

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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TUESDAY
APRIL 29, 2014

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The Subcommittee met by teleconference at 4:00 p.m. Eastern Daylight Time, Elizabeth Hillman, Chair, presiding.

PRESENT

PROFESSOR ELIZABETH HILLMAN, Chair
HARVEY BRYANT
COL (Ret.) LAWRENCE J. MORRIS
COL (Ret.) DAWN E.B. SCHOLZ
RUSSELL STRAND

ALSO PRESENT

BILL SPRANCE, Designated Federal Officer
JANICE CHAYT
JOANNE GORDON
COL PATRICIA HAM
LTC KELLY McGOVERN
TERRI SAUNDERS

PROCEEDINGS

4:06 p.m.

MR. SPRANCE: Good afternoon. This is Bill Sprance, the Designated Federal Official, and this meeting of the Subcommittee is now open.

LTC McGOVERN: And, Dean Hillman, did you have any opening remarks?

CHAIR HILLMAN: No, you've teed everything up for us, so press ahead.

LTC McGOVERN: Okay. With the members we have on right now, we really have —

(Automated message.)

COL MORRIS: Hi, Larry Morris.

LTC McGOVERN: Glad to have you on board, sir. We currently have Russ Strand, Mr. Bryant, Dean Hillman, and our DFO, Bill Sprance, along with CSS Staff, Colonel Ham, and Terri Saunders all on the line. And I was just getting ready to start.

So, I wanted to let you all know that the good news is we've made it through the findings and recommendations initially with these separate teleconferences to get some additional guidance and input, but each of you have provided some specific things which are unique to your areas of expertise that would

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be helpful for us to go back and address real quickly while we have you, so this doesn't need to be a long teleconference, but could be helpful in clarifying things.

If we could start with Mr. Bryant. Last week when we were not able to have you on the phone on one of the teleconferences, we did a finding and recommendation. It was number 49(A) and that finding was about civilian practice, so Dean Hillman asked that we go back and ask for your opinion particularly on that. So, let me pull that up for you.

Basically, the subject matter is what is a best practice in prosecutor offices that you're familiar with for declination memos. The JSC SAS in their interviews learned that some offices are very careful in the wording to avoid victim-blaming language or to jeopardize further prosecution of cases that they may decline at that time. So, Congress is proposing that if Commanders are not going to refer a case they now have to state the reason in writing, but there's no DOD guidance. So, we're trying to propose, or have you all propose something that could help set them up for success. And right now 49(D) is actually the finding. It says, "Civilian offices vary in their practices for reporting decisions to decline cases." If it's prior to indictment they often send it back to the investigator. If it's already been indicted, then they do an informal note in the file, while others complete a standard form, but usually we don't see lengthy written justification.

Is that true from your practice, or would you like to add anything to that?

MR. BRYANT: I don't know whether I put a note on 49 or not. That wasn't -- that's not in one of the things that you sent us in the last couple of days that I ran off.

LTC McGOVERN: And you had not flagged it. It's just when we came across it we were like --

MR. BRYANT: Okay.

LTC McGOVERN: -- oh, we should ask Mr. Bryant.

MR. BRYANT: All right. Well, yes, I'll try to make this short. I think the statement is fair and captures -- in my practice and experience a lot depends on how high profile the case may or may not have been either at the police department, the community, or the media. Obviously, the more attention something has gotten the longer the reason for declining prosecution will be in a written memo in the file. But say if there is such a thing as the average case, a couple of sentences, insufficient evidence or not -- whatever -- something that indicates that the file -- but you've also got in the declination file at least a preliminary police report which will substantiate some of the facts. But the bottom line is, I think what you just read me covers probably -- is a good cover for most of the prosecution offices of the United States.

LTC McGOVERN: Okay. And the last --

MR. BRYANT: At least that I'm familiar with.

LTC McGOVERN: Okay. And the last sentence, I think Rhonnie

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Jaus would at least want us to delete -- it says, "when civilian government offices decline to prosecute a case there's no other alternative dispositions or adverse actions taken against the suspect? And the comparison there really is in the military if they decline to prosecute they will administratively separate a person, they will do an Article 15 or something like that. I know Ms. Jaus thinks there are other ways you can handle cases if you don't prosecute or put pressure on someone, if they're a teacher to quit their job or else you will prosecute. Do you think that the statement that there is no other alternate disposition or adverse action taken against a suspect should be reworded, or do you have any suggestions?

MR. BRYANT: I would put in the words often not available, because I don't think it's fair to say as a blanket statement there's never any alternatives when you don't prosecute. And you have to start getting into whether or not they were on probation, whether or not they were going to submit to a voluntary restraining order, and that kind of sort of thing.

LTC McGOVERN: Right.

MR. BRYANT: But I don't think we could say a blanket statement, but I think often, put the word often in there and then you've got a fair statement.

LTC McGOVERN: Okay, thank you. All right. And we'll have Ms. Jaus edit it in writing if she wants to take it further, but that's helpful.

Next up then, Colonel Morris, we received your input regarding the judicial involvement. I was wondering if you wanted to address any of those

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concerns while we're on the phone here with Dean Hillman and the other members.

COL MORRIS: Sure. I'm trying to find my notes while I'm talking to you, but the main point was on the recommendation on judicial involvement, I might not be much of an advocate for it but my main sense is it wasn't clear even for those who supported what we were asking to do, because it -- I'm trying to look while I'm talking to you. It talked about expanded judicial involvement in the pre-trial hearing, but it wasn't clear whether we wanted to say just kill any vestige of Article 32 and put in whatever new provisions we need to just go to what full preliminary hearing model, or whether we were talking about just some greater involvement by the judge than currently exists, which in general I would support on some of the issues like witness production and that kind of stuff. But it was still -- it just didn't seem clear where we were talking about in the staging and the extent of the authority on judge-alone sentencing, and just in disagreement. You know, just my own minority perspective is that I see all the arguments and I don't doubt there's some efficiency to it, and I sure think judges are specially trained, but we're not like every -- the rest of the world or all of our analysis would be simpler if we were just to insert the right civilian perspective, then you become a totally civilian system. And our concerns about Command influence, in particular, are different. And one of the give-backs, you know, one of the compensating factors in that sort of balance of interests and protections between the rightful amount of Command control and protecting somebody from

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getting steam rolled is being able to have a jury of your sort of peers, bunch of people senior to you, decide what your sentence is going to be.

LTC McGOVERN: Okay. We sent out your edits or your comments to the current version and are waiting for feedback from other people to see where people fall on the issue of judge-alone sentencing or panel sentencing. I just wanted to give you an opportunity to talk about that one. We got to the first issue about involvement in Article 32 last week but I don't think you had the chance to adequately discuss sentencing with Dean Hillman or anyone else at this point.

CHAIR HILLMAN: Okay, this is Beth. Let's talk about sentencing first, and then I want to make sure that we actually are accurately capturing Colonel Morris' concerns about 32 and the pretrial involvement of military judges that we recommend. But let's speak on this sentencing piece right now.

So I think, first, these comments are helpful that are in our draft right now, and I think we should incorporate the comments that are in here to best reflect the arguments for -- the counter arguments to what we're currently saying, which is to go for judge-alone sentencing.

But before we talk sort of about that, I do want to check and see if we have multiple members who agree with Colonel Morris that we should retain panel members sentencing. Then I would like to include that in the draft of the report, rather than Colonel Morris writing separately to articulate his perspective on that. So, I'd just like to poll everybody now and see where you stand with respect to the issue of

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judge-alone sentencing, which our current draft recommends, but Colonel Morris has -- doesn't think is the right way to go. So, let's see, Mr. Bryant, are you with us on judge -- where do you stand on the issue of judge issuing?

MR. BRYANT: I'm in favor of judge-alone sentencing.

CHAIR HILLMAN: Okay. And then Russ?

MR. STRAND: I'm also in favor of judge-alone sentencing. I think to bring in panels could confuse it, and as we go down the road it could easily be morphed back into what we currently have if we're not careful. So, I'm in favor of judge-alone sentencing.

CHAIR HILLMAN: Okay. Then, Colonel Morris, I think you're right that you're by yourself on this. This morning that we didn't have anybody who was -- who wanted to move away from the judge-alone sentencing, so I think that -- then what I'd recommend is that we actually correct the arguments in here to make clear sort of the perspective that you're coming from on this. And, Kelly, should I walk through this and tell you exactly what I mean with respect to the sort of comments that Colonel Morris made?

LTC McGOVERN: The more guidance the better.

CHAIR HILLMAN: Okay. So, if you look at his draft there's a comment near -- there are three comments on the page that's around Footnote 12. And these are all -- the first question is we write sentencing matters themselves have evolved in scope and complexity that make things harder but we don't actually say

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how. So, I think we should say how; that's a great suggestion.

The second is about whether the footnote here supports the point about military criminal law getting more and more complicated, and the question is do we really support that effectively? So, we should look at that, too. I mean, that's a great point.

And then the last one is about how we think things continue to get more complicated all the time, but that might not be the best way to represent that. And I think that's also a fair point. I'm not sure quite how to incorporate that, but it's a good point.

LTC McGOVERN: Okay.

CHAIR HILLMAN: And then on the next page Colonel Morris' comment is just a great point that he should put -- I'm sure, Larry, you'll put this in your statement, that you say judges aren't going to be better or worse, and you're not suggesting they're not competent, but exactly what you wrote there, they're not uniquely competent. But I don't think that -- I'd be happy to put a sentence like that in here to say that judges may not be uniquely competent to -- I actually would say judges are not uniquely competent to adjudicate because I think that's actually a correct point.

And the finally -- and then I'd like any other comments on these issues, too. The last comment -- the next comment that I see is actually an important one where Colonel Morris wrote on the page that has footnote -- there isn't pagination

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on this --

LTC McGOVERN: Right, no. I'm following you, though, exactly, so it's okay.

CHAIR HILLMAN: Okay. On Footnote 21 there, there's a comment about how it caricatures this position to talk about a training opportunity. I actually -- I think that's absolutely true. I would take this out because it's true that it does develop more understanding of and knowledge of military justice, but that's a weak argument for this. And I don't think that it -- I think it undermines the effectiveness of this other -- so I'd actually recommend taking that out.

What Colonel Morris wrote, for those of you -- if you don't have it in front of you, he writes, "It can caricature the position to talk about something as important as jury duty as a training opportunity." So, I would just -- I'm not sure that we should put that training point in there, so I'd recommend cutting that piece.

LTC McGOVERN: Sure. Okay. So, Colonel Morris, we're adopting all of your ones that you poked holes in, the current argument. Correct, Dean Hillman? And then asking him to write a --

CHAIR HILLMAN: Right.

LTC McGOVERN: Is that right?

CHAIR HILLMAN: I think that -- I mean, he's articulating his position more effectively than we did in this document, so I think we should adopt that and articulate the position as effectively as we can in the report that will be the body,

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because his separate statement will just appear at the end of the entire report, so I'd like for those arguments to be reflected as cogently as we can even if we ultimately don't follow them in this document.

LTC McGOVERN: Okay, sounds good. Colonel Morris, did you have anything else you wanted to add or comment on about sentencing?

COL MORRIS: Not that occurs to me right now. Thanks. Should remember what our time is. Should I wait for that revision then and then react to it with whatever separate document might be needed?

LTC McGOVERN: I would recommend you maybe drafting your separate statement now, within the next week we will need it.

COL MORRIS: Well, that's okay, fine. It's not like overnight. Okay.

LTC McGOVERN: So, we are probably not going to take another crack at the actual report until -- we won't push that out until at least this weekend because we're just now finalizing the findings and recommendations, which then are going to cause us to address a lot of these discussions. So, we'll be sending out a new version of this report, and asking members to really take a hard look at that second version we send out. This first version I was hoping to provide context for people as they read through these findings and recommendations. And we were still doing internal edits on the staff, as well, to get these in better shape for you all before you would have to do your comments, so this is extremely helpful for us that you've gone ahead to comment on the section. But as far as a separate statement, if you could start

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on that now, I think that would be great, and really have your position formulated by Monday so if the panel members do ask you questions and if you're able to attend on Monday's call you could respond --

COL MORRIS: Gotcha.

LTC McGOVERN: -- with points that you've laid out.

COL MORRIS: Okay.

LTC McGOVERN: And --

CHAIR HILLMAN: Colonel Morris --

LTC McGOVERN: -- will be there.

COL MORRIS: Okay.

CHAIR HILLMAN: Will you be at the meeting on Monday the 5th?

COL MORRIS: I think so, yes.

CHAIR HILLMAN: That's great. Then I'd like to -- I mean, I'd like you to present what you see as -- you know, what your view is here. I mean, we'll summarize some of this, but really we're going to present findings and recommendations, so for you to articulate your -- I think the panel should hear from you on that, in our presentation.

LTC McGOVERN: Okay. There's nothing else we need to address on that. The only order of business left for the members who are on the line would be --

(Simultaneous speech.)

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LTC McGOVERN: I'm sorry?

CHAIR HILLMAN: Sorry to interrupt you. This is Beth again. But could -- I just wanted to make sure we had the 32 piece straightened out.

LTC McGOVERN: Yes.

CHAIR HILLMAN: So, Colonel Morris, you still had some concerns about whether --what we were recommending with respect to what's left of the Article 32 and the pre-trial role of the military judge vice the Convening Authority now. Is that -- you made some comments on that before and we haven't revised the report.

Are there findings and recommendations that we need to revise in light of what your concerns are there?

COL MORRIS: What are you -- do you want just given -- and there might be because I was not at every meeting either. I know the initial sentiment that we talked about that I think there was a consensus on was that the judge is involved sooner, you can get rid of more stuff that turns into a bigger issue and protracts the process because you can't get to it soon enough. But is there -- I'm not tracking on my page here right now.

But was the thrust of that portion now to -- in the text there we talk about the judge at the preliminary hearing, but it still as though the 32 would be going on, but then it has the judge making a decision about probable cause, and the case going forward to trial. And it wasn't clear where that fit in the sequence, if that was

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accurate, you still have the 32 investigation, or whether we were assuming, you know -- implying -- embedding in the recommendation that the 32 effectively would have evaporated.

LTC McGOVERN: Dean Hillman, do you want me to address this, or do you want to address it?

CHAIR HILLMAN: I do. I'm looking -- this is like 48, is this changes to the pre-trial investigation under Article 32, this is at 48 in our recommendations, I think.

LTC McGOVERN: Okay. The group's discussion on that was the Article 32 would be a judge acting as a judge, rather than a JAG acting as an IO. And perhaps even similar to the Army, Navy Judge arraignment, there could be no -- some judges with less experience during some of these Article 32s, as well, but then if a judge acting as a judge did not find probable cause the change would be that would be a binding decision. If the judge found there was probable cause, then it would be referred to the Convening Authority who would still have the discretion to dispose of it however he saw fit.

COL MORRIS: To restate again, I'm sorry, I'm looking at my screen. I'm sliding across my area here. It would be to change the part we just changed that went to Judge Advocate 32 officers to they would be military judges.

LTC McGOVERN: Yes, sir.

COL MORRIS: All right. And then all decisions are binding.

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LTC McGOVERN: Yes, sir.

COL MORRIS: All right. Okay.

LTC McGOVERN: Some of that is the IOs currently are recommending against cases going forward, but there's the pressure for Commanders to refer, so that would alleviate some of that. And if it is a military judge in that position, they shouldn't definitively propose, that it shouldn't just be an IO. It should be of a judge, and if a judge's finding is there's no probable cause, then you're really setting the Commander up for failure if you just found that there's no probable cause, still giving him something to decide, which is just at his discretion.

COL MORRIS: Okay.

COL HAM: This is Colonel Ham. The government will be able to come back if they have additional evidence. It wouldn't --

LTC McGOVERN: Right, it wouldn't be --

COL HAM: Yes.

COL MORRIS: All right.

MR. STRAND: So, this is Russ. That was my question, if the government has additional information, you know, that they want the judge to consider or reconsider, it's not like closing the door. Does it have to be substantial new evidence, or any new evidence?

LTC McGOVERN: This is Colonel McGovern. You'd have to prefer again and take it to a --

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MR. STRAND: Okay. So, you have to basically turn the process over if the government thinks that they have enough evidence basically to do that.

LTC McGOVERN: Right. Right.

MR. STRAND: Okay. Thanks.

LTC McGOVERN: Are you comfortable with that, Colonel Morris, or do you --

COL MORRIS: I don't think I am, but I've got to reread it with that as the understanding. No. I mean, I just -- my sense is -- well, my sense is what the intent is, you know, is to judicialize this by -- out of an assumption that both ends of the process will we intentionally have provided for lay involvement, but that lay involvement is considered to not be competent enough, or not be ideal in the interest of justice. So, it's not a defense-prosecution thing, though. This is probably will have some potential, maybe, benefit for the defense if the -- if we accept the theory that uncourageous Commanders go to a path of least resistance and refer junk cases because they're afraid of getting knocked around for choosing not to refer a case.

LTC McGOVERN: Right, sir.

COL MORRIS: But it also is true that, you know, when they were writing all these codes for all these years that it was intended, anyway, as we all know -- you know, that there was a value in having non-lawyer perspective there, so in that sense the change to a judge is probably a less significant change than the change we already have in putting Judge Advocates in there.

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CHAIR HILLMAN: Colonel Morris, this is Beth. You're right that this is the lay involvement piece. The only distinction I'd draw is that Article 32 has already been tinkered with and is looking quite different now, so converting it into essentially a probable cause hearing is a significant change that just seems -- it would be very strange to send -- for an -- if we did leave it as an investigating officer who is a Judge Advocate to send forward a recommendation that there's not -- to make a finding that there's not probable cause, and then for a Commander to move forward with that creates a sort of legal conundrum that's difficult to accept that that would be a good outcome for us.

COL MORRIS: And I hear you on that exactly, so let me just think a little here. It is the lesser of the two changes, you know, moving to the judge, the bigger change is removal of the non-lawyers from the process to begin with.

CHAIR HILLMAN: So when Kelly sends the updated findings and recommendations you should take a look at that and see if you want to write separately on that point, too. However that's sent up in the final -- the version that will go out to the members in preparation for next week's meeting.

COL MORRIS: Understand.

LTC McGOVERN: And if you do have any suggestions how we can key this up to make sure we capture the overall proposal that -- like you initially started out, that the judgment involvement to avoid some of these things that are too hard to correct later in the process, and if you do it by baby steps we want to at least

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have them doing witness and expert requests, a bigger step is making a binding decision at the 32. You know, possibly make it in digestible sections that the RSP could either then adopt or reject. Say well, we're willing to go this far, but not that far. I think the majority of our Subcommittee has expressed they are willing to go for full judge involvement through the binding of the decision of the 32. But, sir, if you think that we need to compartmentalize it a little bit to make it so that you can either write the dissenting opinion or have ideas how it may be well received, I'm totally open to suggestions on that. This is a really important matter it seems like to the panel members, and I want to get it right for you all.

COL MORRIS: I got it. Thanks.

CHAIR HILLMAN: Kelly, just one comment on that --

MR. STRAND: This is --

CHAIR HILLMAN: Oh, go ahead, Russ. Were you going to say something?

MR. STRAND: I just -- I really do like the idea, the whole idea of judicial oversight on the pre-trial process. I think it cleans it up significantly. It helps with a lot of the 404 stuff, and everything else, so we don't have to haggle as much. And I agree with Colonel Morris, I think it is going to help both sides, not only the prosecution offices, but also the defense so we have much cleaner going forward if it does go to trial, and we have the protections which we don't currently have. Basically, everything could be brought in, hearsay could be brought in, problems are created

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which really complicates things.

LTC McGOVERN: Dean Hillman, did you have something you wanted to add?

CHAIR HILLMAN: Just that I think the way that you described this, that we're setting things up for the panel to decide. I think we should understand the panel is unlikely to go farther than the sorts of recommendations that we make, and likely will not, you know -- will have to at least -- will not take everything that we say going forward. That doesn't mean we want to say anything we don't mean, we don't want to do that. But I do think that we're -- the things that we don't actually recommend any change on, I would be surprised were anything to happen down the road, so I don't want to be too reluctant to set forth what we see as the best path forward given what we've uncovered in this.

LTC McGOVERN: Okay. I'll make sure that we lay it out and just not -- make it stronger if you think you need to make it stronger or whatever, but we'll continue to work with it. My understanding is just about everybody is -- that we've heard from so far supports the findings and recommendations in principle right now, but Colonel Morris may have some concern. So, if there are additional thoughts, sir, just let us know if you want to write separately on that, as well.

COL MORRIS: Sure will.

LTC McGOVERN: Okay. And then the final thing that I just wanted to raise while I have you all, Russ had provided us initial comments on April

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23rd, some initial edits to the investigative findings and recommendations that I thought maybe we could take a minute to address.

In Recommendation 3, to direct the Secretary to set aside funding as allowed by law. Russ, you put in parenthesis there, we had discussed asking for Congressional and fenced funding, and Congressionally required authorizations. Did you want to talk about that? Do you think setting aside funding is not clear enough?

COL HAM: Kelly, this is Colonel Ham. Colonel Scholz had a comment on that, as well.

LTC McGOVERN: Okay.

COL HAM: She edited it to read, "The Secretary of Defense direct the Service Secretaries to program and budget funding," et cetera, et cetera. And I think she -- I thought she had a bubble comment, too.

LTC McGOVERN: I can --

(Simultaneous speech.)

COL HAM: -- can't set aside funding that's not programmed, basically.

LTC McGOVERN: Right. Yes, I remember that comment.

MR. STRAND: The difficulty with the language here is in decades of experience, if it's set aside, or if it's appropriated, or if it's programmed, it can always be reprogrammed. And that's one of the problems that I've seen along the opportunity to funding over the years.

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The reason I brought up the idea of fenced funding is just -- and the example of the Family Advocacy Program money is because Congress sets the tone, and Congress says this is the only thing this money can be used for. If it's left up to the Service Secretary or the Defense Secretary as priorities change, so does funding, and so does reprogramming and sort of setting aside. So, with that money it is set by Congress, and the Secretaries can't change it if other things need to be used for it. And that's what's protected it all these years, and it's really helped victims along the way, and it's really helped programs remain viable and solvent.

My concern if we don't do the same thing with this is in three or four years down the road as other priorities come up and other things change, this language won't mean anything. And it also doesn't talk about levels and everything else, so the Secretaries can change it very easily without going back to Congress, and maybe miss some of the Congressional intent.

LTC McGOVERN: I think some of the concern as we were writing the report is we may not be as familiar with exactly how things would be fenced, or other language, so we can explore that further with a little guidance from our DFO, as well.

MR. STRAND: Okay. Some of the language that I saw before is that, you know, Congressionally mandated funding, where Congress says this amount of money has to be spent for this purpose, and only this purpose, which leaves no discretion for the services. Now, the services routinely don't like that because they

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don't like to be hamstrung, and they don't like to be like to be told, you know, how to spend their money. But in certain areas, and this was true with Family Advocacy, because leading up to Congressionally mandated fenced funds for Family Advocacy, you know, we were going for decades, you know, where sometimes with a hot issue, Commanders would provide the funding, and then it would go away, and then it would come. So, my understanding of the history of this back in the '80s was Congress said no, we're just going to tell the Department of Defense this money is designated, it's used for only this purpose, and it really has protected the program, and made it what it is still today.

LTC McGOVERN: Yes. I guess as the staff, we need to go and research how exactly that is being worded to make sure it's interpreted that way, whether it's fenced, programmed, or whatever the right words are, but I think I clearly understand your intent at this point, so we'll follow-up with you on that one.

MR. STRAND: Okay, great.

LTC McGOVERN: Then 13(D), you had added in the finding that the Ashland Police Department provided information on a promising best practice they developed allowing victims of sexual assault to make reports of sexual assault to police including subject information. This report does not automatically trigger an investigation. They conduct an investigation into a reported sexual assault only if the victim chooses an investigation following a discussion with a police detective.

And the recommendation that follows is that SecDef change the

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restricted reporting policy to allow a victim who's made a restricted report with a Victim Advocate or Special Victim's Counsel present without it automatically becoming unrestricted. Jan or Dean Hillman, Colonel Ham, does anyone want to comment on adding in the Ashland Police Department findings?

MR. STRAND: That was from when they were briefed, or when they briefed in the Austin meeting.

LTC McGOVERN: Right. No, no, no. I mean, everybody is clearly familiar with the proposal about the Ashland Police Department. I think the issue started to get confused with the Congressional taskings to track offenders in restricted reports with the Ashland Police Department trying to get more people to come forward through investigators.

Colonel Ham or Jan, do you all want to comment?

MS. CHAYT: Yes, we did discuss this at one of the meetings last week. Russ, we did not ignore your comments. I did find other agencies that have something similar to Ashland, but not specific, so I do have some recommendations for rewording the findings. What I had drafted is some civilian police agencies allow a police officer or detective to make contact with the victim of sexual assault without automatically triggering an investigation. The report is only investigated if the victim chooses an investigation following a discussion with the detective. And there are several footnotes explaining where that came from. Pretty much the recommendation is as you read off.

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LTC McGOVERN: Okay.

MR. STRAND: Okay. I'm fine with that. That sounds excellent.

And the only clarification on the actual Recommendation 13 was to make sure, you know, that a Victim Advocate or Counsel is there.

MS. CHAYT: Yes, Russ, that is incorporated in the rewrite. You'll be able to see that in the next day or two.

MR. STRAND: Okay. Because I don't want to be accused later on of, you know, agents trying to browbeat or the allegations that agents are browbeating, so we want that check and balance there.

CHAIR HILLMAN: Okay, this is Beth. This sounds good to me. Kelly, I did hear your point that this is really about encouraging victim reporting rather than about reporting to law enforcement. But, Kelly, do you think that this belongs somewhere else, because this does sound -- this is another reason to make this change in reporting, and alter the restricted reporting policy, so this feels appropriately placed to me here. Do you have a different perspective on where it ought to go?

LTC McGOVERN: Oh, no. I think that part of the investigations report works now. I think during discussions we were -- in previous meetings we were merging issues with Congressional taskings and DSAIDS and how you would collect that information with the Ashland Police Department, but I think we separated those issues out now into two separate things, so I think it's much clearer. I think it works well.

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CHAIR HILLMAN: Okay. And I thought -- I liked Jan's language there, too, that broadens this beyond Ashland, is great, too, because we set up then in the findings the current military practice, the current civilian practice, or at least a part of the civilian practice, and then make a recommendation based on those, so that looks like it's structured right to me now.

LTC McGOVERN: And in an effort to train to standard rather than time, I don't have anything else on the agenda that needs to be discussed at this time for findings and recommendations. We just need to get the transcripts back from today so that we can further edit and provide it to members tomorrow.

CHAIR HILLMAN: I'm on board with closing the call early, if we can. I do have one question I want to ask while I have other members on the line, but before I do that, is there anything that anybody who's on the line, Larry, Russ, Harvey, that you want to raise right now?

MR. BRYANT: Well, I thought based on -- this is Harvey Bryant. I thought based on an email we got I think it was on Friday that we were going to start at some other point, because since Colonel McGovern has mailed out something that started with Finding 51, and another email today about who has commented on those particular points, so I'm just lost out here right now on what we were going to do today, and what the meaning of the email from Friday, how that's interacted with what we're doing today on the teleconference.

LTC McGOVERN: And I apologize --

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CHAIR HILLMAN: Go ahead, Kelly.

LTC McGOVERN: I apologize, sir. We just go through the material today faster than I had expected. Basically, I was -- for the discussion I was trying to provide a quick read ahead so people could know what we were going to be discussing, but we were able to get through the whole list with the group earlier today. So, what we will be doing is incorporating their edits, sending it out to you for a final review, so if -- for all of the findings and recommendations, so you'll have one more time to comment on those.

MR. BRYANT: Okay. This is Harvey Bryant again. So, what you sent out originally saying for the 29 April teleconference started with Finding 51 under the --

(Telephonic interference)

MR. STRAND: -- voir dire and went through 69 recommendations. So, we are going to have another shot on Friday at commenting on some of those?

LTC McGOVERN: Actually, yes, sir. You'll have -- you'll receive tonight numbers 1-50, and then tomorrow night numbers 51-69. And have about 24 hours to turn each of those around, any written comments you have, and we'll have incorporated all of those then by Friday, and talk to you all one more time, make sure everybody is good to go, and have a copy of the PowerPoint slides to you all with the final accepted versions of the findings and recommendations.

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MR. BRYANT: And in the meantime we were supposed to have read the 200 and some page, I think 218 page, I'll call it the discussion narrative.

LTC McGOVERN: That was to provide context to these findings and recommendations discussions we were having in case you were wondering, you know, something that's completely in left field, you could refer to it. You're like oh, that makes sense, but then you need to further clarify the finding and recommendation. You will have an opportunity starting probably this weekend or early next week to fully edit that 200-page document.

MR. BRYANT: All right, then.

LTC McGOVERN: When we send out a second version based on the new findings and recommendations.

MR. BRYANT: All right.

CHAIR HILLMAN: All right. That said, Mr. Bryant, if you have comments on that set that you thought we were talking about now, that you should go ahead and if you want to flag any particular concerns, please do that now because, you know, we're -- they are going to be significantly streamlined and adjusted based on our conversations this morning in the next round. But I don't think that we made any -- I think that the gist of those largely remains the same. So, if you have particular concerns, if you flagged any of those right now, that goes for any of you, you should let us know now.

MR. BRYANT: Well, Professor Hillman, I appreciate that but I

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don't know that that's the best use of everybody else's time. It's something that's already been gone over, and are in -- being edited or proofed in any way, then I think it's fairer to everyone else to let me wait and see what those are, and then I'll try to respond back to Lieutenant Colonel McGovern by email. I mean, I appreciate your giving me the opportunity, but unless you think it's absolutely necessary that I do this right this minute --

CHAIR HILLMAN: I don't.

MR. BRYANT: All right.

COL HAM: Dean Hillman, I do --

CHAIR HILLMAN: Yes. Go ahead, Colonel Ham.

COL HAM: Dean Hillman, Judge Jones called right as the conversation or the teleconference was starting and wanted me to ask you if you had a chance to refine or decide kind of the methodology of presenting the findings and recommendations. In other words, are you going to split -- do you still plan to split it among your Subcommittee members, or have you decided to do something else? She's just trying to get some idea of how the Subcommittee is presenting, if you know.

CHAIR HILLMAN: I think that we'll -- can I speak to that in just a minute after one more question?

COL HAM: Certainly.

CHAIR HILLMAN: I have thought some about it, but I was waiting until we get the sort of findings and recommendations and we know -- we have the

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call on Friday. That's when I think we'll really finalize how we are doing --

COL HAM: Okay.

CHAIR HILLMAN: -- this. But I expect I'll pool delivery or on the presentation, but will ask individual Subcommittee members to speak to particular framing of the recommendation sections that they've spent the most time on and discussing. But I don't expect that -- and I also would like Subcommittee members to be able to address the panel and be answer questions that the panel might have. But I see given the short time that we have in orchestrating a complex presentation it's beyond our -- you know, we don't have a playwright to set us up all in these next days, so I -- but I will ask people to speak on the things that are important to them, and to be available to answer questions. Is that helpful to what Judge Jones asked?

COL HAM: Thank you very much. I think so, yes.

CHAIR HILLMAN: Okay. So, I appreciate what Mr. Bryant just said about others have, you know, concerns maybe about some of those particular findings that are on that list, but we are redrafting, and we'll have another hack at those before they go to the panel.

Recognize, too, we are the one Subcommittee that's not submitting a final report prior to this meeting next week. The other two Subcommittees are, but we are submitting findings and recommendations. That will as yet remain interim until we finalize our report, so should any of the members, you know, that is members of the Subcommittee who are -- should you have concerns that you want to

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be addressed, you know, that become clear as you look at those findings and recommendations, we will have a chance to do that over the next week. Kelly needs to go final by May 12th on our actual final report, so we're not at the don't speak up ever again point yet.

So, Kelly, if it's okay with you, I do have one question that I wanted to raise while we have Colonel Morris, and Mr. Strand, and Mr. Harvey on the line. Is that okay with you?

LTC McGOVERN: Yes, absolutely.

CHAIR HILLMAN: All right. The Article 31(b) recommendation which my computer just froze up and I can't find it right now, but we spoke about that some this morning. Do you know which number that is of the findings and recommendations?

LTC McGOVERN: I have so many versions open --

MS. CHAYT: That's number 10.

CHAIR HILLMAN: Thank you, Jan. So, this is number 10. And this is -- I can't get to things right now. This is where -- this is a difficult piece, we're trying to reckon with what to say about the fact that rights advisement in the course of a victim interview is detrimental to the continuation and the effectiveness of that interview when there's sexual assault involved. But that Article 31(b) does require that those advisements be made, and we actually have agents on the ground who are applying this -- interpreting the law in different ways in different services. And, in fact,

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are essentially granting immunity that is not theirs to grant in some instances. So, what we were wrestling with this morning and in previous calls is how exactly to recommend this be addressed.

Right now, what the recommendation is, is that the Joint Service Committee look at modifying Article 31(b) to create what I think we called this morning a limited automatic expedited, I can't remember whether that word ended up there or not, but a limited automatic exemption that would waive the possibility of criminal charges being brought, immunity, not exemption, immunity. So, limited automatic immunity for the victim who is in that situation of being interviewed and minor collateral misconduct comes up, that that would be -- we'd like the Joint Service Committee to consider an automatic waiver.

So, I just wondered if anybody had thoughts on that who's here now about how best to sort of craft that recommendation, and how far you think we should go, because we're not -- on this morning's call we weren't comfortable, the majority was not comfortable with actually recommending that exemption happen, that immunity happen, but instead was comfortable with sending this to a -- for further study.

MR. BRYANT: Yes, this is Harvey Bryant. I'm comfortable with recommending the limited immunity, but I'm also -- can't -- you can be uncomfortable with saying further study. So, that -- if that's our sort of default, fall back position, then that's fine, too. I'd really like to see us take a stand on that because it

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has surfaced so often in the course of inquiries of this whole situation from investigators, from the defense counsel, from the trial counsel, everybody is concerned, and our Victim's Advocacy groups. It's an issue, and I would just like -- if you were asking me okay, give me the wording, Harvey, I can't do that right this second, but I am in favor of us taking a -- I would vote, I would be in favor of -- now I'm not speaking for everyone, articulating --

CHAIR HILLMAN: That's helpful. That's exactly what we need, not specific language, that's exactly what we need. So, Colonel Morris?

COL MORRIS: Yes, I'm trying to -- is it -- I'm trying to find the language itself. Was it in the list? But, otherwise, on the -- I agree with Mr. Bryant that it's important for us to take a stand on this one, out of so many things that we've talked about, it's one that has ripened to the point that if we can get beyond further study, even if we just make it clearer what costs we're willing to accept with this, I think that would boost the debate along.

CHAIR HILLMAN: All right. Mr. Strand?

MR. STRAND: I also don't think we should punt on this one. I think we should take a stand. What I remember from a previous meeting, though, is a little bit different where we were considering asking the Secretary of Defense to develop a list of what he would consider minor collateral misconduct, and then ask Congress to change Article 31 to include, or have that as an exception to rights advisement so that MCIO folks would not have to advise rights for minor collateral

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misconduct as determined by the Secretary of Defense. I thought that's the way we were going earlier, and maybe that's not a doable thing, but I thought that was a good idea.

But either way, I think we should take a stand, because my concern is if we send it to the Joint Service Committee on Military Justice, they may not have the same insights, and the same background, and the same -- you know, heard the same information that we heard, and may not have the same belief on it. And it could very easily turn into something different, and maybe probably not even happen.

CHAIR HILLMAN: Okay. So, I'd recommend, Kelly, let's redraft that part. I know that some people from this morning, General Cooke, for instance, would not support an automatic -- that we recommend an automatic limited grant of immunity. But I think that putting it in the way that Russ just described, which is we ask the Secretary to specify a list of conduct that would qualify for an automatic grant, I think that actually that might be acceptable to the other members that were on the call this morning.

LTC MCGOVERN: And just as context, when they were considering amending Article 60 into minor and major offenses, that the Convening Authority would have clemency over, we really struggled to go through and itemize every possible -- and I think that's where the discussion had led previously, how difficult it is to rule all those out, so we sent an RFI, which I can circulate this evening, to the services to ask them how often alcohol and under-age drinking is a collateral

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misconduct in sexual assault cases. And most of the services responded that they did not want some sort of automatic immunity, was my understanding, because they wanted the prosecutor to have the discretion how to deal with that at trial.

(Automated message.)

COL SCHOLZ: Hello, this is Colonel Scholz.

LTC McGOVERN: Oh, hi, Colonel Scholz.

COL SCHOLZ: I'm so sorry I'm so late. I'm just getting done here, and I apologize for the delay.

MR. STRAND: This is Russ. I understand there's a lot of offenses and things like that. From a practical standpoint, I was at Fort Hood today and we had a discussion on this. You know, it is almost always in these cases, it is a matter of under-age drinking, it's a matter of, you know, maybe not making a formation, it's a matter of this, and that, and the other thing. In the context of sexual assault, there's just a handful of collateral misconduct, minor collateral misconduct that gets in the way, so instead of maybe examining the whole plethora of possibilities, is to maybe examine what the common minor misconduct is in these cases to ones that we're finding on a routine basis that are inhibiting, you know, our progress in these cases. And maybe now even with the SVCs, I'm hearing more and more that the SVCs are telling their victims do not discuss this aspect of the case, and then we're going to find down the road where the defense is going to be able to use that, and say well, you weren't up

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front, forthright with this. So, I think it's not only an issue now, it's a growing issue, especially with the SVCs. So, I think it would be worth maybe at least getting some of the more common minor collateral misconduct and addressing those specifically for sexual assault and dealing with that, because those -- you know, some of the rare ones we almost never hear, and it's not the problem. But the problem is the under-age drinking, it's missing formation, it's, you know, fraternization. And this is one of the big issues, is if a soldier reports sexual assault and there was fraternization involved, that oftentimes seems to be the central focus, but if it's unwanted sexual contact it's not fraternization, but we're reading people their rights for fraternization. So, those are some of the things that, you know, we may not be able to take on the whole world on this, but there are certain offenses that are routine, and routinely get in the way of these when we start reading their rights.

And I don't -- you know, I could go either way on granting of immunities, and I understand where prosecutors might want to have a tool and things like that, but I think what the focus is, at least in my mind, is the detriment to getting the information, the detriment to the investigation, and later on in prosecuting the case is withholding information because, you know, because their folks are saying well, you should have mentioned this, and that's a significant aspect of the case later on.

CHAIR HILLMAN: Okay. This is Beth. That's well said. Colonel Scholz, since you're on the call now, we're talking about, you know, the Article 31 issue and whether to have an automatic immunity grant, and how to manage that. The

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proposal that's out there is that the Secretary sort of specify a list, and we did talk about this, and Kelly is right that we said that it would be difficult. Russ has pointed out it wouldn't be impossible, so do you have a stance on that? I think that we do have a range of views on it, but I think we're certainly leaning towards encouraging more than simply further study on this. Colonel Scholz?

COL SCHOLZ: I'm sorry, I had the mute on. Sorry about that. What finding are we talking about. Can you get me to the finding and recommendation?

LTC McGOVERN: It's number 10.

COL SCHOLZ: Oh, okay. It's not on the list that you sent us this morning then, Kelly?

LTC McGOVERN: No, it was from last week. Sorry.

COL SCHOLZ: The earlier one. Okay. I need to see how it's written. Let me see. Actually, I think I might have it. Let me see if I can put fingers on it.

CHAIR HILLMAN: This is Beth. The tricky part is it's not really written in quite the way that it's written in what you're going to look at now because of the changes that we've -- so it's a little bit -- just that we really need your sort of general sense of what you think about the viability of addressing the collateral misconduct issue in a more aggressive fashion than what has been the current practice.

LTC McGOVERN: Colonel Scholz, are you on your computer right now?

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COL SCHOLZ: I am.

LTC McGOVERN: Okay. I send you the full language real quickly here.

COL SCHOLZ: Okay. And, actually, I've got an earlier version. Let me see. Right. I understand, Beth, that's it not -- what you're saying, Dean Hillman, is it's not written that way any more, you're proposing kind of changes to it anyhow.

So, are we -- Russ, is it that we're trying to make changes that would just impact sexual assault offenses then, and you're not talking about the broader set of, you know, all offenses. Is that what you're saying?

MR. STRAND: Yes, that's what I'm saying. I think we should focus on just the sexual assault offenses for right now. It may open Pandora's box later but if we try to take on the whole world of Military Justice and all the possible mitigating circumstances and other offenses, and other -- but there are certain offenses that routinely come up specifically with sexual assault that inhibit the victim from either wanting to come forward or telling us the whole story, or us -- you know, once we advise rights they close it down, or now we're having the problem with Special Victim's Counsel advising them don't talk about this part of the story, tell them everything else, but that's a real big problem later on down the road. So, I would say yes, if you focus on sexual assault right now, that -- I'd be comfortable with that.

MR. BRYANT: This is Harvey Bryant. I understand what Russ is saying, but I don't know what it would hurt for us to -- for it to include crimes of

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violence against the person which would also include robbery, for instance, because I can see how you may have collateral misconduct which puts you in a position to get robbed, but maybe he's correct and that we just stick with sexual assault at this point. All the things that are coming up specifically about this will do, it will take some of the sting out of potential cross-examination where you only came forward because, because the answer is going to be well, this is DOD policy, or this is a change in statute and that sort of thing that applied to everyone, not just me, sir. As another reason why I think we should definitely stand on this.

The issue really is the advisement of the rights for this as opposed to what is the particular collateral misconduct that we want to excuse. And I'm struggling right now here in the parking lot to think of how we frame -- how we could frame that, get by with just not advising of the rights. And the more I think about it, I'm -- that's probably not going to do it because then the victims are still not going to know whether or not they're going to be charged with that.

COL SCHOLZ: Well, you know, I feel -- I guess I -- this is Dawn Scholz. Now that they have the Victim's Counsel with them, I feel like I'm maybe not on board with trying to make this kind of, you know, change at this point without really us -- the gratification of being studied, because I do think that they are -- have some protection now in terms of what to say, what not to say, and that kind of stuff with their own counsel. So, I'm less -- I guess I'm not feeling the urgency right now to say we need to figure out a way to carve out some minor misconduct in this area.

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Also, I think we just set ourselves up for a lot of arguments of the fairness of that in terms of well, there's these other offenses, and this -- you know, this victim got, you know, charged, and got in trouble because she didn't -- that particular victim didn't have the minor misconduct that we carved out.

MR. BRYANT: This is Harvey Bryant. I think that's why we probably need a fairly comprehensive list as Russ earlier suggested that would do that. I think it's just as fraught with difficulties, Colonel Scholz, if we're advising victims whether it's his or her own counsel saying don't tell them about the drinking, or the smoking pot, or whatever it happens to be. And that comes out later at trial, it's also to me -- not having that information could tend to hamper the investigation, hamper the interrogation of the defendant, all sorts of things.

COL SCHOLZ: Well, I mean, I'd like a recommendation where we're telling them to examine this, because I think it does need a fix, and there needs to be some change. It's just that, you know, I don't know if we are at the stage where we're ready to come up with, you know, a list that we feel comfortable with, and also understand the secondary effects, or tertiary -- you know, that's my concern.

MR. STRAND: This is Russ. I would assume if we ask the Secretary of Defense to develop a list, he would not do it in a vacuum. And it would in a sense -- you know, they would take a close look at this and study it. But the fact is, that he would have to come up with some sort of a list, and then, you know, the services would have input with that, the JAGs would have input with that.

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And the other concern I have even with the SVCs, we're not sure how many, what percentage of the victims are actually going to take advantage of the SVCs. We certainly don't believe it's 100 percent, we don't know what percentage, so they may or may not have that counsel with them because they can say I don't want it, and they could say I just want to talk about this. I don't want anybody else to know. So, there's a lot of complicated -- but I think if we ask -- if the recommendation is that we -- that Congress asks the Secretary of Defense to come up with a list, they're going to basically turn to the JAGs, look at what misconduct to put on, what not to put on, what they're comfortable with and everything else. But the crux of the issue, and this is really the center of the focus, I think, is whether they get immunity or not.

If I'm a civilian and I report minor collateral misconduct to a law enforcement person, a detective or anything else, they are not compelled to advise me of my rights because, you know, we have more protections under the military under 31. However, I will still say the remedy for that, for not advising the victim of their rights, if we want to pursue the investigation, and that's why I think there's some disparity with the services, is because in the Army we have a rich history with Aberdeen where they just did not advise rights because they were directed by the Commander said not to worry about that, and then they turned around and they all got letters of reprimand, you know, for following that direction. But the remedy for not advising somebody of their rights is you can't use that particular information that's provided at that particular time against them. But what happened was the punitive action went

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against the agent who violated the victim's rights, which is not a punitive thing.

COL SCHOLZ: So, Russ, explain your recommendation again. I'm looking at the recommendation I have. Tell me how you want this changed.

MR. STRAND: It's a two-parter. Basically, that the Secretary of Defense develop a list of what he would consider minor misconduct, and then, you know, in sexual assault cases or if we want to go -- I'm not opposed to going further with crimes against persons, although that might complicate a little bit more, but I'm not opposed to that. So, the Secretary --

COL SCHOLZ: I think your scope is sexual assault for this --

MR. STRAND: Yes, which could make it cleaner. So, Secretary of Defense develop a list of what he would consider minor misconduct in sexual assault cases, and then Congress change Article 31 to add an exception that in those offenses that the Secretary of Defense has determined to be minor misconduct in sexual assault cases, that rights advisement do not have to give for those offenses. I'm not even addressing immunity. That may or may not be too complicated. I'm just saying that if Congress changes Article 31 to say in cases where there's minor misconduct in sexual assault cases and it's on the list that the Secretary of Defense has provided, then the agents don't have to provide rights. And I think that's going to clean things up.

CHAIR HILLMAN: So, Kelly, this is Beth. Let's redraft along these lines. And, Colonel Scholz and others, if you have concerns when you look at the next set of language you can weigh in at that point. And if there's a strong disagreement, we

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can always -- if there are multiple people that have concerns we can include that reservation in the report; otherwise, we can have a separate statement. You could write a separate statement on it. But I think that there's -- we do need to say something more than further study on the collateral misconduct issue. And I think this is pretty close to the compromise position that we talked about at the beginning of our discussion.

COL SCHOLZ: Before we move on, can I just ask you, would that same list of minor misconduct then maybe be able to be used with the limited grant of immunity that we're talking about in 10, basically part of the recommendation says transactional immunity akin to what's available for drug and alcohol abuse? Or a victim self-reports minor collateral misconduct, so is this kind of the list that we would use in that situation, too?

CHAIR HILLMAN: Yes, I think so. This is Beth. But I -- but we had talked this morning about taking out the likening it to the drug and alcohol sort of -- the particular analogy that's in the -- the way it was previously drafted is not going to last here.

COL SCHOLZ: Okay.

CHAIR HILLMAN: Because I don't think that's a direct parallel, so -- but it is -- I think that it would apply to both the rights advisement and to the immunity.

COL SCHOLZ: Okay.

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CHAIR HILLMAN: So, Colonel Scholz, you'll have another chance to look at that, so I think that it -- we'll end up with something in between. I think it's -- this is a part of our sort of serial deliberations, but we're attempting to capture as much of the consensus as we can, and actually write a report that reflects that middle ground as closely as we can as we get down to the deadline here.

So, are there -- we were -- that was the last thing that I wanted to mention, actually, in terms of the questions I wanted to cover when we had those of you on the line who could be there right now. Is there anything else anybody wants to raise now?

MS. CHAYT: Dean Hillman, this is -

CHAIR HILLMAN: Okay. Go ahead, Jan.

MS. CHAYT: There had been a 10(B), I'm not sure if that got out to the Committee, but the 10(B) specifically addressed the fact that NCIS was the service that was not reading victims and witnesses their rights for minor misconduct. And there had been a recommendation that the Secretary of Defense direct the standardization of policy regarding the requirement for MCIO agents to advise victim and witness service members of their rights for minor misconduct uncovered during the investigation of a felony. I think we did discuss it, but I don't know if we had a consensus.

CHAIR HILLMAN: Right. That is in here. Go ahead, Kelly.

LTC McGOVERN: Go ahead, Dean Hillman. Basically, I think it's

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just telling the SecDef to make sure everybody is following the law. Is that right?

MR. STRAND: Right. There already is a policy. It's called the UCMJ. I think the difference is, is that you hold civilian agents to a different -- you know, you can --

LTC McGOVERN: And that's not --

(Simultaneous speech.)

LTC McGOVERN: It's that it's minor misconduct, and they don't deal with it. And it was always the NCIS position that they provide it in writing, it's not listed on -- so, do you all want to --

MR. STRAND: I'm okay with either one.

LTC McGOVERN: Do you all want it to include the additional step that until the law has changed please make sure there is a clear and consistent policy, or that everyone is following the law?

CHAIR HILLMAN: I do. This is Beth. I mean, I feel like we have evidence that actually this isn't -- there's confusion on this. It ought to be corrected, it seems. I think it's putting victims and investigators both in bad positions, and Convening Authority for that matter who have authority, so I'd insure that the law is being followed. That seems to make sense to me.

LTC McGOVERN: Okay. With Colonel Scholz on the line, I just wanted to offer up some insights from our previous discussions for her, if you all don't mind a few minutes of discussion.

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Colonel Scholz, just to let you know we made it through the whole list that was to be covered today in the previous session.

COL SCHOLZ: Right.

LTC McGOVERN: So, this session this evening has just been to tie up loose ends with the members that we have on the line. And I just wanted to personally thank you for all the time you've taken to provide us with edits and comments, and with the other members we've gone through those, and those have helped lead a lot of discussion which has been great.

I want to let you know in 59(A) we are rewording it to articulate that the law should allow the Convening Authority to allow clemency for forfeiture for dependents. It also expressed -- one question I wanted to ask you is about 62. You had said that you thought it might be too much of a burden to have the services issue the sentencing data, that this already exists somewhere in the public. And I was just wondering what you might be referring to as far as the existing systems?

COL SCHOLZ: Well, I mean, it's all a matter of public record, and I know like if the Appellate Court -- when I was on the Appellate Court in the Air Force, these things were loaded up into websites, all the results of cases, the opinions, so I don't know exactly where it's all captured, but for even I remember non-judicial punishment, we would even, you know, publicize in our -- it would be sanitized a little bit for non-judicial punishment, but they would basically publicize the results and

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punishments in the Base newspaper, so that was publicly -- it was made public, let's put it that way. But court records, Court-Martial records are definitely just like other general court cases are available publicly. I'm not sure how you get to them, but it seems to me if you set up a whole system of, you know, or maybe very duplicative. I don't know what's out there already, except I know that there are public records, and accessible. Again, I guess we're saying it's not easily available to the public. I don't know, you know -- does anybody know how you get to them if we're saying it's not easily available?

LTC McGOVERN: I think you have to submit a FOIA request to the SJA if it's still within the -- if they're still in custody of it, or if it's up to the service Court of Appeals, then you go to their clerk of court. So, it does require a FOIA request.

I sent out an email this afternoon showing what the Navy took the initiative to do starting last November, was to just monthly publish this list of their Court-Martial results, so this isn't extremely difficult, but they are doing it an effort to be more transparent. The Subcommittee's efforts to even try to get sentencing data in general to see are there averages and things, would have been very difficult to gather that, or we would have had to figure out which request to request where and things like that. So, I think that's why the proposal came up, that if it's -- data is really hard to gather in order to study, maybe the services could develop something that would be more accessible for the public, and the Navy seems to already be taking steps in that direction.

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COL SCHOLZ: Well, did we ask the questions on how they were making things -- this information, you know, the court results specifically available to the public? Like I said, I just know at the Appellate Court, we have a website that is accessible to anybody that wants to go on it and look at the decisions that are made in cases. So, I'm --

(Simultaneous speech.)

LTC McGOVERN: And that's for the cases that make it up to the Court of Appeals. Right?

COL SCHOLZ: Right. Yes, exactly. But I -- so I guess what I'm saying, I'm surprised that we have to get a FOIA, that you have to send in a FOIA request to get --

MR. BRYANT: This is Harvey Bryant. One of the things we've been trying to determine whether or not we were going to do sentencing guidelines, is that actually I think -- is that the sentencing data was not readily available period. A more truthful statement of 62 finding would be sentencing data in the different services is not readily or easily available with a period at that point.

CHAIR HILLMAN: Okay.

(Automated message.)

MR. STRAND: Russ.

CHAIR HILLMAN: Kelly, I just want to know -- so, we -- did we ask the services how they make this information available? Do we know the results of

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-- you know, do we know? You obviously know what the Navy is doing because it sounds like they're --

LTC McGOVERN: I know that the Army has their different systems, and Colonel Ham can probably speak to this, too. That within the -- I mean, they have what's called Military Justice Online, they have the clerk of court collecting things. You have databases they are collecting different fields of information on, but there's nothing really out there except for what the Navy is doing to say this is what our justice system has done recently.

COL SCHOLZ: Okay. I guess they must have published cases from an Appellate Court, because obviously those are published case -- I guess that's what I'm trying to say, the cases are published, but that is at the appellate level. And you're right, there are so many sentences that don't make it to that level.

COL HAM: This is Colonel Ham. It might be -- I know since the Navy has been doing this for a while, I'm wondering how many hits per day they get. One of the concerns this morning was -- I can't remember the exact words. Basically, the resources necessary to do this, and if the Navy is doing it and five people a day are looking at it, that's different than if 5,000 a day are looking at it. I don't think we have any information on how many people are accessing the information. Do we, Kelly?

LTC McGOVERN: No, ma'am.

(Simultaneous speech.)

CHAIR HILLMAN: Yes. I think it's more that we want the data to

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be available for analysis by the researchers or observers who would be interested more than it's going to be a sort of mass stampede for people to actually look at the sentencing data. So, this is just a part of that, you know, making information a little more available, just like we want to do with the surveys so that we have -- we can reasonably say that we're not hiding the ball on any of this stuff.

COL SCHOLZ: I think my -- I guess my hesitation here is I'm not sure we really identified the problem well enough to figure out if we're saying to recommend the military services to create a worldwide website on which sentencing outcomes are timely made publicly available to increase transparency and promote -- that seems like, you know, a really big undertaking. And I just want to make sure that we're certain that this information isn't already available somewhere, and that we're now telling them, you know, kind of asking them to duplicate these efforts and do what sounds like kind of a heavy lift to me.

CHAIR HILLMAN: Right. But, Colonel Scholz, if it is available, people can't -- we're getting a lot of criticism on failures to have adequate sentencing that we're addressing in some different ways. You know, if we are having -- sentencing is at an adequate level, then whatever we're doing to get the information out there right now isn't enough. And it seems like the Navy's plans wouldn't be that difficult for the other services to follow based on the fact that they just decided to go ahead and release the information. Of course, their perspective is releasing a lot more information about relief of Commanders, et cetera, than what the other services are, too, so we are

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removing some of the discretion from each of the branches about what -- how much to release.

LTC McGOVERN: Would you rather the recommendation be something along the lines of Secretary of Defense should direct military services to timely make information publicly available and delete the requirement that there be this worldwide website so it does give the services, like the Navy, discretion to do it the way they are, and the Army can determine -- because the Army does have more cases than all the other services combined, so for them it will be somewhat of an undertaking.

CHAIR HILLMAN: Yes. It seems like they can't do much for -- you know, I just wonder if we dug into it enough to figure out really -- because as I said, as far as my knowledge was, any Court-Martial information was, you know, it was unlike non-judicial punishment which we didn't publicly release without more. The Court-Martial cases were basically, you know, made public and accessible. I just don't know how people access them.

LTC McGOVERN: No, it's not easily accessible, and that's why we don't have the information, or the only thing that's easily accessible are the high-profile cases that make the newspaper. So, I mean, it's very interesting to look on the Navy's page and see oh, wow, you know, these are sort of the going rates for these different crimes, that this is what happened in these sorts of cases.

MR. BRYANT: This is Harvey Bryant. I just have to point out again

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that if it's readily available, and it's out there, and that it's that easy, that we should be -- we should have a whole different discussion on the guidelines. But we were told over and over again, and could not discover that sentencing data was all in one box somewhere for anyone to get a start on sentencing guidelines. But to say that it's accessible to the public because they can in the civilian world come to the courthouse and pull out the record books, that's lag sensory, frankly. So, I don't know -- you know, high school students can create worldwide webs, and that's not the burden of it. The burden, of course, is the inputting, and I'm sure that's what Colonel Scholz has in mind.

COL SCHOLZ: Yes. Kelly, I kind of liked your compromise of saying let's tell them to do it but not how to do it.

LTC McGOVERN: Okay. We can work on that. Does that sound good, Dean Hillman?

CHAIR HILLMAN: It does. I just -- I don't want to water this down much, because I think they need to do it. They should already have done it, and it's not there, so I'm not too inclined to go far. I'm giving them latitude on this, but --

LTC McGOVERN: Okay, I'll just --

CHAIR HILLMAN: This has been so hard for us to get the information and, you know, that's you asking, Kelly. I mean, for the, you know, the others out there who don't have the resources or the leverage that you do working on it, it seems clear there's a problem.

LTC McGOVERN: Okay. So, I'll work on that one, and then the

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last concern you had that I wanted to inform you about, Colonel Scholz, was number 66. You addressed the fact or asked the question why we were targeting the population of military academies. And the discussion earlier today, we're going to delete that sentence from the recommendation as a best practice, and instead move it to the finding above which says the participation rate in the surveys is fairly low. On the other hand, at the military academies where they require the participation and provide them the time, they do have the high report rate. But then in the recommendation you all want to recommend that they want to have people sitting in an auditorium also and not do victim surveys, that wouldn't accomplish this, the goal. So, that was a great text and we're going to move it up to contrast it as a way to get higher results but not the recommended way for this Subcommittee. Is that accurate, Dean Hillman?

CHAIR HILLMAN: I think so, yes.

LTC McGOVERN: Okay. So, those were the three primary concerns I think you had in the latest round, Colonel Scholz.

COL SCHOLZ: Okay.

LTC McGOVERN: And I think we've addressed everybody else's concerns who are on the line, as well.

COL SCHOLZ: Fantastic. Great progress.

CHAIR HILLMAN: Thank you, Kelly, and everybody there, and thanks to everybody on the phone, too, for all your help with this. So, we'll be back on Friday. Right?

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LTC McGOVERN: Correct, and you'll be getting more emails from me in the next few days requesting edits on the findings and recommendations.

CHAIR HILLMAN: Okay.

LTC McGOVERN: All right. Thank you all. Bill, if you could please close the meeting for us.

MR. SPRANCE: Absolutely. This is Bill Sprance, the DFO, and this meeting of the Subcommittee is now closed.

(Whereupon, the proceedings went off the record at 5:31 p.m.)