) HENLEY: This is Steve  
18 Henley. Maybe practice has changed, but I  
19 thought there was a requirement for experts  
20 that the convening authority would actually  
21 have to deny the request before the judge  
22 would entertain a motion to compel. Is that

1 no longer the requirement?

2 COL HAM: No, sir. That is -- I'm  
3 sorry. Again, this is late-night, brain-dead  
4 wording, but I tried to capture that in the  
5 sentence: "The trial counsel may determine  
6 whether to grant or deny defense witness  
7 requests other than expert witness requests"  
8 --

9 COL (Ret.) HENLEY: Okay. Thanks.

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

12 COL (Ret.) HENLEY: Okay.

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

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

17 MS. JAUS: What happened to 47?

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

20 MS. JAUS: Here is my question:  
21 "Many public defenders have subpoena power"?  
22 I didn't know that. I mean, certainly not in

1 New York. That was my question.

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

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

12 LTCOL McGOVERN: That's easy.

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

17 LTCOL McGOVERN: Okay, sir.

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

22 LTCOL McGOVERN: Okay.

1 COL (Ret.) SCHOLZ: Kelly, this is  
2 Colonel Scholz again. Before you move on to  
3 48, I want to offer this. On the  
4 recommendation, we are making -- in several  
5 places we are saying, we recommend the  
6 Secretary of Defense propose the President to  
7 make amendments to the manual for  
8 courts-martial.

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

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

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

20 Should we not -- I just want to  
21 throw it out -- should we not consider maybe  
22 throwing these recommendations through that

1 committee, too, to look at or propose or  
2 study? I mean, I'm just wondering where we  
3 should be sending these recommendations.

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

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

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

16 COL (Ret.) SCHOLZ: Perfect.  
17 That's fine. Good.

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

1 to the defense as well?

2 CHAIR HILLMAN: Colonel Ham, this  
3 is Beth. Colonel Ham, do you mean 47?

4 COL HAM: Yes, ma'am. Right now  
5 it says, "Require both prosecution and defense  
6 to submit requests for witnesses and other  
7 assistants." And in the recommendation you  
8 just discussed a few minutes ago, you were  
9 limiting that to the defense.

10 CHAIR HILLMAN: Right.

11 COL HAM: Or is it a separate  
12 thing, the defense can -- or the prosecution  
13 can determine whatever witnesses they want,  
14 but they still have to go to the judge to get  
15 the subpoena. I guess it could be a different  
16 thing.

17 LTCOL McGOVERN: Well, and trial  
18 counsel currently, the government has its own  
19 subpoena power. So, Colonel Henley, in this  
20 new world where the judge will have subpoena  
21 power, do you then see the trial counsel or  
22 the government not having subpoena power

1 anymore?

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

8 LTCOL McGOVERN: Right.

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

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

21 COL (Ret.) HENLEY: Oh, yes. Yes,  
22 because I -- you're right. They could

1 subpoena documents as well.

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

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

7 COL (Ret.) MORRIS: Correct.

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

12 COL (Ret.) MORRIS: Yes.

13 LTCOL McGOVERN: Okay.

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

17 LTCOL McGOVERN: Okay. Thank you  
18 for joining us.

19 MS. JAUS: Okay. Bye.

20 CHAIR HILLMAN: Thank you,  
21 Rhonnie.

22 LTCOL McGOVERN: That moves us on

1 to 48a. Colonel Morris, you had a concern  
2 with the finding?

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

7 LTCOL McGOVERN: Okay.

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

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

12 LTCOL McGOVERN: All right. Then  
13 --

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

16 LTCOL McGOVERN: Sure.

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

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

21 COL (Ret.) HENLEY: "Establish  
22 and" --

1 (Simultaneous speaking.)

2 -- "not be compelled to testify."

3 LTCOL McGOVERN: Okay. And,  
4 Colonel Henley, I think you had a concern with  
5 48b.

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

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

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

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

16 COL (Ret.) HENLEY: Oh, okay.

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

20 COL (Ret.) HENLEY: Yes, I -- oh,  
21 it's just a -- so the sentence in the  
22 third-to-the-last paragraph beginning, "A

1 practical effect of this change," so it says,  
2 "For example, statements or perhaps hearsay,"  
3 --

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

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

13 LTCOL McGOVERN: Okay. Yes.

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

17 LTCOL McGOVERN: Okay.

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

1 specifications." Or "how to best dispose" or

2 --

3 CHAIR HILLMAN: Okay. Got it.

4 Yes, "how best to dispose." Okay.

5 LTCOL McGOVERN: All right. We

6 got that, sir. Thank you. Next, Colonel

7 Scholz, you had concerns with 49a and b.

8 COL (Ret.) SCHOLZ: Yes. A --

9 just starting with A, it's really just a

10 question that -- on the second line it says

11 "may increase this pressure," and I've got a

12 big question mark with "this." I'm not sure

13 what "this" is referring to.

14 LTCOL McGOVERN: Maybe "the

15 pressure," or just "pressure"? "May increase

16 pressure by requiring" --

17 COL (Ret.) SCHOLZ: Yes. Probably

18 just "pressure," "may increase pressure by

19 requiring" -- I don't know. It seems -- it's

20 kind of vague and not -- it just probably

21 needs a little bit more --

22 LTCOL McGOVERN: Context?

1 COL (Ret.) SCHOLZ: -- thought. I  
2 don't have -- I haven't come up with any  
3 language for you, but --

4 CHAIR HILLMAN: This is Beth.  
5 This is another -- you know, this is the  
6 structural issue of looking at the findings  
7 outside of the context of the discussion that  
8 you've written. I think -- I do think this is  
9 -- this is a response to our sense that the  
10 ratchet to prosecute with more intensity and  
11 effort has elevated the decision-making  
12 process, and that's the pressure, the pressure  
13 to prosecute aggressively. I think that's  
14 what we mean there. So --

15 COL (Ret.) SCHOLZ: Agreed.  
16 Agreed. I think we should set that up by  
17 making that clear, what we're talking about  
18 there. So --

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

1 reviewed by the higher GCMCA."

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

4 COL (Ret.) HENLEY: That's -- but  
5 I -- yes, so if we explain what that is.  
6 Increases pressure, prosecute, requiring a  
7 decision not to refer charges to a  
8 court-martial.

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

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

19 But then, also, the second  
20 sentence is I just -- I'm not sure I really  
21 agree or think that maybe we want to just  
22 delete that. It says, "Senior trial

1 counseling overriding the SJA." The  
2 "overriding" is -- I'm not sure that's what  
3 they're really doing, but they -- and I don't  
4 really think -- I don't think it's akin to  
5 Assistant U.S. Attorney in the local office  
6 going to an Attorney General. I don't agree  
7 with that sentence.

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

11 COL (Ret.) SCHOLZ: Yes. Great.

12 LTCOL McGOVERN: Okay. Okay.

13 49c.

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

1 this elevated review.

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

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

21 So does this -- did this -- did  
22 49c read convincingly to everybody else?

1 LTCOL McGOVERN: And, again, these  
2 were quotes taken from our discussion  
3 transcript, which may be appropriate in  
4 discussion, but not as a final finding or  
5 recommendation. But for a lot of -- not a  
6 lot, a few of the statutory reviews, I think  
7 the subcommittee's conclusion was there really  
8 isn't going to be much change, but the  
9 practical effect may be victim confidence. So  
10 it is okay.

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

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

1 refer cases.

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

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

21 LTCOL McGOVERN: Okay. And with  
22 deleting that first sentence, would it be

1       okay, then, to combine the first sentence of  
2       49b, then, with the second sentence of 49c?  
3       Because the first sentence of 49b, then, is  
4       just stating what Section 2 is, right?

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

7                   LTCOL McGOVERN:   Okay.

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

10                  COL (Ret.) MORRIS:   Can you repeat  
11       what you're doing there, then?   I'm trying to  
12       --

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

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

18                  LTCOL McGOVERN:   -- or what the  
19       proposal is -- thank you, ma'am -- the first  
20       sentence of 49b we keep, to explain your  
21       interpretation of the law, and then it would  
22       be the second sentence -- second and third

1 sentence of 49c, would all become the finding  
2 of 49b.

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

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

11 COL (Ret.) MORRIS: Okay.

12 LTCOL McGOVERN: -- is that --

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

20 CHAIR HILLMAN: This is Beth. I  
21 think that I -- I agree with what Colonel  
22 Scholz is saying there. But I think, Colonel

1 Morris, in response to what you've pointed out  
2 before --- in some of these findings makes  
3 them more persuasive is we need to say why  
4 they're not better positioned. So I think we  
5 should cut that "are no better positioned,"  
6 but maybe service Secretaries lack the  
7 established structure, information, and, you  
8 know, knowledge to make prosecutorial  
9 decisions, as compared to convening  
10 authorities with the advice of staff judge  
11 advocates.

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

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

22 CHAIR HILLMAN: This is Beth.

1 Always in favor of active voice. That's, you  
2 know, a more positive statement. That's  
3 great. I think that we should just point out  
4 there is no -- there is exercising  
5 prosecutorial discretion, which is a grave  
6 responsibility, and the service Secretaries  
7 have a lot of things to do. Convening  
8 authorities have been doing this.

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

16 LTCOL McGOVERN: Okay.

17 COL (Ret.) MORRIS: And then in  
18 that preceding sentence, please, where we  
19 conclude that sentence with, "Will simply  
20 refer cases to a court-martial," with the idea  
21 that somebody hopefully suggested there about  
22 the specter of command influence and all.

1     Might we say, "On the advice of their SJA, is  
2     that convening authorities might be deterred  
3     from exercising their independent professional  
4     judgment and making -- whether to refer a  
5     case." A little bit of our normal language.

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

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

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

19                   COL (Ret.) SCHOLZ: Yes. This is  
20    Colonel Scholz. That's exactly how I feel,  
21    too. I think it could -- I think some  
22    language, just like he was suggesting, "or

1 could put inappropriate pressure" -- I don't  
2 know if we want to say "illegal" or, you know,  
3 some -- it really is, you know, pressure that  
4 is -- we don't want put on convening  
5 authorities to make these independent  
6 decisions.

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

10 (Laughter.)

11 49b, finding. This was a concern  
12 of Mr. Bryant, so if you don't have a problem  
13 with it, I will consult with him offline and  
14 relay his concerns.

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

21 LTCOL McGOVERN: Will do. Okay.  
22 Then, moving on, Number --

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

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

7 COL HAM: I think that 49d, Delta,  
8 I think the information on that is from the  
9 multi-jurisdiction comparative fact- gathering  
10 --

11 LTCOL McGOVERN: Last summer's  
12 comparative analysis.

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

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

1 CHAIR HILLMAN: This is Beth.

2 Agreed. Sounds great.

3 LTCOL McGOVERN: Colonel Scholz,  
4 you were concerned with the recommendations in  
5 49a, b, and c.

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

19 LTCOL McGOVERN: Which was a  
20 disaster.

21 COL (Ret.) SCHOLZ: Right. It  
22 was. So I'm just -- I'm wondering if we -- in

1 the past they haven't provided -- the fact is  
2 we know -- I know of two big cases where they  
3 have. So do we want to say that sentence?

4 LTCOL McGOVERN: Not required.

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

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

11 LTCOL McGOVERN: Okay.

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

14 (Pause.)

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

20 The recommendation B, 49b, due to  
21 the pressure it creates, or at least the  
22 perception -- you know, there is a perception

1 of pressure, if there isn't pressure, I was  
2 just -- perception was a big deal to me there.  
3 Let's see here. Let's see.

4 CHAIR HILLMAN: This is Beth.  
5 Actually, I would object to that change. I  
6 think that an individual can resist the  
7 pressure successfully, so I don't think we're  
8 saying that it's actually happening. But it  
9 -- to me it undeniably creates a pressure. So  
10 I'd rather leave it not perceived pressure.

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

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

21 COL (Ret.) SCHOLZ: Okay. And so  
22 we're recommending that they should consider

1       repealing that -- including that aspect. I've  
2       got it. Okay.

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

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

10                  LTCOL McGOVERN: Correct.

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

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

21                  LTCOL McGOVERN: Right.

22                  PARTICIPANT: And we studied it

1 and opined on it already.

2 LTCOL McGOVERN: And their --

3 COL (Ret.) SCHOLZ: Okay.

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

6 COL (Ret.) SCHOLZ: Okay.

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

9 COL (Ret.) SCHOLZ: Perfect.

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

17 LTCOL McGOVERN: Okay.

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

22 CHAIR HILLMAN: This is Beth. I'm

1 all for pressing on. That's good. We're --

2 (Laughter.)

3 So, 50, I wasn't a part of the  
4 subgroup that looked at this, but I was  
5 surprised that we didn't recommend any change.  
6 We just said, you know, suggest a -- a study.  
7 We said, you know, study this.

8 So anyone on the call who was on  
9 that subgroup that talked about the plea  
10 bargain, because that has been a target of --  
11 for -- it's a big distinction in military  
12 versus civilian jurisdictions, the deal part  
13 of the way plea agreements work out.

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

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

19 LTCOL McGOVERN: Colonel Henley?

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

22 LTCOL McGOVERN: I mean, I'm happy

1 to refresh everyone's memory on this.

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

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

13 General Dunn thought that,  
14 although this could be changed, this wasn't a  
15 fight worth fighting at this time, that there  
16 may be reasons, and Colonel Ham has expressed  
17 reasons why this traditionally was done. So,  
18 as a matter of the convening authority's power  
19 -- and I think General Cooke alluded to the  
20 historic convening authority's power as well,  
21 that you're entering into this with the  
22 convening authority, but then you are later

1 going to have these clemency opportunities.

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

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

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

21 And I think it is easier to try to  
22 negotiate the terms of a pretrial agreement,

1 and you go in and then you have a sentence  
2 authority, either the military judge or the  
3 court members, if it's court members, actually  
4 adjudge the sentence.

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

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

1 ahead.

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

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

20 I understand that we are not  
21 prepared, as a group, to recommend a change in  
22 this. But the way that it's phrased in that

1 recommendation, it's just too strong for me.

2 Don't change it at this time.

3 LTCOL McGOVERN: Okay.

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

16 I also think that there should be  
17 -- and then I'll stop talking because the  
18 phone will go dead if I talk much longer --  
19 so, but the -- we should say why the military  
20 system is different this way and how other  
21 changes in the system also raise the question  
22 of whether we should change plea agreements.

1                   So, and that finding would be  
2                   clemency opportunities and the special nature  
3                   of the convening authority's role in this  
4                   process, you know, has made the plea  
5                   agreements, has negotiated, and then enforced  
6                   by a military judge. Am I still here?

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

9                   (Laughter.)

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

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

1                   CHAIR HILLMAN: This is Beth.  
2                   Let's aim for Tuesday to go through additional  
3                   things. And if there are comments from  
4                   anybody who can't be on the next call that we  
5                   have scheduled on the subsequent findings or  
6                   -- and recommendations, or a finding and  
7                   recommendation that you didn't get a chance to  
8                   speak to yet, you should do that.

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

14                 LTCOL McGOVERN: Okay. Super.  
15                  Sounds good. Thank you all very much.

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

19  
20  
21  
22

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This is to certify that the foregoing transcript

In the matter of: DOHA RSP CSS

Before: Elizabeth Hillman

Date: April 25, 2014

Place: Teleconference

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