

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

ROLE OF THE COMMANDER SUBCOMMITTEE

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CONFERENCE CALL

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TUESDAY
APRIL 8, 2014

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The Subcommittee convened telephonically at 9:00 a.m. Eastern Daylight Time, The Honorable Barbara Jones, Chair, presiding.

PRESENT:

THE HONORABLE BARBARA JONES, Chair
MAJOR GENERAL (RETIRED) JOHN ALTENBURG
PROFESSOR GEOFFREY CORN
JOYE FROST
GENERAL (RETIRED) CARTER HAM
PROFESSOR ELIZABETH HILLMAN
THE HONORABLE ELIZABETH HOLTZMAN
VICE ADMIRAL (RETIRED) JAMES HOUCK
BRIGADIER GENERAL (SELECT) LISA TURNER

ALSO PRESENT:

WILLIAM SPRANCE, Designated Federal Official
COLONEL PATRICIA HAM, RSP Staff Director
LTCOL KYLE GREEN, RSP Senior Attorney

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

(9:02 a.m.)

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

CHAIR JONES: Thank you, Bill.

This is --

MR. SPRANCE: Good morning, Judge. Welcome.

CHAIR JONES: Good morning. All right. I believe this morning we have three sections of potential reports that we have all had the opportunity to take a look at and to discuss. And we also were sent a table of contents.

I think, by and large, these are excellent, and I think it probably makes sense to start with Section III, the Commander's Responsibilities in Sexual Assault Response.

Were there any comments or suggestions that were sent in, Kyle, that the

1 rest of us, you know, may not have received?

2 LTCOL GREEN: No, Judge Jones. We
3 didn't receive any comments in advance.

4 CHAIR JONES: Okay. Great. I
5 hadn't gotten any, so I suspected there
6 weren't any, but I wanted to just double
7 check.

8 All right. Then, I guess the
9 smartest thing to do, and the most organized,
10 would be just to begin with Section III, which
11 is the draft for April 14, and start with --
12 well, let me ask this, are there any general
13 comments before we just go page by page on
14 this?

15 Okay. The first page is titled --
16 or Section A is Commander Authority and
17 Responsibility. Are there any comments,
18 suggested changes, with respect to that page?

19 GEN HAM: Judge, this is Carter
20 Ham. I would just say that I agree with your
21 assessment. I think the entirety of the
22 report is really well done and quite clear.

1 For Section III, paragraph A, I
2 think there is -- would benefit by a brief
3 description of perhaps how commanders differ
4 from convening authorities. I think it's
5 important, as it says up front, to say, the
6 two roles, while overlapping, are not
7 interchangeable, military officers of all
8 ranks and experiences may serve in command
9 positions.

10 And I'd suggest something along
11 the lines of, while convening authorities are
12 normally more senior and experienced
13 officers, and there might be something -- just
14 a brief, very brief one- or two-liner about
15 how commanders are selected, which is
16 generally -- and command positions are
17 identified, which is generally the purview of
18 local commanders, and how convening
19 authorities are designated, which is a much
20 more centralized process and authorities that
21 flow from the Service Secretaries.

22 CHAIR JONES: I actually think

1 that's a great idea, and I guess when I read
2 this, I've been so close to this it didn't
3 occur to me that that wasn't highlighted or
4 even in there. I think it's a very good idea
5 to put it in.

6 I think we've heard about, to some
7 extent, how commanders are selected, and I
8 think we know convening authorities are
9 generally more senior. Do we have any other
10 more specific information, such as -- actually
11 in the record about them being selected by the
12 Secretaries -- the convening authorities, that
13 is?

14 LTCOL GREEN: Judge Jones and
15 General Ham, this may help. Section IV of the
16 report on Commander's Responsibility in
17 Military Justice cases, Part B is a
18 distinction between commanders and convening
19 authorities, and so that is, sir, a lot of
20 what you are referencing we have included in
21 that section.

22 So we'll take a look and see what

1 -- if some of that can be rolled into this
2 section, but that may help, sir, to -- because
3 the convening authority role obviously is
4 specific to the military justice process.

5 GEN HAM: This is Carter Ham. I
6 agree with that, Kyle, and I think the part in
7 Section IV that addresses the convening
8 authority is well done. I just think there is
9 some value, again, recognizing that most
10 readers of this report will not be intimately
11 familiar with the military justice system. A
12 one- or a two-liner in Section III, paragraph
13 A, simply to further clarify why, for example,
14 the roles, while overlapping, are not
15 interchangeable. Just a couple of sentences
16 up front, and then the fuller description to
17 come in Section IV I think is appropriate.

18 LTCOL GREEN: Yes, sir.

19 PROF. HILLMAN: This is Beth. I
20 wondered, Kyle, do we have Section IV yet?

21 LTCOL GREEN: No, Professor
22 Hillman. I'm going to send it out to you

1 today. It is -- we just finished the review
2 on it for Staff last night, and that will go
3 out to you today. It's about a 15-page
4 section with a lot of detail.

5 PROF. HILLMAN: Okay. I just
6 wondered if I missed it, so -- which is
7 entirely possible.

8 I do sort of have a comment
9 overall on this section. I'm sorry, Judge
10 Jones, to be slow on the uptake here.

11 CHAIR JONES: No, no, no. Please
12 go ahead.

13 PROF. HILLMAN: You know, part of
14 the way that -- I'm concerned that this
15 doesn't sort of set out what makes the -- this
16 sets out the authority of the commander but
17 doesn't gesture even at the ways in which the
18 commander's role is sort of a fraught one
19 here, in that part of the problem with
20 reporting is the deference to authority.

21 And maybe this is also in Part IV.
22 Actually, Kyle, that's why I asked about this,

1 because I wondered if I missed it. But, you
2 know, military justice has unique features
3 that recognize, see Article 31, that recognize
4 the challenge of the deference to authority
5 and the protection of rights that we want in
6 the criminal justice system.

7 And I just think we should note
8 that somewhere in here where we mention that
9 the commander has great authority, but that's
10 a double-edged sword in some ways here,
11 because it does make some victims reluctant to
12 report.

13 Likewise, and then I'll be quiet
14 in just a moment, in this first section, too,
15 where we talk about the -- we set up the
16 importance of the commander's role in
17 maintaining good order and discipline, and
18 then note that commanders have proved
19 essential in culture change. They have proved
20 essential in culture resistance -- resistance
21 to cultural change, too, and I think not
22 saying that up front undermines our

1 credibility.

2 CHAIR JONES: Beth, with respect
3 to your last comment, can you give me a page
4 cite on that? Or is this -- we're still in
5 III, right, A?

6 PROF. HILLMAN: In III(A).
7 Paragraph 3 is about historically commanders
8 being leaders, and just I believe what we say
9 to be correct but incomplete here, that
10 commanders have been important in cultural
11 transition, but commanders have also been
12 sources of tremendous resistance. And
13 commanders are, in fact, in my opinion, now
14 part of the problem and part of the answer in
15 sexual assault issues.

16 And I feel like the authority that
17 we give the commanders is in fact -- is -- it
18 doesn't all trend in one direction. And I'm
19 concerned the way we set this first part up
20 just looks as if we don't realize that.

21 CHAIR JONES: Would you want to
22 send some text in on that?

1 PROF. HILLMAN: Okay.

2 BG TURNER: This is Colonel
3 Turner. I --

4 REP. HOLTZMAN: This is Liz
5 Holtzman. Professor Hillman, are you saying
6 -- I don't disagree with you on your last
7 point, although I don't recall any testimony
8 about it. Undoubtedly, there has been
9 resistance, and we have seen resistance from
10 commands with regard to sexual assault. I'm
11 not familiar with what happened on --

12 CHAIR JONES: Representative
13 Holtzman, you faded out.

14 REP. HOLTZMAN: Okay. I'm sorry.
15 My question to you is, I don't doubt the truth
16 of what you're saying with regard to the fact
17 that commanders have impeded, in some
18 instances, cultural change. I don't know how
19 much testimony there is in the record on that,
20 but undoubtedly it has happened.

21 But I'm really focused on your
22 first point, which is, is your point because

1 someone is in a position of high authority
2 that it's intimidating, or are you making some
3 other point about that? I'm trying to
4 understand the point you're making about
5 commanders.

6 PROF. HILLMAN: This is Beth.
7 Absolutely, Congresswoman Holtzman, that's
8 exactly what I mean. And Article 31, for
9 instance, requires that service members get a
10 rights advisement before, if they are
11 suspected of criminal wrongdoing from anybody
12 in the military, not only who is in a position
13 of authority, not only a convening
14 authority/commanding officer, which we've
15 pointed --

16 REP. HOLTZMAN: Correct.

17 PROF. HILLMAN: -- out are
18 indistinguishable terms. So, yes, I do think
19 that that's relevant.

20 PROF. CORN: This is Professor --

21 COL HAM: Dean Hillman, something
22 like, "The Uniform Code of Military Justice

1 recognizes the inherently coercive nature of
2 command." I'm not sure if that's the right
3 word, but I know -- I know the -- of course
4 the line of -- the cases that you're talking
5 about and the law that you're talking about.

6 So that would be an example of --
7 so a statement of your point, and then an
8 example of how the military justice system
9 adapts or addresses that point in numerous
10 sections, of course, the prohibition against
11 unlawful command influence as well.

12 PROF. HILLMAN: Right. But that
13 would be -- that's exactly what I mean,
14 Colonel Ham.

15 PROF. CORN: This is Professor
16 Corn. I think that in some of the -- I recall
17 in some of the discussions with the commanders
18 at Lackland that I think we -- there were
19 questions asked to reflect that a commander
20 has -- because of the commander's authority,
21 if they exercise their authority diligently
22 and properly, it has a potentially significant

1 positive effect, but there are also commanders
2 who conceded that if they -- they were
3 derelict in the exercise of their authority
4 that it could have a negative effect.

5 I think that's a fairer statement.
6 I am hesitant to link it to Article 31,
7 because Article 31 is based on an inherent
8 coercion that is produced by the confluence of
9 the nature of the superior-subordinate
10 relationship in the military and being
11 suspected of criminal wrongdoing and being
12 questioned for that wrongdoing.

13 I don't think Article 31 is
14 premised on the notion that the military --
15 the military culture itself is constantly
16 inherently coercive. It is the combination of
17 the military society, plus the suspicion of
18 wrongdoing, which is precisely why Article 31
19 requires that the individual questioning the
20 service member inform them of the offense they
21 are suspected of having committed, unlike a
22 normal Miranda warning.

1 But I do think -- I do agree with
2 Professor Hillman that it would be legitimate
3 and appropriate to note that commanders,
4 because of their authority over a unit, when
5 they are not discharging their
6 responsibilities properly and they are
7 derelict in the discharge of their
8 responsibilities, it can have a very
9 significant corrosive effect on the culture of
10 the unit, and that would extend to this area
11 as well if they are not properly discharging
12 their responsibility.

13 CHAIR JONES: You know, correct me
14 if I'm wrong, Beth, but I think you are
15 actually commenting on the inherent authority
16 of the commander as I guess having the
17 potential for being inherently "intimidating,"
18 I think was one word that was used, or
19 "coercive."

20 I think it would be best if you
21 sent us some text, and then we could take a
22 look at it.

1 PROF. HILLMAN: Okay, Judge Jones.
2 I will.

3 CHAIR JONES: Am I on the right
4 track, Beth?

5 PROF. HILLMAN: You are.

6 CHAIR JONES: Okay. Thanks.

7 Any other comments about that
8 issue or anything else with respect to page 1?
9 And, if not, we can go to B, which is
10 reporting channels on page 2 for victims of
11 sexual --

12 PROF. HILLMAN: Judge Jones, this
13 is Beth Hillman again. This section, I -- one
14 of the things I think important in the
15 reporting channels that we saw on the ground
16 during our site visits was that it's not
17 entirely clear to everyone how the reporting
18 channels work. This is, in part, their
19 novelty. It is, in part, the difficulty just
20 of educating, which the military faces all the
21 time and overcomes.

22 But I feel like this section

1 doesn't acknowledge that, you know, there is
2 all of this extensive training. We saw
3 evidence on the ground that not everybody gets
4 this very well. We actually witnessed a
5 problem with the restricted report, something
6 being made through restricted reports that
7 actually couldn't do that, couldn't be made
8 that under the rules that we then articulate
9 here.

10 So I am concerned that we don't
11 address the challenge here as well as the
12 efforts to overcome it.

13 CHAIR JONES: I don't disagree
14 with the fact that I think I heard at least
15 one example of -- and maybe more, although not
16 at Fort Hood, of where reporting was somewhat
17 difficult, reporting options might be somewhat
18 difficult to understand.

19 So I don't have a problem with
20 acknowledging that and making -- you know,
21 adding some lines with respect to that. Does
22 anybody else have an opinion with respect to

1 that or a suggestion?

2 REP. HOLTZMAN: My only concern --
3 this is Liz Holtzman -- is that I guess
4 Professor Hillman's concern -- and I want to
5 make it clear what her concern is. Is it that
6 the reporting option with regard to restricted
7 versus unrestricted or how to make a report?
8 Because I think that's two different things.

9 I'm not sure I have seen any
10 evidence that anybody was confused about how
11 to make a report or that they didn't have to
12 go to the commander or that they didn't have
13 to go to their, you know, immediate
14 supervisor, but that there were lots of other
15 options.

16 But if you're talking about
17 confusion about that, then I don't know. I
18 haven't seen any evidence. Maybe we've had
19 it, and I've just missed it. It's possible.

20 PROF. HILLMAN: This is Beth
21 Hillman again. I actually think it's very
22 tough to have evidence of people being

1 uncertain about how to report, but I think
2 that the victim advocates recognize that the
3 persons who do come forward sometimes manifest
4 uncertainty about what it means to talk to
5 many of the different persons who are listed
6 in the charts on page 4.

7 And this is, in some ways, a
8 consequence of the proliferation of reporting
9 channels, which is -- the many avenues to
10 report are great, but there is very little
11 simplicity in this process. And, for
12 instance, the privileges that attach to victim
13 advocates, to chaplains, to legal personnel,
14 to law enforcement, to legal assistants,
15 attorneys.

16 This is -- I don't believe that
17 it's probably possible to communicate in a
18 very, you know, complete and comprehensive
19 fashion all of the details of the different
20 privileges and then the restricted versus
21 unrestricted. I'd say both. It's the
22 restricted and unrestricted are still somewhat

1 novel concepts. Even though we have been
2 doing it for some time, I'm not sure everybody
3 gets that. And then I think it's just the
4 different meaning of talking to all these
5 different persons is not --

6 REP. HOLTZMAN: But you're not
7 saying that there is confusion or at least --
8 I just want to make clear what the point is
9 you're making. But you're not saying there is
10 confusion about the various places that you
11 can go to make a report as opposed to the
12 consequences of making a report to these
13 various different people in terms of legality,
14 the privilege, confidentiality, and restricted
15 versus unrestricted. Or are you saying there
16 is confusion about everything?

17 PROF. HILLMAN: No, ma'am. This
18 is Beth again. No, ma'am, I wouldn't go that
19 far. Just the last paragraph -- let me be
20 specific. On page 4, the last paragraph of
21 Section B, which is underneath the chart says,
22 "The reporting options are well and broadly

1 publicized throughout the military." Maybe
2 this is in the -- maybe this doesn't even have
3 to go here.

4 And I apologize, we just -- we
5 haven't talked very much about our conclusions
6 here. So I was -- I had a lot of reaction to
7 the drafts here. So it's a lot, and I'll --
8 I regret slowing us down so much, but I just
9 think the fact that they're publicized doesn't
10 mean that they're understood.

11 And I feel like it's worth in our
12 text here to support the idea that there is
13 more that we need to do, and that the training
14 that we have in place and these options that
15 we have are just not -- they are not, you
16 know, like the sky is blue to everybody out
17 there just yet. It's still -- it remains a
18 confusing and complicated system.

19 LTCOL GREEN: Professor Hillman,
20 this is Kyle. Something that might help with
21 this -- and I will tell you, ma'am, we are
22 smiling here because designing that little

1 two-column chart on that page has taken many,
2 many, many hours and more footnotes than we
3 care to provide. But -- so I think you're 100
4 percent right on that, especially when the
5 trained lawyers are having trouble figuring
6 out exactly where things sit.

7 The one thing I will say is we
8 have asked DoD SAPRO and the DEOMI folks for
9 the data from the first -- since January, they
10 have been using DEOCS 4.0, and that includes
11 six specific quiz-like questions on reporting
12 options. And so everyone that is taking a
13 climate survey since January, I think it's a
14 fairly good assessment as to whether or not
15 they really understand who can and cannot take
16 a restricted report. We have asked them for
17 that, and so that might be some objective
18 data, I mean, at least for a few months' worth
19 of information as to what we're seeing
20 initially with that that might help to clarify
21 that.

22 PROF. HILLMAN: That would be

1 great.

2 REP. HOLTZMAN: This is Liz
3 Holtzman again. I'm not quarreling with the
4 view that there could be confusion in a victim
5 about the difference between restricted and
6 unrestricted. I'm not doubting that there
7 could be confusion about, if I go to a
8 chaplain, will it be restricted? Or if I go
9 to a victim advocate, will it be restricted?
10 I completely agree with you, and it's a point
11 very well taken.

12 But what I am doubtful about is --
13 and I don't remember you making this point,
14 which is that the various options for making
15 a report are understood. Maybe not all the
16 consequences, but are you saying that people
17 don't know that they can report to a chaplain,
18 to a SARC, to the sergeant, to the captain, to
19 the general, to the -- to a medical officer,
20 are you saying that that's the -- that there
21 is confusion about that, that people don't
22 know they have all of those places that they

1 can go to?

2 Or are you saying that -- because
3 about that, I don't know that I've seen any
4 evidence because I'm just questioning if
5 that's the point you're making. I'm not
6 disagreeing with the other part of that. I am
7 just questioning about whether there is
8 confusion about the fact that you can go and
9 make a report to all of these places.

10 PROF. HILLMAN: This is Beth
11 again. I guess what I'd just say is I think
12 that what it means to make a report and what
13 the role of each of these persons is in the
14 system we've set up is not well understood by
15 most people. It is just -- and so I guess --
16 I'll leave it at that.

17 REP. HOLTZMAN: Okay.

18 CHAIR JONES: All right. Thanks,
19 Kyle, if you can give us that data.

20 LTCOL GREEN: Yes, ma'am. We're
21 hoping to get that as soon as possible.

22 CHAIR JONES: But I also think

1 there has been, to my memory, some anecdotal
2 information about the confusion with respect
3 to reporting. In some instances, it is just
4 -- it has been a problem with commanders
5 themselves in terms of, if you report to a
6 certain person, can that remain restricted or
7 not? I think that has been clarified in
8 policy now.

9 But I think we've also heard from
10 at least one or two victims that, you know,
11 they might have wanted a restricted report,
12 but because, for instance, in one instance the
13 victim ended up in a civilian hospital, it was
14 no longer a restricted report.

15 So, I mean, if we can find other
16 anecdotal pieces of information, we should try
17 to do that, too.

18 Okay. Anything else on Section B,
19 or can we go to Section C, Investigation of
20 Sexual Assault Allegations?

21 REP. HOLTZMAN: Wait a minute. We
22 didn't finish page 4 -- 3. And I have some

1 questions.

2 CHAIR JONES: Oh, okay. Sorry.

3 Okay.

4 REP. HOLTZMAN: Actually, page 2
5 also.

6 CHAIR JONES: All right.

7 REP. HOLTZMAN: I saw in paragraph
8 1 where we talk about studies indicate that
9 the risk for contact, sexual violence, is
10 comparable in the civilian sector. Could we
11 throw some numbers in there, so that -- not a
12 whole section, but just at least some numbers?
13 Maybe one sentence with some numbers so that
14 people can get a sense of that?

15 CHAIR JONES: I think we have
16 them, yes.

17 REP. HOLTZMAN: Yes, they're later
18 on. So when we make this point, it just --
19 it's a lot.

20 And on page 3, it is just not
21 clear to me, at the end of the first full
22 paragraph, "or in the victim's chain of

1 command or non-commissioned officer support
2 channel." What is a "non-commissioned officer
3 support channel"? I don't know what that
4 means. I mean, maybe I should, but I don't.
5 I'm sure I should.

6 CHAIR JONES: Go ahead, Kyle.

7 LTCOL GREEN: We tend to use,
8 inappropriately, "non-commissioned officer
9 chain of command," and obviously "chain of
10 command" is a function of command, which is an
11 officer function. So we misuse that term, and
12 "non-commissioned officer support channel" is
13 really the correct term for what most people
14 refer to as "non-commissioned officer."

15 REP. HOLTZMAN: All right. Well,
16 if I don't understand it, probably there are
17 at least one or two other people in the rest
18 of the world who might not understand it. So
19 maybe you can use non-jargon language for
20 that.

21 LTCOL GREEN: Okay. I think we
22 clarify it someplace else. We'll make sure

1 that it's --

2 REP. HOLTZMAN: Oh, great.

3 LTCOL GREEN: I'm not sure that
4 we've done it yet, ma'am. It may be this is
5 a carryover from the initial assessment, so
6 let me make sure that we've referenced it
7 properly. Thanks.

8 MG ALTENBURG: This is Altenburg.
9 That could be covered with a footnote, I
10 think.

11 REP. HOLTZMAN: Or whatever.

12 LTCOL GREEN: Yes, sir.

13 GEN HAM: This is Carter Ham. I
14 have two quick comments on page 2 in Section
15 B in the second paragraph at the end. It
16 says, "Commander does not investigate the
17 report." I think we certainly have some -- I
18 think we have heard where commanders have,
19 inappropriately, investigated the report. The
20 issue is they no longer have the authority to
21 investigate the report. Maybe that's a
22 nuanced difference, I don't know.

1 And in the next paragraph, with
2 regard to restricted or unrestricted, and
3 beginning -- unrestricted beginning in 2005,
4 I think that's true but not -- I don't think
5 it is universally true. For example, my
6 recollection is that DoD civilians were not
7 entitled to restricted reporting when the
8 policy was initially begun. That's probably
9 worth checking, but my -- I recall actually a
10 fight with the Vice Chief of Staff of the Army
11 when I was in a command position to make
12 civilians -- have civilians covered by
13 restricted reporting. And family members as
14 well, by the way.

15 REP. HOLTZMAN: I have another
16 question on page 3.

17 CHAIR JONES: Okay.

18 REP. HOLTZMAN: In the middle of
19 the second full paragraph where it talks about
20 military criminal investigative organizations.
21 "Should honor a victim's choice to decline to
22 participate in the investigation?" -- what

1 does it mean? What does that mean?

2 You're saying that the person has
3 made an unrestricted -- the victim has made an
4 unrestricted report, and then declines to
5 participate in the investigation.

6 COL HAM: Yes, ma'am.

7 REP. HOLTZMAN: Is that what it
8 refers to?

9 COL HAM: Yes, ma'am. This is
10 Colonel Ham.

11 REP. HOLTZMAN: Okay.

12 COL HAM: Or if they've made no
13 report at all and someone else has reported an
14 incident --

15 REP. HOLTZMAN: Well, how about
16 the unrestricted? Oh, that's the
17 unrestricted?

18 COL HAM: It would -- I think the
19 point is -- we'll check the language of the
20 policy, but the point is that a victim never
21 -- that the MCIO, the Military Criminal
22 Investigative Organization, should honor a

1 victim's decision to decline to participate in
2 an investigation, whether it's the result of
3 an unrestricted report on her part or his
4 part, or no report at all, if someone else has
5 reported it, for example, a third party.

6 REP. HOLTZMAN: Okay. I had one
7 further comment on the bottom of page 3. It
8 says, "Several military" -- the last paragraph
9 says, "Several military personnel are trained
10 as initial responders to sexual assault
11 reports. Only SARCs are responsible for
12 documenting reports on a form."

13 GEN HAM: Yes. Liz, this is
14 Carter Ham. I would suggest inserting
15 categories. "There are several categories of
16 military personnel who are trained as initial
17 responders," and then go from there.

18 CHAIR JONES: Does that help your
19 concern, Liz?

20 REP. HOLTZMAN: Well, it's -- yes,
21 right, it does. But it just -- it goes to
22 Beth's point. It's confusing.

1 PROF. HILLMAN: Judge Jones, this
2 is Beth again.

3 CHAIR JONES: Yes, go ahead.

4 PROF. HILLMAN: I was wondering
5 how we might -- Kyle, are you going to
6 reference like intras and supras to other
7 parts of the report? Like I'm looking at page
8 2, note 10, which is about the reporting rate.
9 It starts with, "Studies indicate 55 percent
10 of crimes are not reported." We're going to
11 have a whole section on statistics and
12 surveys. And, really, I'm not comfortable
13 with citing to a single statement about what
14 the reporting rate is because it varies. I
15 mean, we heard numbers in testimony from five
16 to 25 percent are reported. One of the
17 witnesses testified about the different
18 numbers recently at the service academies.

19 That is just so complicated, I
20 wonder if you could just drop, you know, "most
21 crimes" -- "Most sexual assault crimes are not
22 reported. We address this in greater detail,

1 you know, at this section." Is that feasible
2 for us to do here, to cross-reference, or --

3 CHAIR JONES: Yes. No, I think we
4 have to make those kinds of cross-references
5 because there is overlap, particularly in the
6 statistical comparisons. And that's where I
7 noticed it as well in this.

8 So I agree with you, and I --
9 there is going to be a lot of that done once
10 we have the report sort of in more final form,
11 although I guess this is pretty close to final
12 form. But, no, I think we have to do a lot of
13 that.

14 What is your specific -- I don't
15 know what page you're on, Beth.

16 PROF. HILLMAN: Footnote 10.

17 CHAIR JONES: I see it.

18 PROF. HILLMAN: Because it
19 references the reporting rate, which is very
20 contested.

21 LTCOL GREEN: And, Professor
22 Hillman, I think what you're talking about is

1 the statistical analysis that CSS is doing?

2 PROF. HILLMAN: That's right.

3 LTCOL GREEN: I guess the only
4 issue with that -- I mean, I don't know that
5 the Subcommittee reports are going to cross-
6 reference each other. I wonder if that's
7 something when we sort of combine it into one
8 overall Panel report, if that's clarification
9 that needs to happen there, because, I mean,
10 quite frankly, the Subcommittees by design and
11 just by the nature of it, are not necessarily
12 looking at each other's reports in their own
13 report-writing.

14 PROF. HILLMAN: This is Beth
15 again.

16 CHAIR JONES: Kyle, could I
17 suggest, then, that we -- can we just not
18 reference that issue? I mean, not be so -- I
19 don't know.

20 I just -- I worry about putting --
21 like you're going to put it -- if there's a
22 conclusion, then this -- we're going to have

1 conflicting subcommittee reports, then,
2 because the one on statistics will sort of be
3 a nuanced look into -- with a lot of fine-
4 grain detail.

5 So maybe it doesn't -- maybe we
6 just -- can we just alter that line and say,
7 "Studies indicate most sexual assault crimes
8 are not reported, with similar reporting rates
9 in civilian and military," instead of saying
10 "among females," which I wouldn't even be that
11 specific. I would just say "similar reporting
12 rates in the civilian and military -- civilian
13 sector and the military." Period. Like just
14 be a little less specific.

15 PROF. HILLMAN: This is Liz
16 Holtzman. I think it's very important to --
17 at this point to cite to the work of the
18 Subcommittee and the report of the
19 Subcommittee. We might have to give pages,
20 but, I mean, how can we leave that out? I
21 don't know. Maybe it's a mistake, but --
22 maybe I'm mistaken, but I think that it should

1 -- there should be a cross-reference.

2 CHAIR JONES: Well, I think that
3 would -- I mean, I think what we should do is
4 highlight the suggestion. I don't think -- I
5 completely agree, we should not have dueling
6 conclusions in the Subcommittee reports if we
7 can avoid it. And it may be that we have to
8 highlight each of these, and then -- I mean,
9 personally, I don't have a problem with the
10 suggestion that you are making, Beth, because
11 it makes the point and I -- with a cross-
12 reference to your statistics, there will be
13 more data.

14 I hope we are going to be able to
15 figure out where we're going in terms of
16 potential conflicts with the other two
17 Subcommittees everywhere. But at the moment,
18 Kyle is right. We have our own -- you know,
19 we have our own information here that has led
20 to this report.

21 I would -- Beth, is your
22 Subcommittee report in form for deliberations,

1 or where are you at with that?

2 PROF. HILLMAN: This is Beth
3 again. That's a good question, Judge Jones.
4 Lieutenant Colonel McGovern and her staff are
5 working really hard, and they have had a lot
6 of support from Kyle, too, on this. We are
7 actually deliberating again, and we are
8 hearing witnesses on Friday related to the
9 specific reporting and the surveys, the
10 validity of the results from the surveys,
11 because we view this as a really critical
12 piece of it.

13 And then, what we have deliberated
14 -- we have had many discussions on findings
15 and recommendations, and that's what we've
16 focused on to date. But we don't -- we don't
17 yet have the draft reports, but we will soon.
18 So that's where we are. But we don't have
19 something to give you yet.

20 CHAIR JONES: Do you --

21 PROF. HILLMAN: We can't actually
22 -- we can't report out to your Subcommittee.

1 That's what -- the sort of procedural point
2 that I think Kyle is flagging --

3 CHAIR JONES: Right.

4 PROF. HILLMAN: -- the
5 Subcommittees report to the Panel. The
6 Subcommittees don't report to each other. So
7 I don't know that we actually can give that to
8 you, so I don't know how we'd cross-reference
9 in these internal reports.

10 REP. HOLTZMAN: Well, why don't
11 we? And, you know, and if someone thinks it
12 violates FACA, which how could it? No one is
13 deliberating. You know there is a report that
14 has been studying this issue. You can say,
15 you know, "Another Subcommittee of the
16 Response Panel has been studying this issue.
17 See the report entitled" dot, dot, dot,
18 whatever it is. That's what -- you don't have
19 to reference a page, but it does at least give
20 somebody an indication that there is something
21 else out there, too. I don't think that that
22 violates anything.

1 CHAIR JONES: Well, we know there
2 is more that has been done, and I know it
3 because I'm also on that Subcommittee. And I
4 guess it's the Bureau of Justice Statistics
5 people who will be coming on Friday.

6 All right. So, Kyle, can we
7 generalize that sentence as Professor Hillman
8 suggested and make a cite to -- or at least a
9 placeholder on --

10 LTCOL GREEN: Yes, ma'am.

11 CHAIR JONES: -- and mention that
12 there is an in-depth statistical analysis
13 being done by Comparative Services?

14 LTCOL GREEN: Yes, ma'am. We can
15 do that.

16 CHAIR JONES: Okay. And I guess
17 we will all be alert to any other areas where
18 we may need to look at additional data as a
19 panel, or the Panel will need to look at the
20 additional data worked up by the other
21 Subcommittees. This is a big area, but I
22 think there would also be some overlap with

1 respect to some of the Victim Services issues.

2 All right. Is there anything else
3 in those first three pages, four pages, on
4 Section B?

5 (No audible response.)

6 CHAIR JONES: Okay. So then I'm
7 on page 4, which starts -- which is where
8 Investigation of Sexual Assault Allegations,
9 Section C, begins. Any comments with respect
10 to this section or with respect to page 4 or
11 5?

12 REP. HOLTZMAN: On 5, in the last
13 paragraph, first sentence, where it talks
14 about the implementation of special victims
15 capabilities, the second sentence says what
16 special victims capability includes --
17 capabilities includes, but it doesn't say what
18 it is supposed to do. I don't even know what
19 a special victims capabilities is. Is it a
20 unit? Is it a policy?

21 CHAIR JONES: Yes. Well, that's a
22 good question. I thought they were units at

1 different installations, but maybe I'm wrong
2 and it certainly doesn't say that.

3 REP. HOLTZMAN: And what their
4 purpose is. So if you could just put a comma
5 and explain what those special victims
6 capabilities are, is, whatever.

7 CHAIR JONES: Is it that easy,
8 Kyle? Are they units at installations that
9 these personnel assigned?

10 COL HAM: It's a statutory
11 requirement, so the statute gave it that name.

12 REP. HOLTZMAN: What is it? Is it
13 an animal, vegetable, or mineral?

14 (Laughter.)

15 COL HAM: It's a multi --

16 CHAIR JONES: Why do you have to
17 ask these hard questions, Liz?

18 COL HAM: Multidisciplinary team
19 to address a criminal allegation of sexual
20 assault. I think that's a fair statement,
21 Kyle.

22 REP. HOLTZMAN: So they

1 investigate? I mean, what -- are they
2 supposed to help the victim? What are they
3 supposed to do?

4 LTCOL GREEN: All of the above,
5 ma'am. It's basically a tip-to-tail support
6 resource for sexual assault, from allegation
7 to conclusion. It's the team that is
8 specially trained and specially outfitted to
9 assist the victim and prosecute the case
10 through the process.

11 REP. HOLTZMAN: Great. So maybe
12 you can put a comma and say that, assist the
13 victim and prosecute the case -- probably not
14 prosecute, investigate the case.

15 LTCOL GREEN: Absolutely. Yes,
16 ma'am.

17 REP. HOLTZMAN: Okay.

18 LTCOL GREEN: Thank you for --

19 REP. HOLTZMAN: So if you'd put a
20 comma and put those points, that would be
21 great.

22 LTCOL GREEN: We will --

1 GEN HAM: This is Carter. This
2 one on page 5, the second paragraph that
3 begins with, "Allegations of sexual assault."
4 I think just probably a footnote, but I
5 believe there is some difference between
6 stateside and overseas reporting because of
7 status of forces agreements with regard to
8 interaction with host nation law enforcement
9 in reports of sexual assault. So that's
10 probably worthy of a footnote.

11 CHAIR JONES: Kyle, have you got
12 that?

13 LTCOL GREEN: Yes, ma'am. Thank
14 you, sir.

15 CHAIR JONES: Great. All right.
16 Was there anything else in this section that's
17 on pages 4, 5, and the top of 6? Okay.

18 REP. HOLTZMAN: Just a question on
19 the top of 6, where it says that it is
20 supposed to be given to appropriate military
21 command for consideration.

22 Well, since there are no more

1 special -- is it clear -- I really got
2 confused because of the special courts-
3 martial. Is it clear to this -- which kind of
4 military commander the charge has to go to?
5 Because I guess I was -- what concerned me
6 was, what happens if it goes to the wrong
7 place? Talk about confusion. Does everybody
8 know who the appropriate commander is once the
9 investigation is complete?

10 CHAIR JONES: No.

11 REP. HOLTZMAN: Well, if it's not
12 an issue or whatever, then just -- I withdraw
13 the comment. But it was just something that
14 --

15 LTCOL GREEN: Well, and I think,
16 Ms. Holtzman, that's what the whole next
17 section goes to. I think the discussion on
18 the investigation is more of a generalized --
19 when an investigation is completed, it goes to
20 an appropriate military commander, and that is
21 not defined. But then specific to sexual
22 assault, the initial disposition authority, by

1 DoD policy, is defined as the special court-
2 martial convening authority, as you mentioned.
3 So I think --

4 REP. HOLTZMAN: So it goes to the
5 special court-martial convening authority
6 first.

7 LTCOL GREEN: For sexual assault.

8 REP. HOLTZMAN: So he or she looks
9 at it, and then what happens? But they can't
10 -- then it has to go to general court-martial
11 convening authority, isn't that right?

12 LTCOL GREEN: No, ma'am. The
13 initial disposition authority has the
14 authority to initiate action or take no
15 action. It would go to the general court-
16 martial convening authority either by chain of
17 command policy or if referred after an Article
18 32 investigation, once charges are proffered
19 and it's at that stage.

20 REP. HOLTZMAN: I see. So it goes
21 to two separate convening commanders.

22 LTCOL GREEN: Well, it would go

1 to --

2 REP. HOLTZMAN: It goes first to
3 the special military -- special convening
4 authority and then if the prosecution -- if
5 the charges are sustained, and then it goes to
6 the general convening authority?

7 LTCOL GREEN: For referral, yes,
8 ma'am.

9 BG TURNER: This is Colonel
10 Turner. But it is up to the special court-
11 martial convening authority to decide whether
12 or not to forward those charges, although at
13 least for the Air Force our Secretary issued
14 a memo in June of '13 directing the special
15 court-martial convening authority to let the
16 GCMCAs know about that, so they could
17 independently withhold if the case isn't
18 formally forwarded.

19 CHAIR JONES: I'm sorry. Colonel
20 Turner, they could withhold, but they have to
21 forward? Did I miss something?

22 BG TURNER: No, ma'am. It's up to

1 the special court-martial convening authority
2 if, after looking at his evidence and talking
3 to his JAG, if he wants to forward the case to
4 the GCM with the recommendation that it be
5 referred to trial or choose to look at the
6 evidence and say no, I'm not going to do that,
7 and in that kind of case it would be up to the
8 GCM to decide whether or not he wants to pull
9 it up on his own, since it hasn't been
10 formally forwarded to him.

11 CHAIR JONES: I see. And what are
12 the other branches doing about that?

13 (No audible response.)

14 CHAIR JONES: You don't know?

15 Okay.

16 COL HAM: Well, there's -- I'm
17 trying to think if it's in the NDAA. I think
18 it is. Any report of a sexual assault has to
19 go to the first general officer in command, so
20 they know about every one from the initiation
21 of the report. And you've learned about --
22 you learned about other entities of the sexual

1 assault review boards that are in place at
2 every installation, where they're meeting
3 monthly on the incidents more from a victim
4 services point of view.

5 But the installation commander or,
6 you know, general officer are on those sexual
7 assault review boards, so I think that answers
8 your question. But they are required to know.
9 The first general officer in command is
10 required to know.

11 CHAIR JONES: I hate to do this,
12 but could I just take you back to page 5, the
13 last sentence again? We're talking about
14 investigations being completed, and then we --
15 and I'm assuming in sexual assaults. We're
16 not talking about just any investigation.
17 Correct?

18 COL HAM: Right. Well, except at
19 the beginning of the paragraph, Judge Jones.

20 CHAIR JONES: Right.

21 COL HAM: So I think --

22 CHAIR JONES: Right. Then it says

1 the case is provided to the appropriate
2 military commander. Don't we know that the
3 appropriate military commander is the special
4 court-martial convening authority on sexual
5 assaults? Or am I missing something, which is
6 quite possible.

7 LTCOL GREEN: Judge Jones, you are
8 correct. I think -- and this is good. I
9 think our intent was to talk about the
10 appropriate commander being the commander of
11 the accused, but let us -- I think there's --
12 we need to clarify that. So we will fix that
13 so that it talks about the initial disposition
14 authority for the accused.

15 CHAIR JONES: Okay. Well, that
16 would help me. That would be great.

17 All right. Now, in thinking about
18 that, I missed I think some of the other
19 discussion. Were there any other problems
20 that -- with that particular section? Or are
21 we now into disposition authority, D, on page
22 6?

1 (No audible response.)

2 Okay. That runs through page 6
3 and 7.

4 PROF. HILLMAN: Judge Jones, this
5 is Beth.

6 CHAIR JONES: Yes, Professor.

7 PROF. HILLMAN: I have a question
8 about the unfounding description. This is on
9 page 6, this -- in draft under paragraph D.
10 I just wondered why we described the founding
11 decision in the Army and then not in the other
12 services.

13 CHAIR JONES: Yes, I don't know.
14 I have that underlined myself because we do
15 have the Army definition, which is a probable
16 cause determination. I don't know. Do we
17 know, is it very different? Is it just
18 nuanced in the other services? Kyle?

19 LTCOL GREEN: No. Judge Jones,
20 the Army is the only Service to use the term
21 "founding." And the Army is the only Service
22 that -- in which the MCIO can unfound an

1 investigation. In the other Services, it is
2 required to be unfounded by the commander. So
3 there is a discrepancy, and I believe CSS is
4 -- we have talked at length with them about
5 this. There is definitely a disconnect among
6 policies and practices among the four
7 Services.

8 PROF. HILLMAN: Kyle, this is
9 Beth. We are actually going to make a
10 recommendation about that from CSS. But here,
11 I actually can tell now -- I can see you
12 actually -- you buried that in the -- and this
13 is really well-written. This is not a
14 critique of how you've written it, but you
15 just buried it where you wrote that the other
16 investigative services, on the top of page 7,
17 provide investigations without any legal
18 conclusions or qualitative opinion on the
19 evidence elicited.

20 Maybe just add at the end of
21 there, "unlike the Army's process" or flag at
22 the beginning of the section, "only the Army

1 does this," because it just mixes up -- we
2 can't quite --

3 LTCOL GREEN: It's confusing.
4 Thank you.

5 CHAIR JONES: Anything else on
6 Section D?

7 REP. HOLTZMAN: Yes. Just a few.
8 What does it mean on the top of page 7 that
9 the commanders are required to provide MCIO
10 written disposition data prior to closure of
11 a criminal investigation? What does that
12 mean?

13 COL HAM: Ma'am, it's -- I'm
14 trying to think of the best way to put it.
15 The commander actually has to --

16 GEN HAM: This is Carter Ham.
17 Let me jump in here. There is -- whenever
18 there is a founded allegation by the criminal
19 investigation, it is as in the Army. Then,
20 the commander is required, by Army policy, to
21 respond to the criminal investigation
22 organization how he or she has disposed of

1 that case, whether it's a court-martial,
2 whether they took no action, administrative
3 action, whatever it is, but there is a
4 requirement to report back and say, "I got
5 your report that this allegation was founded,
6 and here is what I did about it."

7 REP. HOLTZMAN: But that's not
8 what this says -- provide the MCIO written
9 disposition data. Data is not -- I don't know
10 what disposition data means -- prior to the
11 closure of a criminal investigation. Is a
12 criminal investigation closed when it is sent
13 to the commander, either for -- closed because
14 it's not founded or closed because they
15 founded it, so to speak? I don't know. I'm
16 just troubled by -- I don't understand what
17 this means.

18 LTCOL GREEN: Right. And, Ms.
19 Holtzman, the data is actually the word used
20 in the instructions, so --

21 REP. HOLTZMAN: Oh, well that's
22 great.

1 (Laughter.)

2 LTCOL GREEN: -- highlight a
3 point, and so we will -- we'll find a better
4 way to describe that. But no, the
5 investigation remains open until receipt of
6 the commander's disposition.

7 REP. HOLTZMAN: Okay. Well, so --
8 all right. So the MCIO can't close the case
9 until they have heard -- and that is across
10 all the Services -- until they've heard from
11 the commander that the case has been -- what
12 his or her decision is?

13 LTCOL GREEN: That's correct.

14 REP. HOLTZMAN: All Services.

15 LTCOL GREEN: That's correct.

16 Yes, ma'am.

17 REP. HOLTZMAN: Okay. And I guess
18 -- I don't want to hold you up. I have some
19 other -- I just had some other questions where
20 I was confused. I can give you the language
21 and maybe, you know, you could take a look at
22 it.

1 CHAIR JONES: Are you sure? It's
2 fine if you want to do it now.

3 REP. HOLTZMAN: Not really.

4 CHAIR JONES: Do you want to wait?
5 Okay. Okay. Then we'll go to E, unless there
6 are some other -- there's another discussion,
7 any other discussion in D?

8 (No audible response.)

9 Okay. Then we're in Other
10 Commander Responsibilities, and it runs
11 through pages 7 and 8.

12 PROF. HILLMAN: Judge Jones, this
13 is Beth.

14 CHAIR JONES: Go ahead.

15 PROF. HILLMAN: I would just -- as
16 I mentioned before, I feel like that unlawful
17 command influence piece deserves greater play
18 in this draft about the role of the commander,
19 as a risk to the commander's effectiveness
20 throughout this process. And the way that
21 we've set it up, it gets -- you know, we
22 mention Article 37 in the last paragraph here.

1 So I'd just recommend that we --
2 we make a larger point in saying the
3 commander's ability to -- to act in this realm
4 is affected by the possibility of unlawfully
5 influencing the process.

6 CHAIR JONES: Yes. I actually
7 made that note in -- we can go over here that
8 we should say more about unlawful command
9 influence. And so I agree with you that we
10 need to say more. Do you -- do you want to
11 send in some suggested language? And then
12 we'll --

13 LTCOL GREEN: Judge Jones, this is
14 Kyle again. And again, this is our fault or
15 just the nature of the drafting process. We
16 have a section on UCI and the commander's
17 responsibility in military justice cases. I
18 mean, it's more of an evolution. Section IV,
19 which you all will get today, it more goes
20 into the case history and the treatment of
21 this judicially. So it may or not, Professor
22 Hillman, answer your question. But we may

1 want to look at that just once the sections
2 are integrated.

3 CHAIR JONES: Yes. And, actually,
4 I didn't think of the fact that we needed to
5 say more about it until I sort of finished
6 reading Section VI. But, okay, we should take
7 a look at the other section we haven't gotten
8 yet, although Beth, if you want to send in
9 some language, I'd still appreciate that for
10 Section III. Okay?

11 PROF. HILLMAN: Okay.

12 BG TURNER: Judge Jones, this is
13 Colonel Turner.

14 CHAIR JONES: Yes.

15 BG TURNER: I completely agree
16 that if we are going to introduce it here,
17 although we will expand it more later, we want
18 this at least to be a fully accurate summary.
19 And so like Professor Hillman is talking one
20 part of that equation. The other part is that
21 lots of people can commit unlawful command
22 influence, not just the commander, and so

1 there ought to be some recognition of that.

2 CHAIR JONES: I agree.

3 COL HAM: And that is in the other
4 section, but we can maybe both refer to it and
5 mention it here as well.

6 CHAIR JONES: Okay, great. So I
7 guess we're -- unless there's anything further
8 on this --

9 REP. HOLTZMAN: I have a couple of
10 points on page 8.

11 CHAIR JONES: Certainly.

12 REP. HOLTZMAN: Here again, I
13 mean, this is my ignorance of this -- of the
14 military system in general. But line 4 refers
15 to the first flag officer in the chain of
16 command. I mean, what is that? I mean, I'm
17 sure it's in something written, but I don't
18 know what it means. So maybe you could
19 explain that in English.

20 And the other thing, too, is that
21 commanders also -- the second sentence is a
22 very important sentence, but we just sort of

1 leave it there, which is to deal with
2 potential peer retaliation. We never discuss
3 how they do that. Or maybe it is going to be
4 in some other part of this report. If so,
5 perhaps we should reference that.

6 CHAIR JONES: Where are you? On
7 page 8?

8 REP. HOLTZMAN: First paragraph,
9 the last sentence.

10 CHAIR JONES: Okay.

11 REP. HOLTZMAN: "Have personnel
12 responsibilities which require them to assess
13 and eliminate potential peer retaliation." I
14 mean, that's a big subject. Are we just going
15 to leave it out? I mean, do we deal with it,
16 Kyle, or --

17 LTCOL GREEN: Well, I think,
18 ma'am, we'll have a section -- I mean, some of
19 this will be discussed in the prevention
20 section, but I think you're -- we can
21 certainly expand -- at least expand on what
22 we're talking about here, and maybe make

1 references to those and --

2 REP. HOLTZMAN: Yes. At least
3 just refer to where else it's, you know, being
4 discussed. All right.

5 And then, again, a language point,
6 further down in the next paragraph, "alleged
7 -- this should not -- and should not discuss
8 alleged misconduct with the subject." What
9 are we talking about with regard to a subject?
10 Is that the accused? Is that -- who is that?
11 This is new terminology that we're using, and
12 so I just want to be sure that someone
13 understands what we're talking about here.

14 LTCOL GREEN: Okay. No, we are
15 talking about an accused or -- I mean, again,
16 using the terminology used within Article 31
17 and case rights for that. But we will -- I
18 think what you're saying is to try to make
19 that consistent with terminology we are --

20 REP. HOLTZMAN: Well, what I'm
21 trying to say is that we don't need to use the
22 military jargon if there is other language

1 that people generally understand. I mean,
2 this is not a report just for military people.
3 This is a report going to the Congress -- I
4 don't know how many of them have served in the
5 military -- and the President. And we know he
6 didn't. Or the Secretary of Defense; he did,
7 so he'll understand it, but others won't.

8 Wait a minute. How does -- okay.
9 Wait. Oh yes, "Commander must ensure that the
10 accused is not punished in any way prior to
11 trial in violation of Article 13." How does
12 this jibe with the -- his power or her power
13 to incarcerate the accused prior to trial or
14 to reassign the accused prior to trial? I
15 mean, those are powers that the commander has.
16 How does that fit in?

17 COL HAM: Yes, ma'am. I don't
18 know --

19 REP. HOLTZMAN: I'm not looking
20 for an answer. I'm just saying, how do we
21 address this?

22 COL HAM: Got it.

1 REP. HOLTZMAN: Okay. And I guess
2 we haven't talked about plea bargaining
3 anywhere here or administrative disposition.
4 So I assume that is going to be somewhere
5 else?

6 LTCOL GREEN: In the next section,
7 yes, ma'am.

8 REP. HOLTZMAN: Okay. And I
9 thought also that in the last -- "Cases of
10 sexual assault posed a particular concern for
11 undue or unlawful command influence," and do
12 we need some examples there? I don't know.

13 CHAIR JONES: I thought we were
14 going to expand on this in another --

15 REP. HOLTZMAN: Okay. Well, we --
16 okay, fine.

17 CHAIR JONES: I think we can do
18 that.

19 REP. HOLTZMAN: Okay. I'm
20 finished with page 8.

21 CHAIR JONES: Okay. Anything else
22 before we go to page 9, Findings and

1 Recommendations?

2 (No audible response.)

3 All right. There are five
4 findings here. The first is, "Criticism of
5 the military justice system often confuses the
6 term commander' with the person authorized to
7 convene courts-martial for serious violations
8 of the UCMJ. These are not the same thing."
9 Are there any -- is there any discussion about
10 that, suggested language changes, that or
11 actually we could just take them one at a
12 time. But for the first one, any issues?

13 LTCOL GREEN: And Judge Jones, all
14 five of these are pulled over from your
15 initial assessment.

16 CHAIR JONES: Right. I know. I
17 recognize them, but --

18 PROF. HILLMAN: Judge Jones, this
19 is Beth. That doesn't seem like a finding to
20 me so much, but maybe I'm misunderstanding.
21 So I just -- it's just -- the point that --
22 and there are no recommendations in this

1 particular part, so these are -- in terms of
2 the most important things for us to say, I
3 guess that's not at the top of my list, so --
4 but I guess we want to try to -- the text
5 above clarifies that, and we've spent some
6 time on it.

7 Maybe this is just an attempt to
8 highlight that, but it -- I see the findings
9 as supporting recommendations that we are
10 going to make, so the recommendations are
11 based on it, so the findings sort of
12 disconnected from that are a little -- I don't
13 know. I guess I just don't know. There is a
14 huge number of things we could conclude as a
15 result of the -- all of the work that is
16 reported in the document above, but I -- this
17 one doesn't strike me as the most important
18 one.

19 CHAIR JONES: Okay. Well, let's
20 go through these and see if there are any
21 issues with any of them. And I think what
22 you're pointing out is that if there is going

1 to be a final report here, and a lot of
2 integration, it is going to have to get done.
3 Any other general comments with respect to
4 these findings?

5 (No audible response.)

6 All right. Then the second one,
7 any issues with respect to that? It begins
8 "Under current law and practice," talks about
9 the authority to refer sexual assault
10 allegations.

11 (No audible response.)

12 All right. The third one is,
13 "Sexual assault victims currently have
14 numerous channels outside the chain of
15 command." And we talked a little bit about
16 this in the context of the report. And I
17 think we talked about particularly the notion
18 about the alternative reporting channels are
19 well and broadly publicized throughout the
20 military.

21 Liz, did you have a comment?

22 REP. HOLTZMAN: Yes, I don't --

1 just going to the point about, in the second
2 sentence there. "They are not required to
3 report to anyone in their organization." What
4 does that mean, "in their organization"? Is
5 that an understood -- is that a generally used
6 term? Is that -- I don't know what that --

7 CHAIR JONES: Yes. It seems to me
8 there has to be a better one than that.

9 COL HAM: "In their military
10 organization" or --

11 REP. HOLTZMAN: "In their military
12 organization," does that mean their military
13 unit, is that -- I'm sure you can figure out
14 the words.

15 And, you know, going to Beth's
16 point earlier, you know, the finding doesn't
17 in any way allude to the possibility of
18 confusion or the existence of some confusion.
19 I don't know whether we want to do that.

20 CHAIR JONES: Well, we may want to
21 -- we may want to add that more can be done,
22 which I think is an important --

1 REP. HOLTZMAN: Right.

2 CHAIR JONES: And so let's rework
3 a little bit the third finding, based on our
4 conversation earlier. And I don't know, is it
5 enough to say they are not required to report
6 to anyone in their chain of command? Because
7 I don't know what "organization" specifically
8 means either.

9 REP. HOLTZMAN: I think they are
10 going to change it to "military unit" or
11 something like that.

12 CHAIR JONES: Okay. Let's -- we
13 have two things at least, then, to rework in
14 the third finding.

15 The fourth one is -- I'm sorry.
16 Did I cut somebody off?

17 (No audible response.)

18 Fourth finding is about the
19 assaults. "Assault allegations have to be
20 referred to the MCIOs," that they are
21 independent of the chain of command. No
22 commander can refuse to forward an allegation.

1 I agree with that finding. I'm
2 not sure we specifically say -- do we
3 specifically say that in the sections that we
4 have just gone -- in the section we have just
5 gone through? I mean, I can go back and
6 double-check my own memory. I didn't think it
7 was quite that sharp.

8 (No audible response.)

9 All right. Well, apparently,
10 everyone else read it, so I'm okay. Or I'm
11 not okay.

12 And the last finding is, "Under
13 current law and practice, the authority to
14 resolve sexual assault allegations is limited
15 to senior commanders who must receive advice
16 from judge advocates before determining
17 appropriate resolution."

18 REP. HOLTZMAN: My only -- this is
19 Liz Holtzman again. My only concern about
20 this is that there is very little in the text
21 about the judge advocate and the advice. I
22 mean, I know it's an important finding, but,

1 I mean, have we sufficiently spelled out that
2 point in the text? Or do we do it somewhere
3 else?

4 CHAIR JONES: I think this is sort
5 of the same problem we have had earlier, which
6 is that there is a lot more about the
7 relationship of the judge advocate and the
8 commander in another section. So --

9 REP. HOLTZMAN: Maybe the finding
10 doesn't belong here.

11 CHAIR JONES: It might not. I'm
12 right about that, Kyle, right? I think I read
13 a lot more in the other section that we are
14 going to be talking about today.

15 LTCOL GREEN: That's correct. And
16 I mean, obviously the SJA's advice is in the
17 next section on military justice process. So
18 yes, ma'am.

19 REP. HOLTZMAN: I just raise the
20 issue.

21 LTCOL GREEN: Sure. Yes, ma'am.
22 And as we sort of see this -- and, again, this

1 is up to your all's conclusion and what you
2 want to do, but if we separate out the
3 findings and recommendations, they are not
4 necessarily going to be chapter by chapter,
5 but more one overall section, and it may make
6 a little bit more flow sense at that point,
7 ma'am.

8 CHAIR JONES: Yes. No, I think
9 it's definitely going to because we don't know
10 -- we really don't know where they fit, I
11 think at this point. This last one is a very
12 good example of that.

13 All right. Should we head on,
14 then, to Section VI?

15 BG TURNER: Judge Jones, this is
16 Colonel Turner here.

17 CHAIR JONES: Yes, Colonel.

18 BG TURNER: Just as to that
19 finding, after the words "to senior
20 commanders," perhaps we should put in the
21 clause "who have been designated as convening
22 authorities," and then continue with the rest

1 of the sentence.

2 CHAIR JONES: Excellent point.

3 Got it.

4 COL HAM: Did any of the
5 Subcommittee members have any additional
6 findings from this section?

7 LTCOL GREEN: Or recommendations.

8 COL HAM: Or recommendations?

9 PROF. HILLMAN: This is Beth,
10 Colonel Ham. I think we should say something
11 about unlawful command influence here. I know
12 it's in Part IV, which focuses on the military
13 justice piece, but this is actually the part,
14 similar to the climate part, that is sort of
15 the larger frame of the commander's
16 responsibility.

17 And unlawful command influence is
18 cognizable within the military justice system
19 that you are going to talk about in Part IV,
20 but it affects the commander's ability to be
21 effective outside of the confines of that --
22 the military justice process.

1 So I think we should make a
2 finding about unlawful command influence is
3 relevant and it's distinctive. I mean, this
4 is -- we're identifying what's distinctive
5 about this whole process and problem in the
6 armed forces, and I think the command
7 influence issue with the convening authority
8 and all other persons who can engage in
9 unlawful command influence potentially is a
10 part of that playing field that we should just
11 highlight in the findings.

12 CHAIR JONES: Beth, why don't you
13 send us a proposed finding? Because I think
14 you were going to send us some text for that
15 section, where we can put more in about
16 unlawful command influence.

17 PROF. HILLMAN: Okay.

18 CHAIR JONES: And again, I'm not
19 sure where these findings are all going to end
20 up in terms of the overall set of findings and
21 recommendations in the final report.

22 All right. We are on Section VI,

1 Perspectives on the Military Justice Authority
2 of Commanders. This is 28 pages. I think the
3 best thing to do is, first, to ask are there
4 any general comments or can we just proceed
5 page by page?

6 (No audible response.)

7 Okay. On page 1, then, Judicial
8 Deference to Commander Authority, and it's
9 pretty much a recap of Supreme Court cases.

10 PROF. HILLMAN: Judge Jones, this
11 is Beth. This is not -- this is an
12 interpretation of the case law that I don't
13 entirely agree with. So I -- but I'm not --
14 if this is what everyone else agrees with,
15 then it's fine. So, but I don't view the case
16 law in quite this way. So it's -- but to --
17 anyway, so this -- sort of the -- anyway, so
18 I -- likewise, I'm not sure that I share the
19 perspective of the majority of the
20 Subcommittee on these issues, so I don't need
21 to belabor that. But I'll just point that
22 out.

1 CHAIR JONES: Well, I'll be honest
2 with you, I haven't gone back and actually
3 read all of the text of these cases and then
4 compared it with the commentary here, which
5 I'd be willing to do.

6 Liz, was that you?

7 REP. HOLTZMAN: Yes. Well, I
8 wasn't really sure about the relevance of this
9 whole part. I would very much like to
10 understand what your different take is. I
11 don't know that this reflects -- it certainly
12 doesn't reflect my understanding because I
13 haven't read these cases.

14 PROF. HILLMAN: This is Beth. I
15 just -- I don't see the degree of deference to
16 the military in quite the way -- so the
17 central doctrine that is the theme here is the
18 degree of judicial deference to the military,
19 and then that plays out here in the -- whether
20 or not commanders are interfered with in their
21 military justice role by -- or whether the
22 military justice system is left untouched by

1 the Supreme Court.

2 And I see it as more a sine wave
3 in some ways, and then a lot more deference
4 under first Justice Rehnquist, then-Chief
5 Justice Rehnquist, that has shaped this, but
6 that it was quite different in the early years
7 of the UCMJ, and that O'Callahan, the case
8 that is set out here, is not really the total
9 outlier, nor do I think, as this section
10 concludes, that it is just a coincidence that
11 all of these cases, or most of these cases,
12 are about sexual assault.

13 I think the fact that all of these
14 cases, or most of these cases, are about
15 domestic violence and sexual assault just
16 confirms that this has long been a problem in
17 the armed forces and that these issues are --
18 these issues are difficult for the military
19 justice system to grapple with in terms of
20 jurisdiction as well as in terms of services,
21 victims services, et cetera.

22 So I -- this section doesn't --

1 there is difference of opinions, of course,
2 among, you know, those who view the lines and
3 discuss how to interpret them. But just for
4 me, this isn't cognizant.

5 MG ALTENBURG: I think there is --
6 this is Altenburg. I think there are several
7 Supreme Court cases, other than the ones that
8 you mentioned, about sexual assault that are
9 even stronger in reinforcing -- I wouldn't
10 call it the deference, which is an
11 acknowledgement that the system is
12 sophisticated and has matured.

13 One of the first ones is Parker v.
14 Levy, '74, which is huge in terms of deference
15 to the UCMJ and the way the military justice
16 system is run because it involves what are
17 called the general articles. And the other
18 are several murder cases in the late '80s and
19 '90s, capital murder cases, that went all the
20 way to the Supreme Court, and there were nine-
21 zero opinions affirming the military justice
22 system for handling capital cases.

1 And I think that's, in a way, far
2 more -- those cases are far more significant
3 than the cases that are mentioned about sexual
4 assault as far as any -- again, I don't know
5 if the right term is deference to military
6 justice, but certainly the courts have
7 recognized that the system works.

8 PROF. HILLMAN: This is Beth.
9 General Altenburg, you're right about all of
10 those other cases. These are the cases about
11 service connection, where it's like, you know,
12 capital cases and, you know, the general
13 articles cases are about the constitutional
14 principles, whether it's -- you know, the
15 general articles are void for vagueness or
16 whether, as you say, the system is protective
17 of due process in a way that it gets deference
18 from the civilian courts to operate on its own
19 in some respects.

20 So, but these cases are about
21 service connection, and those are sexual
22 assault cases.

1 CHAIR JONES: Well maybe, you
2 know, Beth, I -- I'm not comfortable signing
3 off on this without actually, you know,
4 reading the cases. And I think maybe we
5 should think more about, you know, how
6 important this section is in terms of
7 relevance, maybe background, and maybe it
8 needs to be shortened or removed.

9 So I would like to shelve it for
10 the moment, unless people feel strongly about
11 discussing it further now. I'm not prepared
12 to do that because honestly, I have to really
13 take a closer look at it.

14 (No audible response.)

15 Okay. So we move to B, Recent
16 studies of commander authority under the UCMJ.
17 And that actually, the text begins on page 4.

18 PROF. HILLMAN: Judge Jones, this
19 is Beth again.

20 CHAIR JONES: Yes.

21 PROF. HILLMAN: The first
22 sentence, which is -- the second sentence,

1 which describes the review of the Cox
2 Commission, I know that it's a quotation from
3 one of my friends and colleagues, Vic Hansen,
4 who wrote about the Cox Commission, calling it
5 a bottom-up review. But as the reporter for
6 the Cox Commission, I disagree with that
7 description of what we did. So I think we
8 could polish that.

9 CHAIR JONES: I'm going to make
10 that --

11 REP HOLTZMAN: So why don't you
12 just take the word out and just say, just
13 "undertook a review"?

14 PROF. HILLMAN: That's fine. So
15 it's just -- it was very -- we had no funding,
16 and we did the best we could. But at that --
17 that celebrates the extent of its review, and
18 it makes it much bigger than what it was.

19 CHAIR JONES: I defer to you,
20 Professor. I think we should take "about a
21 month" out then.

22 Anything further on page 4? Let

1 me just look. Okay. Is everybody with me?
2 What about page 5? At the bottom of page 5,
3 we leave the commentary about the U.S.
4 Commission on Civil Rights and move to Defense
5 Advisory Committee on Women, which is
6 basically, again, reporting on their
7 conclusions, their deliberations,
8 recommendations, into page 6. Any issues with
9 any of that?

10 REP. HOLTZMAN: No, but I just
11 have a question on page 5, the first full
12 paragraph, the last sentence. "As hard as
13 they might try not to, the officer will almost
14 inevitably consider conflicts that arise above
15 and below their rank in the chain of command."
16 What are the conflicts that we're talking
17 about here? It seems like a very -- I don't
18 understand the point.

19 CHAIR JONES: Well, it is a quote
20 from a commissioner, so I don't know --

21 REP. HOLTZMAN: Well, I understand
22 that, but --

1 CHAIR JONES: Yes, right. I guess
2 I --

3 REP. HOLTZMAN: I don't understand
4 the --

5 (Simultaneous speaking.)

6 CHAIR JONES: -- we'll have to let
7 our imaginations run wild on what they are.
8 I don't know what he was referring to. I can
9 imagine that, you know, below is the notion of
10 possibly knowing either the accused or the
11 victim, and above, you know --

12 REP. HOLTZMAN: Well, if that's
13 what they're talking about, then --

14 CHAIR JONES: Right.

15 REP. HOLTZMAN: -- they can
16 clarify that. We don't need a quote. I don't
17 know what this is designed to -- what point
18 this is designed to make.

19 CHAIR JONES: Well, then, maybe
20 what I would ask the Staff to do is go back
21 and read it and see if we can put it in
22 context. Go back to the source here. Fair

1 enough, Kyle?

2 LTCOL GREEN: We can do that.

3 Yes, ma'am.

4 CHAIR JONES: Okay. Okay. What
5 other points in this section, page 5, page 6?

6 BG TURNER: Judge Jones, Colonel
7 Turner.

8 CHAIR JONES: Yes, Colonel.

9 BG TURNER: So if we move to page
10 6, I just wondered about a structural matter.

11 CHAIR JONES: Okay.

12 BG TURNER: We are, in Section C
13 and Section D, asking the reader to evaluate
14 and hear essentially the summary of our
15 evidence over a number of points, as opposed
16 to integrating the two sections, C and D, so
17 that you'd have, for example, as an
18 alternative structure, victim reporting and
19 then the response -- reprisal, retribution,
20 and then the response; expectations of victims
21 and survivors, and so forth, as opposed to the
22 current structure which asks the reader to

1 retain quite a range of discussion points, and
2 then hear the countervailing point separately.

3 CHAIR JONES: What does everybody
4 else think about that? Hello?

5 PROF. HILLMAN: Judge Jones, this
6 is Beth.

7 CHAIR JONES: Yes.

8 PROF. HILLMAN: I don't have a
9 strong feeling about that. I think that this
10 does read like -- as Colonel Turner just said,
11 like a summary of a lot of material there --
12 you know, a lot of the arguments, and it sets
13 them out. But I don't have strong feelings.

14 Colonel Turner, you think it would
15 make it clear, or you just find this sort of
16 clunky? I mean, it's lengthy, but I didn't
17 find it all that hard to follow. You found it
18 tough to follow?

19 BG TURNER: Only in that, you
20 know, we are so immersed in this, I think we
21 can go through, because we've heard so many of
22 the arguments so many times, but for the

1 civilian readership it seems to me that if we
2 take it in smaller chunks it will be more
3 accessible to them.

4 CHAIR JONES: Go ahead, Beth and
5 Liz.

6 PROF. HILLMAN: This is Beth. I
7 would just say, I don't -- my sense of the
8 greater civilian readership is probably maybe
9 more limited than what some of you think who
10 will read this, but the framing of it I think
11 will really matter. So I'd especially -- the
12 executive summary or the -- you know, the top
13 piece of this certainly should do that. I
14 think you're absolutely right. But here --
15 I'm a little less concerned here.

16 I do wonder, too, if you want
17 those findings -- you know, the way that the
18 report is structured, the findings and
19 recommendations are in Part IX, you know, of
20 the overall report. So they are just -- they
21 are coming at the end.

22 I don't know if we could highlight

1 those or if maybe you're already planning the
2 summary -- the executive summary will
3 incorporate all of those findings I guess,
4 with the abstract at the top. So I think that
5 will do a lot of what the -- you know, trying
6 to break it down -- that we need to do.

7 CHAIR JONES: Yes. I think I
8 agree. I mean, it's true, I have no idea what
9 the civilian readership -- what difficulties
10 they might have, but I think it made sense to
11 me.

12 And I think the executive summary
13 fashions in that way, with issue and then the
14 arguments for changes, and then arguments
15 against changes, makes a lot of sense and
16 should alert every reader.

17 So I don't think I would recommend
18 redoing the section. What does everybody else
19 think? I guess we're okay with this, then,
20 the way it is.

21 MS. FROST: Judge Jones, this is
22 Joye Frost. I apologize, but it's a really

1 busy day for me and I'm going to have to
2 depart the phone call at this point, but thank
3 you.

4 CHAIR JONES: Okay. Thank you,
5 Joye.

6 REP. HOLTZMAN: Judge Jones, I
7 have to say the same thing. This is Liz
8 Holtzman. I apologize very much. I just
9 would like to make some overall general
10 points.

11 CHAIR JONES: Yes.

12 VADM HOUCK: Congresswoman
13 Holtzman, just a second. This is Jim. I also
14 have a 10:30 meeting I've got to bail out for
15 now. Sorry for the interruption.

16 CHAIR JONES: I think we're going
17 to have to end this at 10:30. So that's what
18 I had scheduled too, so --

19 REP. HOLTZMAN: Sorry.

20 CHAIR JONES: No. No one else
21 should have to apologize.

22 And then I think what we need to

1 do is get everyone's availability for another
2 conference. I'm sorry. Kyle, are you still
3 there?

4 LTCOL GREEN: Yes, Judge Jones.
5 We're still here.

6 CHAIR JONES: You're not leaving
7 for a meeting?

8 (Laughter.)

9 LTCOL GREEN: No. I think we
10 blocked the time. But we can do that, ma'am.
11 We'll send out -- and then anybody that's
12 left, if we have some written comments that we
13 can take, we can certainly circulate that if
14 that's more efficient for everybody, to
15 circulate comments among each other.

16 CHAIR JONES: Okay. Well, we're -
17 - we haven't closed the meeting yet, have we?

18 LTCOL GREEN: No ma'am, we
19 haven't.

20 CHAIR JONES: Okay. I think it
21 would be a good idea to try to rewrite the
22 section that discusses the Supreme Court

1 cases. I don't -- and maybe there is a way to
2 narrow it down. And again, since I haven't
3 read them, I don't know that I agree or
4 disagree with what is there now. But maybe we
5 can make an effort at that.

6 And the other thing is, I am
7 concerned about this cross-referencing, and
8 also the -- I guess we have to keep in mind
9 that these are readouts of Subcommittee
10 reports that we are talking about for the
11 whole Panel.

12 But since they do contain
13 statements in them where -- and data where
14 there may be more information in other
15 Subcommittee reports, we have to figure out a
16 way to cross-reference and maybe, as we did in
17 that one case, generalize and say, you know,
18 the statistics are comparable or -- as opposed
19 to getting into more detail, if we have a much
20 more comprehensive review and comparative
21 system. So that's the best example I can
22 think of at the moment, but I'm afraid there

1 are going to be other examples. And we -- I
2 think we need to give some thought to how to
3 fix this or handle it.

4 Okay. I don't have much else to
5 say, then, if anything. You're going to try
6 to either -- well, both solicit written
7 comments, Kyle, but also set up another
8 telephone availability.

9 LTCOL GREEN: Yes, ma'am.

10 CHAIR JONES: So that we can
11 continue deliberations. Okay.

12 LTCOL GREEN: Yes, ma'am.

13 CHAIR JONES: Thanks, everybody,
14 very much. Are you going to close the
15 meeting, Bill?

16 MR. SPRANCE: Yes, ma'am, I will.

17 CHAIR JONES: Okay.

18 MR. SPRANCE: This is Bill
19 Sprance, and the Subcommittee meeting is now
20 closed.

21 (Whereupon, at 10:31 a.m., the
22 Subcommittee meeting was concluded.)

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This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual
Assault Crimes Panel Meeting

Before: US DOD

Date: 04-08-14

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
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