The Panel met in the United States District Court for the District of Columbia, Ceremonial Courtroom 20, 6th Floor, 333 Constitution Avenue, N.W., Washington, D.C., at 9:00 a.m., The Honorable Barbara Jones, Chair, presiding.

PRESENT

THE HONORABLE BARBARA JONES, Chair
THE HONORABLE ELIZABETH HOLTZMAN
VICE ADMIRAL (RETIRED) JAMES HOUCK
BRIGADIER GENERAL (RETIRED) COLLEEN MCGUIRE
BRIGADIER GENERAL (RETIRED) MALINDA DUNN
COLONEL (RETIRED) HOLLY COOK
PROFESSOR ELIZABETH HILLMAN (by telephone)
HARVEY BRYANT
MAI FERNANDEZ (by telephone)
ALSO PRESENT

MARIA FRIED, Designated Federal Official
THE HONORABLE CHRISTEL MARQUARDT, Victim Services Subcommittee (by telephone)
MEG GARVIN, Victim Services Subcommittee
COLONEL PATRICIA HAM, Staff Director
LIEUTENANT COLONEL KYLE GREEN, Supervising Attorney
COMMANDER SHERRY KING, Supervising Attorney
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Public Comment

Adjourn
CHAIR JONES: First of all, good morning. And I want to explain that on May 5th and 6th, the Response Panel began to hear the reports from each of its three subcommittees, and to deliberate on and accept or modify or reject the various recommendations that came from those subcommittees.

This morning, we are going to finish the report out of the Role of the Commander Subcommittee and the recommendations made by that subcommittee to the full Panel which we were unable to complete on May 6th.

As I think you all know by now, we have three subcommittees, The Role of the Commander, Victim Services, and Comparative Systems. And many of the Panel members, all of the Panel members are on one or more of those subcommittees, plus we have a number of other members of subcommittees who are subject
matters experts.

This morning, you will see that we have Elizabeth Holtzman and Jim Houck who are both subcommittee members of the Role of the Commander Subcommittee as well as Panel members. And so we wear both hats.

Right now, I'm reporting out as the chair of the Subcommittee on the Role of the Commander.

We have already briefed the Panel on three major areas of study that we've done. Ms. Joye Frost, who is the Director of the Office for Victims of Crime at the Department of Justice, discussed the role of the commander in sexual assault prevention.

And Professor Geoffrey Corn, who is the Presidential Research Professor of Law at the South Texas College of Law was the subcommittee member who presented our report on climate assessment and command accountability.

We were able to discuss,
deliberate, and accept either in whole or with
some modifications on May 6th, the
subcommittee's recommendations in these areas
which were 5 through 13 and 20 through 28.

We actually have three additional
recommendations in the area of commander
accountability which I would like to go
through now.

The first recommendation I'd like
to talk about is Recommendation 21. This
recommendation is right in line with
Recommendations 27 and 28, and it's meant to
complement and strengthen both the Department
of Defense and Congress' efforts to hold
commanders accountable.

From the beginning of our
discussions as a subcommittee, we quickly
realized the importance of command
accountability, commander accountability, if
there was going to be success in implementing
the Sexual Assault Prevention and Response
Programs. And in fact, the Secretary of
Defense, as you will recall, just to do a little recap, directed the secretaries of the services to report on how they were going to implement SAPRO's 2013 Strategic Plan and as such, specifically directed them to develop metrics to enhance commander accountability, which they did.

The first action in the services was to modify performance evaluations so that they would now require specific consideration of SAPRO issues for officers and noncommissioned officers.

But 29, our recommendation there goes to the basic issue which is that before you, can hold the commander and anyone else accountable, they have to know what the goals are and what is expected of them. And so the services have made efforts in that direction. A particularly good example comes from the Navy. The Navy has provided tailored and specific guidance to commanders on the implementation of the Navy's Sexual Assault,
Prevention, and Response Program initiatives and have sent it to the entire fleet. These programs give guidance which is, as I said, specific on how to implement these initiatives. And they also explain and set out the standards and expectations so that a commander reading these will have a good idea of what's expected of him and then can be held accountable.

So our recommendation in 29 is in order to hold commanders accountable, DoD SAPRO and the service secretaries must ensure that Sexual Assault Prevention and Response Programs and initiatives are clearly defined and establish objective standards when possible. So that's basically our recommendation for 29.

Recommendation 30, which we'll go to now, is really just an extension of that. The service secretaries, it reads, should ensure sexual assault prevention, response, performance assessment requirements extend
below unit commanders to include subordinate leaders including officers, noncommissioned officers and civilian supervisors. This could not be more important and it's been touched on before during these proceedings.

We know that subordinate leaders in a unit play a significant role in the success or failure of sexual assault prevention and response efforts, and accountability has to extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors. So that is the basic backdrop for Recommendation 30.

The last recommendation which is 31 is actually a much broader recommendation which goes beyond the topic of command accountability. And it reads that, the Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O6 and above receive dedicated, legal training that fully prepares them to perform the quasi-judicial authority
and functions assigned to them under the UCMJ.

As we know from all of our interviews and all of our information and our study of the UCMJ, many of the decisions made by commanders are ones that do require assessing, making judgments about conduct, and then deciding what should be done about it, and it's a justice system. Obviously, all commanders need some training with respect to this and they receive it. But our recommendation is that it should be more intense and be dedicated legal training, not an ad hoc system.

I would just also add that obviously senior commanders have judge advocates on their staff who provide constant advice and training with respect to what we're calling these quasi-judicial issues. But we think our recommendation will promote, and we hope will promote, more dedicated and more training for commanders in an O6 and above range to help them with this kind of decision
making.

So those are the three recommendations that came from the commander accountability section which we didn't finish last week and I would open it up now to any comments, questions, or deliberation.

Colonel? I guess I'll be chair now. Go ahead, Colonel.

COL COOK: Judge Jones, on -- for the most part I agree with all three, just some clarifications or some nuances in the wordings. On Recommendation 29, I agree with the DoD and SAPRO making sure that everything is specific. I recommend to change that introductory language. The goal, I don't think, is to hold people accountable. The goal is to identify -- part of me wants to just say to ensure military leaders understand their duties and responsibilities, DoD and service secretaries. The goal is to get them to adhere to those duties and responsibilities. It's not to find
accountability after the fact. That may be a consequence if they don't do it, but I would just recommend stating it more positively. It's to make sure they know what they're supposed to do, make sure they do it. The system is written in a way that if they don't do it, they could be held accountable afterward as long as it was clearly defined. So that's a comment on 28.

CHAIR JONES: And are you thinking along the lines of to ensure the commanders know what is expected of them, language along those lines?

COL COOK: Since you in Recommendation 30 had extend below, just below commanders to supervisors, I would say to ensure military leaders, supervisors and leaders. Make it more generic to go in accordance with your recommendation at the next one. And I'd be okay with that. And then on Recommendation 31, I have no objection to the wording of the
recommendation. I would recommend a change to
the finding that's in the report itself
because it's not quite accurate.

I agree with giving mandatory
training, but dedicated legal training could
be at a capstone course, it could be any kind
of leadership training, but the finding 31-1
said that at the Army and the Navy JAG Schools
they provide senior commanders with mandatory
resident or on-site courses. The courses are
available and they are encouraged to go
resident or on-site, but there are occasions
where military exigencies prevent them from
going. It's not mandatory on site or
residence. They have to get that training.

If they can get to the JAG School that's the
gold standard, but if they can't, there are
SJAs in the field that provide them one-on-one
training. So I would just take the word
mandatory out of that finding.

CHAIR JONES: Are you saying that
there is mandatory training, but it doesn't
necessarily have to be residential or on-site?

COL COOK: No, it's not necessarily resident of the JAG Schools which is what your point is in that finding. You say, for example, the Army and Navy JAG Schools provide senior commanders -- I would say with resident and on-site courses on legal issues. There are other places -- they're going to get resident training as part of their leadership courses. It's not always at the JAG Schools.

CHAIR JONES: Okay, then my only question is, is there any mandatory training?

COL COOK: I would say yes. I would say in the --

CHAIR JONES: I'm not taking mandatory -- there is mandatory training.

COL COOK: It's incorporated into courses of instruction.

CHAIR JONES: Okay, fine.

Understood. Yes, General Dunn?

BG DUNN: I was just going to
clarify that the Army does have mandatory legal training incorporated into the mandatory commanders' training at Fort Leavenworth. And in addition has courses at the Judge Advocate Generals Legal Center and School which are focused specifically on commanders that provide additional training.

CHAIR JONES: Anything else? All right, well I think with those suggestions, we can make modifications acceptable to everybody. Based on our discussion, I believe Recommendations 29, 30, and 31 have been accepted with those modifications.

All right, the remaining session of our subcommittee report centers on the role of the commander as convening authority.

And on January 30th, this subcommittee presented its initial assessment that senior commanders should retain authority to refer cases of sexual assault to courts-martial. After deliberations on that initial assessment, the Panel adopted it with a
dissent from Professor Beth Hillman joined in by Mr. Bryant.

Today, the subcommittee reports out that it remains in agreement that senior commanders should retain convening authority and recommends against current legislation that would modify or remove that authority. In this regard, we have three recommendations and Professor Hillman, are you on the phone, Professor?

PROF. HILLMAN: Yes, Judge Jones.

CHAIR JONES: Okay, who is a member of our subcommittee who has presented -- is dissenting and has presented her written dissent in Section 10 of our subcommittee report. Let me begin by presenting some of our basic findings surrounding the issue of the convening authority which I think are important to understand and to our conclusions.

First of all is the fact that the term commander is not synonymous with the term
convening authority. Convening authority is a person authorized to convene courts-martial for serious violations of the Uniform Code of Military Justice. Most commanders are not convening authorities and only a very few senior commanders have convening authority.

We've also found that commanders with authority to refer sexual assault allegations for trial by court-martial are elevated in the chain of command to the point that they will not only be removed from any personal knowledge of an accused or the victim. And specifically, under the new legislation enacted by Congress in NDAA 2014 and under current practice, only a general court-martial convening authority is authorized to make the decision whether or not to take the case to trial for the offenses of rape, sexual assault, and forcible sodomy, as well as the attempts to commit those crimes.

We've also found that the victim of a sexual assault does not have to report
that sexual assault to anyone in their military unit or any member of their chain of command. Victims have a number of channels outside of the chain of command to report incidents of sexual assault.

In addition, under current law and practice unrestricted reports of sexual assault must be referred to and investigated by military criminal investigative organizations that are independent of the chain of command and no commander or convening authority may refuse to forward an allegation or impede in an investigation.

In addition, any attempt to do so would constitute a dereliction of duty or obstruction of justice in violation of that Uniform Code of Military Justice.

This subcommittee, as well as the full Panel, has listened carefully to the very powerful testimony of victims' advocates and victims of sexual assaults and we have witnessed personally the pain and the damage
to the community, body, and spirit caused by those assaults. We are aware that this is not a new problem in the military and that there have been many previous efforts by the military to respond to this problem with not enough success.

We recognize that virtually all of the victims' advocate groups we heard from and most of the victims who have testified before us, earnestly believe that removing the commander as the convening authority will not increase victim confidence in military justice system and promote reporting.

We have also listened to a number of current and former commanders. While some agree with the position that the convening authority should be removed, most do not. The majority stressed the unique society that is the military, a society based upon discipline and the need for commanders to maintain good order and discipline if they are to remain mission-ready. They honestly believe that the
authority to order courts-martial in felony cases is necessary if commanders are to remaincredible leaders and to enforce values, and they maintain that if they're to be heldaccountable in reducing sexual assaults, they should also remain responsible foradministering justice.

After analyzing these positions, the subcommittee finds that it is not clear what impact removing convening authority from some of the commanders would have on the military justice process or what consequences would result to organization, discipline, or operational capability and effectiveness. Having said that, we also find that the evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault, increase reporting of sexual assaults, improve the quality of investigations or prosecutions or increase the conviction rate in these cases.
These findings are supported by a volume of analysis that this subcommittee did and the experience of the military justice systems employed by our allies. Although they have eliminated the role of the convening authority and have placed prosecution decisions with independent military or civilian entities, the evidence does not indicate that the removal of the commander from the decisionmaking process has affected the reporting of sexual assaults. In fact, despite this fundamental change to their military justice systems, our allies still face many of the same issues in preventing and responding to sexual assaults as the U.S. military does.

In this regard, we also found that civilian jurisdictions face under-reporting challenges in sexual assault cases that are similar to the military and it is not clear that the criminal justice response in civilian jurisdictions where prosecutorial decisions
are supervised by elected or appointed lawyers is more effective.

It is also worth noting that we find that senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. First, if a convening authority has other than an official interest in a particular case, a convening authority is required to recuse himself or herself just as a prosecuting authority or judge in the civilian world would have to do.

Second, as with leaders of all organizations, commanders often must make decisions that will negatively impact individual members of the organization when those decisions are in the best interest of the organization.

Our mandate from Congress and so our focus with respect to the subcommittee on
the Role of the Commander is to analyze the problem of sexual assault and recommend measures that will be successful in preventing it and reducing it. The subcommittee does not believe that there is sufficient evidence to support that eliminating the convening authority from the Uniform Code of Military Justice will achieve either of those results.

If we could go to Recommendation - well, you have. Recommendation 15 and I should say here that Recommendation 19 and 15 are virtually identical, so I will go with 15. It simply reads that Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by a court-martial beyond the recent amendments to the UCMJ and Department of Defense policy.

And if we could go to Recommendation 1 now. Recommendation 1 follows from the findings and the recommendation that I just read which support
our recommendation which is that we recommend
against any further modification to authority
vested in commanders also designated as court-
martial convening authorities. So we do not
recommend Congress adopt the reforms in either
the Sexual Assault Training Oversight and
Prevent Act, the STOP Act, or the Military
Justice Improvement Act, also known as the
MJIA.

In this regard, we believe that
Congress should not make any further changes
to the convening authority until current
important initiatives that have begun can be
evaluated for their success or failure in
responding to sexual assaults. Congress, over
the last two years, has enacted significant
amendments to the Code to enhance the response
to sexual assault in the military and the
Department of Defense has enumerated and
implemented numerous changes to policies and
programs for the same purpose.

Some changes have just been
implemented; other amendments to the UCMJ have not yet been implemented. The Department of Defense has yet to fully evaluate what impact these reforms will have on the incidence of reporting or prosecution of sexual assault in the military. And so for that reason, we believe that those changes and implementations should be given some time.

Now to go specifically to the MJIA and I just will make this distinction between the two acts, the STOP Act and the Military Justice Improvement Act both call for the removal of the commander as the convening authority, but in the STOP Act, it would be the creation of a prosecutorial judicial process which would not include commanders, but it would only cover sexual assault crimes.

In the Military Justice Improvement Act, it would call for a new set of military prosecutors and I'll get into that a little bit more in a moment, but all cases that one might consider, I guess the easiest
way to describe it is felony cases which would be all serious cases including sexual assault cases would no longer be in the jurisdiction of the convening authority, but would go to a separate group of military lawyers. And I should say in that regard with respect to serious felony cases, some have been exempted under the MJIA which were considered to be specifically military crimes such as desertion and other crimes of that type. But otherwise, all serious felonies are included in the MJIA.

In addition to the reasons that the subcommittee has already given with respect to this issue, there are a couple of things that we also find that are of concern with respect to the Military Justice Improvement Act. It seems to us that it would involve significant personnel and administrative costs. Essentially, it is a bill that calls for a separate military prosecution system outside the chain of command staffed by military lawyers who must
be senior judge advocates with prosecutor qualifications at the level of O6 or above.

We have found that the existing pool of O6 advocates is finite and to implement the MJIA, these qualified judge advocates would have to be reassigned from other assignments that are related to important aspects of military legal practice. The problem with this -- in regard to this specific issue is that this bill, although we believe that it would involve significant personnel and administrative costs includes the statutory restriction on the expenditure of additional resources or authorization of additional personnel. That's merely an additional specific comment with respect to the MJIA that went into our considerations.

Professor Hillman, did you want to make a statement or present your dissent at this point?

PROF. HILLMAN: Yes, Your Honor.

Thank you for the opportunity to speak and I
I apologize for not being able to attend in
person.

I think these are very important
recommendations and I appreciate the work that
the subcommittee has put into this effort and
also to the members of the Panel for convening
to review these findings and recommendations.
So I won't reiterate what I said before when
I explained why I thought that prosecutorial
discretion belongs with trained and
experienced prosecutors, the same people that
civilian systems and federal and state and
also most well respected military systems rely
on. But I'll just focus on what I view as a
fundamental difference between the way I see
the chain of command and the way the other
subcommittee members see it.

Commanders are critical to
military operational success and also to
success in solving difficult problems like
military sexual assault, but the hierarchy of
the military and the impact of rank and of the
demographic balance of the military leaves us with a different problem with respect to sexual assault than in other circles. And the subcommittee report likens the sexual violence in the military precisely to what happens in the civil sector and I just don't think that that's a reasonable conclusion, nor do I think that commanders can be considered as the solution without some checks on the power that they have in the military justice system.

And really, our military justice system has already evolved significantly to reduce the authority of commanders in many ways that Judge Jones just recounted. This would be a step that would make the court-martial process and the entire, from beginning to end, response to sexual assault something the commander had a role in, but not something the commander controlled in a way that undermines the legitimacy of the entire system and rejects international norms and U.S. norms of procedural justice.
So I'll just note that to me, the fact that commanders continue to run into trouble in the high profile ways here means that despite the training which we just recommended also that be increased for commanding officers, that putting excessive legal authority in the chain of command doesn't solve the problem of commanders erring in this really critical role. And the quasi-judicial role that Judge Jones just mentioned, the training that we're adding to help commanders manage that, puts them in a very difficult position.

So the subcommittee report actually talks quite a bit about the training, grooming officers for command, and yet we've had officers groomed for command who have -- who continue to make missteps in this area that redound to the detriment of victims of sexual violence in the military today just as has happened in the past. And I would privilege the comments of those survivors of
military sexual assault rather than those of commanding officers who I think should retain the authority to take all these steps that are so important in changing the climate and advancing the cultural changes that will reduce the incidence of sexual assault in the military, but I see no reason to leave this decision to prosecute in the chain of command. Thank you, Judge Jones. That’s all I have to say.

CHAIR JONES: Thank you, Professor Hillman.

Is there comment, deliberations, questions from the Panel?

MR. BRYANT: Yes, Judge Jones.

CHAIR JONES: Mr. Bryant.

MR. BRYANT: I had intended to save the majority of my remarks for Recommendation 19, but --

CHAIR JONES: You know, I think 19 and 15 are so similar that -- feel free to go ahead now.
MR. BRYANT: Okay, I thought I would wait until they got -- it was actually on the board. I disagree with Recommendation 15, Recommendation 1, Recommendation 18, and I don't know at what point we're going to get to that, and Recommendation 19.

And let me say that in terms of specifying sexual assault offenses, I agree with those who say that if we're going to limit or change the authority to prefer charges and initiate general courts-martial, it should be for all felony-level offenses, not just for sexual assault. To take that one crime and carve that out of the rest of the mix really is -- really will cause some problems. So when I speak of this, I'm talking about the general authority of commanders who have the rank and the position to initiate general courts-martial in any felony-level offense.

My memory and my understanding of my notes from when we were in this very
courtroom at one point is that the generals and admirals who came before us, all well intentioned, all well experienced -- and I want to say before I go further that I certainly admire the work and the diligence that the Role of the Commander Subcommittee has put into this. I respect your work and your findings and your effort to come up with these recommendations. So it is with all of that respect for the work that you've put in that I respectfully disagree with these following recommendations.

When we were here at one point with several generals and admirals on this very topic, what came through to me and what my notes and memory seem to say is that the primary reason they did not want this authority taken away from them was they felt that it would somehow affect morale in the unit. Well, what are we going to say to the men and women who we send into battle? Are we going to suddenly say that Congress does not
trust us to make the decisions in courts-martial when they trust us to send the sons and daughters of this country into battle?

And the other thing was that some idea that I want the troops to know that if they have committed these crimes, I'm the person they're going to have to answer to, and I just don't see realistically that either one of those are true, are going to be true. I asked during other deliberations, do we have any idea that the average soldier, whether he be enlisted or even an officer, is going to have less respect for their commander and all the other war-fighting decisions that have to be made just because they're not now going to be the ones who will decide who is going to be court-martialed if we give that over to the professional prosecutors who exist in the military.

The reason that I just don't believe that is going to be true is that we have heard nothing publicly, nothing from
Congress, nothing before this committee that
the changes that Congress has already made in
restricting the authority of the convening
authorities in a variety of ways in terms of
what punishments and when they can do and
initiate certain charges, we have heard
nothing that suddenly there's a lack of
respect or a lack of morale within the units
because, gee whiz, Congress doesn't trust
General Smith and I don't mean any General
Smith in particular. I mean a hypothetical
General Smith or an Admiral Jones. So we
haven't seen any of that. And I just really
doubt that we would see it if suddenly or
through legislation the convening authority
was taken away in general courts-martial and
given to prosecutors as, much more eloquently,
Dean Hillman has told us about today and
earlier.

The other reason that I don't
think it would have that effect is that I
honestly don't believe that the majority of
the people in the military even know who the convening authority is for general courts-martial. I just don't believe it. And some proof of that, if you don't mind, is that obviously, unscientific, random survey that I have taken the liberty over the last several months of asking people, both active and retired, in my neighborhood, in my social circles, in airports, at Portsmouth Naval Hospital where for family reasons I've had to be several days recently, asking active duty and retired and in my neighborhood, like a lot of neighborhoods in the Norfolk-Virginia Beach area, we have -- this is just to my knowledge, there may be others, a retired commodore, five retired Navy captains, one active duty Navy captain and a retired Army O6 colonel.

When I take these random surveys and just go up and say who's the convening authority in your unit for general courts-martial, often the enlisted people just give me a blank stare because they don't know what
I'm talking about. The officers know what I'm talking about and are generally unsure. When I say this is random, I'm talking 12 to 15 people total, that's all, just walk up and say hi, I'm conducting a random anonymous survey, do you know who the convening authority of general courts-martial is?

Some of the officers will give me a name or a position. And I will say are you sure? And they'll say no, I'm not sure.

I remember a particular active duty field grade Army officer who was at a particular post in the United States, that's where he was stationed. And when I asked him he said I think it's the post commander. That would make sense because we're all within his purview. But, said this field grade Army officer, it might be the division commander because our division headquarters are at a different post. He wasn't sure. And I just don't think as we talk about that and look at that and use our common sense that this idea
that the average soldier needs to know that

General So and So or Admiral So and So is the

person they're going to have to answer to and

who can potentially cause them to be charged

with felony offenses, I don't think they know

that any more than the average citizen can

name their prosecutor, except when they see it

on the ballot every four years or can name who

their chief of police is because it's not

something that's in the forefront of their

mind.

I hope that our sailors and

soldiers and airmen do not constantly have in

the forefront of their mind with all the other

things that we expect of them who is the

convening authority if I commit a felony. If

that were true in the civilian world, then

maybe we wouldn't have as much crime if they

had constantly in the forefront of their minds

who is the prosecutor, who is the chief of

police. I hope what they have in mind is how

they're going to do their jobs and they have
no idea that at some point they may commit
something that's going to cause them to come
before a general court-martial.

So I don't think it's going to
affect morale. I don't think that the idea
that the average person in the military knows
who the convening authority is true because I
did not find that to be true in my informal
survey of primarily O6s and below.

So the other aspect of that that
comes in my mind is that on one of our site
visits -- this was just the Comparative
Systems Subcommittee, and we agreed that those
comments would be off the record and not
attributable to anyone in particular. But
among the site visits at a major military
facility, we found that the convening
authority there had absorbed convening
authority from other lower-level convening
authorities and was the convening authority
for about 100,000 troops.

We also heard that that convening
authority always followed the advice of his SJA. We also heard that that convening authority for approximately 100,000 troops, and a direct question was how long is spent on convening authority matters in a week or a month, and without hesitation, the answer was 15 minutes a week.

Assuming that's all it needs and that's all it takes, and I have every belief that that is all it takes, if you're just doing what the SJA says every time it comes up. I don't know why it would be the end of good order and discipline as we know it if those decisions were being made by a professional military prosecutor.

Another example and I'm sorry that this answer is long, but since it's going to cover several recommendations, we all bring our own experiences and many of you have fantastic experience way beyond anything that I could imagine in terms of your military background. And I respect that and I
appreciate that from every one of you. But I recall when I was first enlisted before I went to Infantry OCS, guard duty. And for guard duty, you had to be able to name the, quote, chain of command. It was amazing how many people could not remember the chain of command beyond, say, the brigade commander, even though you know that when you went to guard duty, if you didn't know those things, you were going to be standing in front of a first sergeant the next morning and then over and over. So they drilled us. They had us memorize it before we ever went. And many, many people could not remember their chain of command, even as important we stressed that it was. So again, I have to wonder who is aware of, in the military today -- I don't even know if people stand guard duty anymore, but I can recall once I became an officer, being the officer of the guard and when I was the one asking the questions about chain of command, and again it was difficult for those who were
assigned guard duty, even though they had been
drilled and knew from former guard duties that
when they came there they better know the
chain of command which did not frankly involve
a question of who is the convening authority
of a general court-martial. And I don't mean
to be flip about it, but it involved the
normal general chain of command, those who
have their pictures on the wall.

And at Portsmouth Medical
Hospital, by the way, the picture of the
convening authority is not on the wall over
there because that's not what affects the
average person at that facility which is a
major facility treating Army, Navy, Air Force,
all sorts of people in our region.

But even as officer of the guard,
I found that the ire of the lower commands
came the most when a soldier couldn't name who
the first sergeant was and I'll never forget
the day I went back the next morning and said,
"First Sergeant, So and So didn't know who is
his first sergeant." And of course, you could imagine the verbiage that came out of his mouth and said he will know who I am before this day is over.

So all those anecdotal stories just support how, in my mind, it's not really going to have a morale effect, nor the other effects in terms of good order and discipline or I want them to know they're going to be answering to me because I don't think the -- I don't mean to repeat myself -- I don't think he average troop and my informal, unscientific, admittedly unscientific survey, I didn't find that field grade officers were sure who was the convening authority for general courts-martial were, was, is.

The other thing that we heard from the admirals and generals here that was, if we took this away from commanders, whether it's the convening authority or commanders, in general, and it was being handled somewhere else, that they really wouldn't be paying
attention to it. If I'm not responsible for charging, then I'm not really going to care about the other aspects of this which struck me as a very odd thing, if not a very dangerous thing to be saying. Because I can't believe that just because I'm not going to be convening authority, that suddenly sexual assault in their unit isn't going to be on their radar.

The third or fourth aspect was, well, just like -- and they gave us an example, when these offenses occur in town, they're, quote, off my radar, said one of the general officers. Off my radar when they occur in town. And frankly, again, at one of our site visits, at a major military facility there, you've got an awful lot of prosecutions were taking place in the surrounding cities, we heard just the opposite, no, I track those every minute. Those cases that are going to be prosecuted by civilians I track every minute. I believe our commanders, as
conscientious as they are in preparing their
troops for war-fighting, are going to follow
charges whether they are initiated by a
military commander or whether initiated by a
senior military prosecutor who does this as a
profession.

The other thing that strikes me
about the necessity to do that is, and this
may get into other aspects, Judge Jones, of
other recommendations is the recommendation
against higher review. It would be higher
review of these decisions by the secretaries
of the services or the next highest general
court-martial level. It would seem to me,
with the presentation and attitude of, yes, we
should do this, we should keep this, this
should be within our purview, I'm confident
that I'm doing the right thing. I'm confident
that I'm getting good advice from my SJA, it
just seems to me that the better tactic and
the better strategy and I'm surprised that
we're not hearing it from the military would
be, yes, review what I do. I'm not -- I have
every confidence that what I do is right. Go
ahead and review it. Secretary of the Army,
he can send it to the President, because I
know what I'm doing. And yet, we're hearing
just sort of the opposite. We don't want to
do that. It may cause undue pressure,
unnecessary command influence.

And so I don't understand,
frankly, the military for whom I have a great
deal of respect in their many, many functions
that they have to do and do for us, I don't
understand why they are resisting review of
their decisions at a higher level if they're
so confident that what they're doing is, in
fact, the right thing.

The last -- I'm going to stop in
just a minute. The last thing that occurs to
me is that at least when you have prosecutors
making these decisions, lawyers, licensed
lawyers in whatever state, there is always the
possibility of a review of their decision making in terms of whether or not it's ethical by their state bar associations and I realize that there is a body of law that goes back and forth at the state bar associations can't dictate what a government lawyer can do and I experienced that when I was in the U.S. Attorney's Office. But that prospect is there that those decisions to prosecute without sufficient grounds are reviewable as an ethical violation. That doesn't exist in the military commanders. So again, I wonder why they would be critical of a review of their decision making process.

In short and to sum up, I respectfully disagree with the subcommittee's Recommendations 1, 15, and 19 and associated.

CHAIR JONES: Thank you, Mr. Bryant. I guess I should say we are now deliberating as the Panel, so I think I've made most of the remarks that I intended to make.
Are there additional statements or remarks that anyone else would like to make?
And I know, Professor Hillman, you're on there. Ms. Fernandez, are you on there?

MS. FERNANDEZ: I am.

CHAIR JONES: Thank you very much.

Okay. Any other comments?

Admiral?

VADM HOUCK: As a member of the subcommittee who is supportive of the recommendations of the subcommittee, I want to make just a couple of very brief remarks.

I think fundamentally the Uniform Code of Military Justice has played a fundamental role in the success of the U.S. armed forces over the past several decades and that the role of the commander in the UCMJ has also been fundamental to the success of the UCMJ and the role that the UCMJ has played.

Throughout this nearly year-long process, at every turn, at every opportunity,
I and others have asked the question of proponents of change of removing the commander from the process for empirical evidence, for some evidence to suggest that this would make a difference, that the significant and arguably radical change, removing the commander from the process would be supported by some notion that it was going to make a difference. This question has been asked of the domestic proponents. It's been asked of proponents from foreign militaries. It's been asked of law enforcement and judicial officers from civilian jurisdictions, even in the United States.

There has been no evidence, none, zero evidence that this change would make a difference. Judge Jones made that point in her preliminary remarks, but I wanted to reinforce it. There has been speculation. There has been anecdote, but there has been no evidence that this would make a difference.

I think one of the things that has
gone a little but unnoticed in this process is that what I think is the interesting phenomenon that of the proposal for these changes, that the proposals are not to remove the military from the process, but to put the onus of the decision making on military prosecutors. I find it interesting and fascinating that not a single trained, licensed, military prosecutor that has appeared before this Panel throughout the course of the past year has supported the very change that is supposed to put military prosecutors in charge of this process.

I think some might argue that yeah, that's because many of them were on active duty and are beholden to the chain of command and are going to be unwilling to speak freely about that. I'm not. Having served for 27 years as a licensed attorney in the United States armed forces, I've seen it in a variety of vantage points.

I think it would be a significant
error to remove commanders from this decision-making process because I believe that the commanders play a constructive role which is not to say that commanders are always perfect.

In a system as large as the United States armed forces and as many people who are involved in decisions, you will have people that make decisions that are questionable. You will have people who make decisions that are arguably wrong. But I think that by and large, and this admittedly is anecdotal on my own part, the dialogue that goes on between judge advocates and commanders who know their units is enormously productive and enormously beneficial and serves the interest of justice.

I think that there are many, many changes that this Panel is going to endorse, not only the Role of the Commander Subcommittee, but the other two subcommittees as well, significant changes that are going to make a difference in fighting the scourge and contemptible crime of sexual assault in the
military. I think those changes will make a difference. I do not think that removing the commander from the process is going to be productive, but that the other changes are the way to go. Thank you.

CHAIR JONES: Thank you, Admiral Houck.

Is there anyone else who would like to comment? Ms. Holtzman?

REP. HOLTZMAN: Thank you, Judge Jones. I made comments on this issue before, but since the dissenters are speaking out, I just thought that the public should not think that by our silence we are not responding to the dissent. So I just want to make a few points on which I made before. I'll try to be real brief.

First of all, the claim that we need to privilege victims, we have heard from no victims of crimes other than sexual assault and yet, this is a change over the fact the prosecution of every serious crime in the
military, aside from specifically military crimes, as you mentioned, Judge Jones, such as desertion. We have no evidence to support the need for such a change with regard to those crimes and yet that demand has been made to us without evidence.

Secondly, the idea that somehow putting the decision making into the hands of professional prosecutors is a panacea is wrong. I want to say first I have no military experience and I don't speak from that perspective. But I was a prosecutor in the fourth largest office in the United States for eight years. I have some familiarity with that system. I would say most of the people who worked for me were dedicated, conscientious, trained, caring people. But they made mistakes and right now, in Brooklyn, New York there is a special panel that has been convened to review cases of serious prosecutorial misconduct over the past 20 or 25 years.
So the idea that, oh, if we take it away from a commander and give it to a professional prosecutor we are going to have justice. I mean that's just nonsense. And I think sadly contemporary history shows the contrary. People are human beings and they can make mistakes. What you try to do is have trained, competent people and actually this system in the military justice has its checks and balances which we don't really have in a prosecutorial system. After all, the convening authority must, M-U-S-T, has to, discuss the decision of whether to prefer charges with his or her SJA which means there is already a discussion of a need to prove your case. And the special judge advocate can raise any disagreement that he or she has with the convening authority to higher level. But the idea that there's no review, I think, with all due respect is not quite accurate. There is a check and balance in this system.

And I think without spelling out
how the prosecutorial role is going to be played here, it would be irresponsible to change a system and say oh, we'll let the professional prosecutors handle it without describing how that's going to happen and without funding it.

And finally, the idea that people don't know who the convening authority is and the anecdotal research that's been done, I think that that's -- my own sense is that that is the results of that endeavor reflect my own intuition which is that many people don't know who the convening authority is and the conclusion that can be drawn from that is not that you need to change the system, but that the absence of knowledge of who the convening authority is, is not affecting the decision one way or another of the person who is a victim of crime to come forward. That's the conclusion that I draw. I know everybody is very passionate about changing a system that has produced too much sexual assault and too
much pain and sorrow for the victims and too
much disgrace for a great military and to this
nation. But we should not be looking for a
silver bullet that's going to solve this
problem. It's an unrealistic effort. We owe
the victims more than that.

I think there are serious and
important and systematic changes that are
being made, need to be made such as Special
Victims' Counsel that will have an enormous
and profound effect on how the military
handles this system and how victims handle it.
But I think this is an ill-advised, not
thought through proposal, very well
intentioned because people want to solve this
problem, but the problem -- this is not the
solution to the problem. Thank you.

CHAIR JONES: Thank you, Ms.
Holtzman. Anyone else? Colonel Cook?

COL COOK: If I may? And I agree
with the subcommittee on this and with the
comments just offered by Representative
Holtzman and Admiral Houck. And one of the things I just wanted to take on from what Representative Holtzman had said and one of my biggest concerns is as you noted, the convening authority now must confer with the judge advocate. If we take this out and put it just in the judge advocate channels, that reciprocal requirement wouldn't be there and I will say that you would take away a fairness perspective that's there.

The military is not the civilian community where somebody may get into trouble. You go through a disciplinary action. They go to jail. They go home. They get probation. And the problem is solved. Within the military that command structure and that command unit continues to exist. The questions that are presented are not always just legal decisions. Good order and discipline is more than that. Things like bad checks; somebody not doing their job or they're late for work, dereliction of duty, if
you will; an improper relationship, for us,
fraternization. They affect the way that
command is going to operate. They affect the
morale and welfare of everybody if they're not
addressed and I do agree with that concept.

You don't pull the convening
authority out of one offense, but not all. So
assume you pull them out of all, you need that
judge advocate and commander discussion. The
lawyer is going to bring to the perspective,
hey, this is what the requirements are. This
is everything you need to be aware of. And
the commander is going to bring to the
discussion the holistic impact it has on that
unit, what should be done.

The fact that somebody does
something wrong doesn't automatically mean
it's a court martial and there's a whole host
of tools that are out there. So I'd say that
the system the way it is now that forces a
convening authority to confer with the judge
advocate, especially if the general court
martial convening authority, it is a high-level officer who's got a lot of experience providing that advice, the benefit to the entire community that's affected, the unit, the accused, and the victims that are involved, it's not all crimes, have a person as a victim, some of them are victimless, but everybody's interests are considered as part of a holistic review with those two people being involved. And to take out one side or the other, the military is going to lose that synergy that, as Admiral Houck said, has proven effective and the perception of fairness over the years.

CHAIR JONES: Thank you, Colonel Cook.

Ms. Fernandez, General Dunn, General McGuire, any further comments?

MS. FERNANDEZ: This is Mai Fernandez. I don't have any at the time.

CHAIR JONES: All right, thank you. PROF. HILLMAN: Judge
CHAIR JONES: Yes.

PROF. HILLMAN: This is Beth Hillman.

CHAIR JONES: I'm sorry, Professor.

PROF. HILLMAN: I'd just like to make a point briefly.

CHAIR JONES: Sure, go ahead.

PROF. HILLMAN: I just wanted to say that I appreciate the comments of everybody on these issues. I understand that we disagree. It's a perspective on where the system is headed and how we're negotiating around what I see as a central problem as opposed to whether this is -- that all the changes actually are able to support this sort of central premise.

I just wanted to mention in response to Admiral Houck's statement that there's no judge advocate for the record stating that we should make this change.
I have heard from many judge advocates who think that we should, but they're not on the record for a reason, because they're in the line of duty, because it doesn't help their -- there are some who have written about this, but it's not in their interest and it's actually not in their job description to get out there and to make statements that are contrary to what their commands are saying on this very issue and testimony before us.

The military is not monolithic. There are many brilliant lawyers throughout the services who have a range of different opinions on all the issues that we're trying to address. And I appreciate all of that experience that we hear from, but considering all of those judge advocates out there with all the different experiences they have as agreeing on any particular point is just a mistake in terms of understanding where they're coming from on this. That's all.
Thanks, Judge Jones.

CHAIR JONES: Thank you, Professor. All right, then with respect to -- and let me just go back up to the podium for a minute. Will you put Recommendation 19 up there, the actual recommendation? Pardon me? I think we were showing 15 originally, correct? Oh, I'm sorry, okay.

The reason 19 is not even in the deck is it says the same thing as 15. So at this point, I believe that we have two dissents from the recommendations which are 15 and 1 of the Role of the Commander Subcommittee, with the remaining members of the Panel in favor of those recommendations. Is that correct?

PROF. HILLMAN: Yes, that's correct.

CHAIR JONES: Then those two recommendations are accepted.

All right, I'd like to move on then to Recommendation 2 of the Role of the
Commander Subcommittee.

This is actually a recommendation that's also been made in substance by the Comparative Systems Committee. And it's our recommendation that Congress should not adopt Section 2 of the Victims Protection Act of 2014. And we believe that the decision whether to refer a case to courts martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

The act that we're recommending against is actually legislation that would mandate secretarial review of cases involving sex-related offenses when the senior trial counsel on a case recommends that charges should be referred to trial and the convening authority

upon the advice of her staff judge advocate
decides not to refer charges. And I think you alluded to this, Mr. Bryant, a little bit.

MR. BRYANT: Yes, ma'am.
CHAIR JONES: Basically, our subcommittee, as well as the Comparative Systems Subcommittee, think it's just simply inappropriate to elevate the assessments of a trial counsel and trial counsel are generally more junior and less experienced than the staff judge advocate who is advising the convening authority to elevating that assessment to require review when it's in the convening authority and a much more experienced staff judge advocate.

So we agree with Comparative Systems, and although theirs has not been deliberated or voted on yet, we would recommend that you agree with our Recommendation 2. Is there any discussion with respect to that?

Mr. Bryant?

MR. BRYANT: Yes. Judge Jones, thank you. Again, it goes without saying that I have the great respect for the work that this Role of the Commander Subcommittee has
done.

In terms of review at a secretary level, I would re-adopt my earlier statements. I guess in a courtroom, Judge Jones, you would hear one of the lawyers say "I have a continuing objection."

CHAIR JONES: You've got it, Mr. Bryant.

MR. BRYANT: Yes, to that. But I just want to point out that our commanders at almost every level, at every level are subject to review in almost everything else they do, especially when they are in their war-fighting capacity. The decision to launch an air strike, the decision to call in artillery, the decision even to where to place a particular outpost is going to be subject to review, especially when something goes wrong.

There have been numerous times in Afghanistan and one in particular stands out in my mind that I'm aware of and watched young Sergeant White receive the Congressional Medal
of Honor this week in the East Room of the White House and that particular unit, not that event that he was involved in, but another event by that unit was highly scrutinized at all levels, up through the United States Senate over the decision of where that unit was placed, what preparations were made to defend the perimeter, to supply water, all sorts of things was questioned and reviewed up through two- and three-star generals.

Who was being reviewed? A company commander, a battalion commander, and a brigade commander. It went on for over a year, maybe two. I may be short on how long it went on. But the point is -- and they were all eventually cleared of having -- of any wrongdoing or dereliction of duty or any of those things. But my point is our military commanders are subject to review in much, much more serious events when life and death is on the line for our young soldiers and sailors and airmen and why there wouldn't be the
tactic, the strategy, for the military to come in here and say yes, by golly, go ahead, review me, I ask that you review me because I'm confident that the things that I do are right. Or when I play prosecutor, when I play judge, I know I'm confident that I'm doing the right thing. So please, review my decisions. Thank you.

CHAIR JONES: All right. I just have one comment which is to say that I think Recommendation 2 is not so much about kicking a decision to a higher up, it's about -- because frankly, with respect to charging decisions by convening authorities, there are provisions for when there's a disagreement with the staff judge advocate for there to be higher review. Article 6 provides for it. Congress has now more legislation that will send it to as high as the secretary. This provision, I think, is really about having someone junior in the process being able to stop the train and ask for a
review to go forward. And it seems even -- I
won't say even from, in my experience it would
be unusual to have or to permit someone who is
junior in the system to be able to not just
challenge and debate, but also have the
ability to engender a review above a more
senior person. And I think that's the main
reason behind that.

Did anyone else have a comment?

Mr. Bryant, I understand that you
dissent. Does anyone else dissent from
Recommendation 2? All right, then that's
accepted. Thank you.

Recommendation 3.

COL COOK: I'm sorry, Judge Jones,
just to qualify, Recommendation 2 that's
accepted, but you're using the language that
the Comparative Systems report had done or the
language that you have --

CHAIR JONES: No, our --

COL COOK: Your language, okay.

CHAIR JONES: Our language.
Recognizing that we may have to reconcile them when we deliberate Comparative Systems.

COL COOK: I just wanted to clarify.

CHAIR JONES: Right, thank you, Colonel.

PROF. HILLMAN: Judge Jones, can you hear me? This is Beth Hillman.

CHAIR JONES: Oh, yes, Professor.

PROF. HILLMAN: I'm just in the continuing objection category of Mr. Bryant, just to be clear on that.

CHAIR JONES: Oh, all right.

Thank you.

PROF. HILLMAN: Thank you.

CHAIR JONES: Do we have three?

Let me start talking about it anyway. Section 3(d) of the Victims Protection Act of 2014 calls for a climate assessment following each report of a sexual offense. And frankly, our thinking in recommending that Congress not adopt this fairly straight-forward, it's just
not clear to us at least, the subcommittee, how that assessment would necessarily be effective. And also, we have a lot of concern that has been discussed by the subcommittees and panels before about more surveys causing more survey fatigue. And frankly, we think there are probably better ways to respond to each individual sexual assault incident.

And our recommendation is not only that Congress should not adopt 3(d) of the VPA, but also that the Secretary of Defense should direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the noncriminal factors surrounding the event. And such reviews should address what measures ought to be taken to lessen the likelihood of recurrence and that could be physical security, lighting, access to alcohol offered at establishments, etcetera. I have very little doubt that those types of things are not being done now by military investigators,
but I think as with all things, having a formulation for such a review process could standardize it and would be very helpful.

And I know that some of commands have developed review processes and we think they should be evaluated in connection with this so that the DoD can formulate a review process. Are there any comments with respect to Recommendation 3?

COL COOK: Judge Jones, a question. You're not suggesting that they come up the review process, but the --

CHAIR JONES: I'm sorry, I'm just having a little trouble hearing you.

COL COOK: I'm sorry. In that recommendation, I don't have a problem with the review process. I guess my question is you're not suggesting that be pulled up at a higher level to review them more centrally. It can be a review process that's built in at the local command as they do it.

CHAIR JONES: Yes, I think that
only the local command can do it. I agree.

Thank you. Anything else?

MR. BRYANT: Judge Jones --

CHAIR JONES: Yes, Mr. Bryant.

MR. BRYANT: -- I just want to make it clear for the record that my continuing objection does not apply to Recommendation 3. I do agree with Recommendation 3.

CHAIR JONES: Okay, thank you. I think we can move now to -- you can tell me what's next on your slide deck. Fourteen, okay.

You know, in the course of the subcommittee's review of reporting, generally, by sexual assault victims or failure to report for that matter, we learned that a number of -- could you put the findings up, please?

Particularly junior members of the military scored lowest in understanding the options for filing a restricted report and the results of this survey that was done showed
that nearly one half of junior enlisted personnel surveyed thought that they could make a restricted report to someone in their chain of command.

So for that reason, we have recommended 14 and let me read the text of it to you: "that the Secretary of Defense should direct DoD SAPRO to ensure sexual assault reporting options are clarified to ensure all members of the military, including the most junior personnel, understand their options for making a restricted or an unrestricted report and the channels through which they can make a report."

It was pretty clear as we listened to witnesses and also did site visits, for instance, that there was some confusion about who you could report to and still have a restricted report. And so we think that this is a very important recommendation so that in this particular area which is so important to victims that there is a real effort to clarify
the rules.

Are there any comments with respect to 14?

MR. BRYANT: Just to say that my standing objection does not apply to Recommendation 14.

CHAIR JONES: All right, thank you, Mr. Bryant. Then the Panel will accept Recommendation 14. Thanks.

I think then we should have 16, 17, or 18 next? Seventeen, okay.

All right, Recommendation 17, "the Secretary of Defense should direct the Military Justice Review Group or the Joint Service Committee to evaluate if there are circumstances when a general court martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigative charge for trial by court martial."

Obviously, at this stage and never

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has a convening authority been bound by the recommendation made by an investigating officer from an Article 32. And so obviously the question here is whether or not they should now under certain circumstances be bound by it. And our recommendation is simply that this is something that ought to be reviewed in either the Joint Service Committee or the Military Justice Review Group, or both of them review appropriate places to review it.

Obviously, Article 32 has changed with most recent legislation. And I think at this point it's fair to say that it's not entirely clear what the scope of Article 32s are going to be in the future. They appear to be trending more towards preliminary hearings and clearly the victim under the new legislation can no longer be ordered to appear for testimony.

Nonetheless, it appears that defense -- defendants will still be calling
witnesses and having testimony taken before their investigating officer and so the report of the investigating officer is still likely not just to have a finding of probable cause or no probable cause, but may still contain findings with respect to the facts and the strength of the proof in recommendations with respect to the case on those grounds.

So I think at this point that's one very good reason since everything is in a bit of a state of flux not to be making any recommendations ourselves and to be suggesting -- recommending it go to these two other potential reviewers.

Are there comments or considerations anyone would like to make with respect to that recommendation?

MR. BRYANT: Judge Jones, as a member of the Comparative Systems Subcommittee, I am in favor of our Recommendation 45(d) which is listed as being somewhat comparable, but it's not quite the
same as Recommendation 17, so I have some
hesitancy in not opposing Recommendation 17.

CHAIR JONES: You know what, Mr. Bryant? You are completely right. There is
a Comparative Systems recommendation and if I recall it correctly, it's that if the
investigating officer finds no probable cause essentially, that that should be binding on
the convening authority and we have not deliberated that because there's not yet a
final report.

I would be happy to wait on taking a vote on this until we --

MR. BRYANT: Obviously, I defer to you as chairman of your subcommittee and
chairman of this Panel as to whether or not we do that. I would point out that one
difference in the Comparative Systems Subcommittee recommendation is that military
judges would become the hearing officers in what the revised Article 32 is. So that would
be a difference and a nuance that I don't see
as part of the recommendations or findings in
17.

CHAIR JONES: Well, actually, you
make a good point. I think I would be in
favor of our recommendation now that I realize
we're only talking about investigating
officers who are judge advocates, but not
judges, not military judges.

I will switch my position thanks
to your help and go back to recommending our
subcommittee's Recommendation 17. I don't see
that it is in conflict now with Comparative
Systems.

Any -- Colonel?

COL COOK: I would agree with the
Role of the Commander's Recommendation 17 and
I would object to the Comparative Systems'
recommendation with all due respect.

CHAIR JONES: Well, we're actually
not deliberating that now, but please feel
free to --

COL COOK: One of the big
differences is that you're going to mandate
that a military judge become the Article 32
officer in all cases and if they make a
determination in some regards it becomes
binding. I don't think we've had sufficient
evidence to jump to that. I don't think
there's been a need and I don't think anyone
has looked at the feasibility of requiring
military judges to sit as that 32 officer in
all cases.

And the testimony that we heard at
our last proceeding said that the military
judge that had been -- the former military
judge and member of the subcommittee that had
been presenting us information had advocated
that it be that same judge at the Article 32
and then later at the trial in most cases.

And again, not knowing what an
Article 32 is going to develop into -- if the
defense attorney presents their case there and
they have the opportunity to see how the
evidence lays out, do you have the same judge
sitting at the trial later on? So I strongly
concur with the recommendation that's on the
screen now, but I'm not sure I agree with the
other one.

CHAIR JONES: All right, thank
you.

PROF. HILLMAN: Judge Jones?

CHAIR JONES: Yes, Professor.

PROF. HILLMAN: Thank you, Judge
Jones. I'm sorry -- I want to let our staff
-- our staff is working really hard to get
this report out and I regret that the Panel
doesn't yet have the Comparative Systems
Subcommittee's full report and discussion, but
because of all the hard work and site visits
and efforts of the subcommittee members and
then the staff, I'd like to wait to talk about
those until actually the Panel members have
the benefit of that report.

CHAIR JONES: All right. Are you
saying you don't want to take a position on
the recommendation we're making now?
PROF. HILLMAN: No, ma'am, I'm not. Seventeen was fine.


Then Role of the Commander

Recommendation 17 is accepted, despite my best efforts to confuse people.

What's our next -- Recommendation 18, "Congress should not adopt additional amendments to Article 60 of the Uniform Code of Military Justice beyond the significant limits on discretion already adopted and the President should not impose additional limits to the post-trial authority of convening authorities."

I think we're all aware of the provisions in FY14 NDAA which modifies Article 60. And really does significantly limit post-trial authority and discretion for convening authorities with respect to sexual offenses. They cannot disapprove findings and they can't -- and it reduces their discretion to reduce
the court martial sentence for sexual assault offenses.

I think I may ask Professor Hillman for some help here. You have a similar provision about Article 60, Professor, and I think it has to do with possibly amending it so that convening authorities would have the right to hold off on the forfeiture of the accused's assets so that their families might be able to keep those for their support. Am I right about that?

PROF. HILLMAN: Yes, Your Honor.

CHAIR JONES: Am I right about that?

PROF. HILLMAN: Yes, Your Honor.

CHAIR JONES: That would be something we're recommending. I frankly don't know. Are there more or additional amendments that are floating around right now to Article 60? I'll have to go to Colonel Green. Okay. So it's basically then without
prejudice to the Comparative Systems recommendation which we'll talk about at an upcoming session. The Role of the Commander Subcommittee's recommendation is straight out that there shouldn't be any additional amendments to Article 60 that would significantly limit, further limit the convening authority's authority.

Are there any comments about that?

MR. BRYANT: I disagree.

CHAIR JONES: All right, then.

That recommendation is also accepted.

PROF. HILLMAN: Judge Jones, I disagree, too. I just wanted to clarify. My disagreements are actually on the record in the separate statement, so I'm not going to interrupt you from a long distance any more on that. Thank you.

CHAIR JONES: All right, thank you, Professor.

Next. This recommendation has to do with a topic that both the Role of the
Commander and the Comparative Systems Committees have looked at to some extent, Comparative Systems, I believe, more than the Role of the Commander Subcommittee. And it relates to modifying authority for specific quasi-judicial responsibilities. What we're talking about is discovery, selecting the court martial panel, authorizing searches, appointment and funding of experts and witnesses and consultants, the procurement of witnesses. And basically, there has been a lot of discussion about the feasibility of modifying the authority of the convening authorities in these areas and switching some of this authority to military judges.

It's the consensus of the Role of the Commander Subcommittee that the Secretary of Defense should direct the Military Justice Review Group or the Joint Service Committee to evaluate the feasibility and consequences of doing this, of modifying authority for specific quasi-judicial responsibilities that
are currently assigned to convening
authorities.

And as I said earlier, including
discovery oversight, court martial panel
member selections, search authorization and
other magistrate duties, appointment and
funding of expert witnesses, and expert
consultants and procurement of witnesses.

Our subcommittee just thinks that
a lot of further study is necessary in order
to fully assess what the positive and negative
impacts would be from changing some of these
pre-trial or trial responsibilities that
convening authorities now have.

Comments?

PROF. HILLMAN: Your Honor, this
is Beth Hillman. I just wondered where is
that in the subcommittee report? Are you
talking about a particular recommendation?
I'm sorry if I got lost there.

CHAIR JONES: I'm talking about
Recommendation 16.
PROF. HILLMAN: Sixteen.

CHAIR JONES: Sorry.

PROF. HILLMAN: No, no. It's my fault. Fair enough, so I'm caught up. This is -- I was just reading in the report about it there.

CHAIR JONES: And this would obviously be a recommendation that would differ from the one that I believe your subcommittee is planning to make. But I'd love to hear from you on that.

PROF. HILLMAN: That's correct, Your Honor.

CHAIR JONES: Okay.

BG DUNN: May I speak for one moment?

CHAIR JONES: Yes, General Dunn.

BG DUNN: Professor Hillman, this is Malinda Dunn. If I speak in error, please correct me. But I think that the RSS Subcommittee vision is that you would insert the military judge in the process sooner, not
necessarily change the authority of the convening authority, but insert the military judge in the process sooner.

So in terms of this recommendation and what may be discussed when the RSS recommendations are discussed, I think if we approve both of them it would be a little inconsistent. At some point, we're going to have to square this recommendation with the RSS recommendation.

PROF. HILLMAN: Agreed, General Dunn.

CHAIR JONES: All right. I think that is exactly what my concern was. So why don't we discuss Recommendation 16 and the CSS recommendation together because they will be inconsistent.

And I think actually, General Dunn, it goes way beyond just having the military judge come in sooner, although I think that's your point that it probably would be completely opposite to what we're talking
about here.

We're not against any of these things. We're merely recommending study. But you're right, there would be a different position in the CSS recommendation.

BG DUNN: And these would be the bodies that would study the concept of putting the judge into the process earlier, so it may just be a matter of modifying that --

CHAIR JONES: I am happy to hold Recommendation 16 of our committee, the subcommittee, Role of the Commander, until we get to the relevant CSS recommendation.

All right. I think we're at the last of the Role of the Commander recommendations. And this recommendation is that "the Secretary of Defense should establish an advisory panel comprised of persons external to the Department of Defense to offer to the secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD sexual
assault prevention and response programs and politics."

I think the Panel has heard this before, particularly from Joye Frost not so long ago that in order for the Department of Defense to have credibility, there need to be independent organizations and evaluations by independent entities conducted and that was the genesis for this final recommendation for the Role of the Commander Committee.

Are there any comments or questions with respect to that?

I'm looking at you, Colonel Cook. Any? Okay.

COL COOK: There's no problem. External will give validation to what's out there.

CHAIR JONES: All right, anyone else? All right, thank you. Recommendation 4 is also accepted.

I think, unless I've overlooked
one, that that concludes the recommendations
made by the Role of the Commander
Subcommittee. And I think we'll take a ten-
minute break at this point and come back and
we'll begin to discuss some of the remaining
Victim Services recommendations. Thanks.

(Whereupon, the above-entitled
matter briefly went off the record.)

CHAIR JONES: We're going to
resume the Response Panel meeting now. And we
have Meg Garvin with us this afternoon.
Welcome, Meg. And Ms. Garvin is a member of
the Victims' Services Subcommittee. Mai, you're still on the phone, right?

MS. FERNANDEZ: I am.

CHAIR JONES: Great. And Mai
Fernandez who couldn't be here with us in
person is the Chair of that subcommittee and
a Panel member. And I don't know if there are
any subcommittee members for Victim Services
on the line. Are there? Okay.

So what we're going to do this
afternoon is go through a few of the recommendations that we did not finish deliberating on. And, Ms. Garvin, you're going to make the presentations. And so if you will just direct us to each recommendation as you go along.

MS. GARVIN: Certainly. Thank you. Happy to be here and I'm sorry I missed the last meeting but glad I can participate in this one. We're going to start with -- I'm going to go through the pending Panel discussion recommendations.

That's how they are labeled on the PowerPoint. I'm going to go through just a handful of those. And then two additional ones that I had asked to comment on that are also on the slide deck, Recommendations 26 and 33.

But I will start with Recommendation 5. Make sure everyone gets there. This is pending Panel discussion. There were some modifications made during the
last meeting. I'm going to start each time reiterating the findings, which are the context in which the subcommittee came to its recommendations.

And I think reiterating those while they're on the slide deck but framing the recommendation first with the findings helps to explain the context. So I'm going to start with the findings on 5.

And I will read some of them and also paraphrase some of them. So findings 5-1 through 5-5. The subcommittee found that there's no current mechanism for a sexual assault victim to keep a report of sexual assault restricted and yet still request an expedited transfer.

DoD policy does not permit victims who file a restricted report of sexual assault to request temporary or permanent expedited transfer from their assigned command or installation to a different location within their assigned duty or living location.
If the commander knows or learns about the sexual assault and report it, it becomes unrestricted. We heard a great deal of testimony about this issue and how troubling it was for survivors.

We did also hear and received evidence that there may be inherent flexibility, inherent powers of the commander and flexibility to transfer members or place them on limited duty status due to medical conditions.

Based on those findings and the great deal of weight of evidence about why it's important that restricted reports still be allowed, individuals who file restricted reports still to be able to transfer without the report going unrestricted, which is a significant moment for survivors.

We have made a recommendation that you all looked at at the last meeting and made some modifications. You have both versions in front of you.
The original recommendation of the subcommittee was Service Secretary's should ensure that command orientation and training address the commander's authority to make duty or living assignment transfers based upon the recommendation of medical personnel even if the specific underlying reason for the request for transfer is protected and cannot be disclosed.

In the last meeting, there was discussion and proposed amendments to that recommendation that would read, Service Secretary should create a means by which sexual assault victims who file a restricted report may request an expedited transfer without having to make the report unrestricted.

In reviewing everything from the subcommittee's perspective the amended language aligns with the great deal of evidence we heard, the intent of the subcommittee with regard to Recommendation 5.
But I was asked to re-present that

to you with the findings and indicate that it
aligns with the subcommittee. There was no
discussion at the last meeting with regard to
Recommendation 5A, however, which is that
there should be required training for medical
personnel, SARCs and VAs to include options
that a commander has available to make or
affect transfers based on recommendations from
medical personnel.

This sub-recommendation, or
recommendation 5A, came out of evidence we
heard that individuals did not know that it
was possible for transfers to happen, that the
Commander had this authority inherent and that
therefore victims wouldn't know that they
could do it.

And so the only answer out there
was to go unrestricted. So the subcommittee
had made Recommendations 5 and 5A to
accommodate the evidence that we heard and to
support victims' need to stay with restricted
reports but still be able to transfer. And
that's all that we have on that one, so I
submit it to you.

CHAIR JONES: So, Ms. Garvin, are
you asking us to reconsider the -- I'm just a
little --

MS. GARVIN: I'm sorry, Judge, I
read both versions just to provide the
context. I'm not asking, on behalf of
subcommittee, I'm not asking you to go back to
the original language. I am indicating to you
that your amended language of Recommendation
5 is in alignment with the subcommittee's
assessment of things.

CHAIR JONES: Okay.

MS. GARVIN: So I'm asking you to
stick with your amended language but then to
please consider Recommendation 5A --

CHAIR JONES: Okay.

MS. GARVIN: -- of the
subcommittee.

CHAIR JONES: Well, I guess my
question would be, I mean, it assumes that the
recommendation from medical personnel, which
is -- we may not be in a position where there
is any training yet on that.

I mean, isn't that the point if we
-- you're not talking about a specific means
by which the secretaries both might come up
with could be a medical transfer.

So I don't know that a specific
recommendation that they be trained based on
recommendations from medical personnel. I
don't know. Maybe it's broad enough but do
you see my concern?

MS. GARVIN: Certainly, Your
Honor. 5A, I believe, based on the
subcommittee's evidence received would still
stand in that Commanders do have this inherent
authority now under the medical provision to
make a transfer and that is not well known
based on the evidenced we've received.

CHAIR JONES: Oh, so --

MS. GARVIN: So regardless of the
additional mechanisms that the Service
Secretaries may put into place, individuals
that we heard from and as we understood do not
know about the existing opportunity for
transfers.

And it seems that recommendation
could move forward even though the Panel is
making a larger recommendation now to create
additional means.

COL COOK: Judge Jones, if I can
offer --

CHAIR JONES: Yes, Colonel.

COL COOK: You might be able to --
I think if you leave it with the language
that's in there now for 5A, it becomes a
little bit unclear with Recommendation 5.

But I think we can modify it
slightly leaving the training for medical
personnel, SARCs and VAs should include the
options to leave this to the Commander that a
Commander has available to make or effect
transfers when an unrestricted report is made.
Take out the portion about whether it's the recommendation of the medical personnel, which is whatever. And it would have to be an unrestricted report because we just said that in modifying Part A, that Part A is they can come up with the means to effect transfers.

And one of the discussions when you weren't here the last time was outside of the command channels so that once it's in the hands of a Commander it's unrestricted. But you can keep it outside the hands of the Commander keep it restricted and go up another channel through personnel or SAPRO, whatever.

Let them look at what that process should be. So if you just put available or to make or affect transfers cross out based on the recommendation from medical personnel and add the language when an unrestricted report is made.

CHAIR JONES: I think that sounds right.
MS. GARVIN: That would certainly align with where the subcommittee was going, which is --

CHAIR JONES: Right.

MS. GARVIN: -- ensuring that there is training on available means for staying restricted yet still securing a transfer.

COL COOK: And it still allows the Secretary to determine how best to effect that.

MS. GARVIN: Right.

CHAIR JONES: All right then. Is there any other comment or hearing none, then we are going to now, if we didn't already. I guess we did not, obviously. Recommendation 5A is accepted. Thank you.

CDR KING: Your Honor, So I don't think that the Panel deliberated or completely deliberated and either accepted or rejected 5 either. I think it was delayed because of some of the members not being present at the
last meeting.

CHAIR JONES: All right. I think you're right. And we were still talking about it. And does anybody need a little bit more time to consider it? Any objections to 5, which basically asks the Service Secretaries to figure this out and find a means for someone who's filed a restricted report to get an expedited transfer without having to make their report unrestricted.

I don't know whether they'll be able to figure it out but we're asking them to figure it out. Any problems with that? All right. 5 is accepted. Thank you, Sherry.

MS. GARVIN: So I'd like to turn the Panel to Recommendation 31, which -- the slide deck 2 --

CHAIR JONES: On Page 2? Yes.

MS. GARVIN: It refers to is the right to confer. I'm going to start again with the findings to provide the context for this. There was, and I have reviewed the
transcript from the last hearing and there was substantial conversation about this but then it was delayed until today.

So the findings on Recommendation 31, which are findings 31-1 through 31-4. The right to confer with the prosecutor under the Federal Crime Victims Rights Act, which is 18 USC 3771, which was passed in 2004 is not directly analogous to the right to confer with trial counsel, which is currently afforded to military victims.

The CVRA grants the victims the right to confer with a prosecutor in the case. The DoD policy and service policies as well as NDAA do grant victims the right to confer with the attorney for the government or trial counsel in criminal cases.

However, that is and the evidence received during the subcommittee meetings, those are not analogous rights in large part because the decision making moment with regard to proceedings is not in trial counsel's hands
but instead is with the convening authority.

So while the victim may confer
with trial counsel on a variety of matters,
whether those are to pursue court marshal,
non-judicial punishment or administrative
action in the case.

And if pursuing court-martial, the
level of court-martial the right is afforded
to victims because the Commander serving as
the convening authority actually makes the
decision with regard to how to dispose of
cases, the victim's right to confer as
currently afforded in military rights is not
in aligned with the Federal Crime Victims'
Rights Act, which was one of the specific
responsibilities of the subcommittee to
analyze is whether the military systems and
proceedings provide the rights afforded by 18
USC 3771.

And I'm noting that right out of
the objectives by which we were guided. So
with those findings in place, the
recommendation of the subcommittee in order to align the rights that military victims have is that the Secretary of Defense direct the creation and implementation of mechanisms where not currently in place requiring trial counsel to convey the victim's specific concerns and preferences regarding case disposition to the convening authority so that the convening authority may consider the victim's concerns and preferences prior to making a decision on case disposition.

The procedures will account for the convening authority's role in the disposition of cases under military justice system and create a process more analogous to the victim conferring with the prosecutor under the CVRA.

The import of this is that under the CVRA and in the civilian system, victims have the right to confer all along with the prosecuting attorney from the get go of the case.
In fact, we heard evidence along the way that it actually can happen precharging in the civilian system all the way through the moment of charging or not and then what charges.

And in order to align military victims' rights with that, which was our directive in large part, we tried to find a mechanism by which that would happen.

And so our recommendation is in fact that the Secretary of Defense grant and implement those mechanisms but to make sure that it's meaningful and actually does align with the Federal Crime Victims' Right Act that it should be communication to the convening authority.

BG DUNN: I would just make one comment. I don't have any problem with the recommendation but in my 28 years and 5 months on active duty in the United States Army, Judge Advocate General's Corps would have fired any prosecutor who did not convey the
victims' sensibilities on the trial in a
sexual assault case to me, as the Staff Judge
Advocate to carry to the convening authority.

So I think that this is a process
that is certainly in place in any well-run
criminal jurisdiction in any of the United
States military services, but.

MS. GARVIN: And we certainly
heard evidence that practice is allowing this
to happen right now and we took testimony that
many trial counsel are doing this.

The question is making sure there
is a process in place to ensure that it
happens so that victims know that their
interests are being conveyed and whether it be
being done right now by practice, it's not
mandated under the current process. And that
is what the gap we were trying to fill based
on aligning the rights.

CHAIR JONES: Any other comment on
this?

COL COOK: I have one comment.
And it's not subject to the wording of what's on there. But during our discussion the last time I think we had talked about the possibility of combining Recommendation 31 and 32.

31 deals with being heard. You have the right to convey information regarding case disposition. And 32 has to do with the pretrial agreement.

And one of the comments that I had made on the record last time was you could change the wording on 31 to leave most of the first two lines but add the acceptance of a plea here so that the wording would say, the Secretary of Defense direct the creation and implementation of mechanisms where not currently in place requiring trial counsel to convey the victim's specific concerns and preferences -- delete the next three lines regarding case disposition because we're going to add it later -- to the convening authority so the convening authority may consider the

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victim's concerns and preferences prior to making a decision on case disposition and/or accepting a plea.

So you'd be adding the words and/or accepting a plea at the end and having the case disposition. And you'd be combining, trial counsel you must convey what the victim preferences on those two actions are during the course of the proceedings. And that should get rid of having to put out the next recommendation.

CHAIR JONES: Because the Secretary of Defense might decide to do it by changing the venue for courts martial. Is that your point?

COL COOK: I'm sorry?

CHAIR JONES: We don't need 32 because that could be one way the Secretary of Defense would --

COL COOK: In the Manual for Courts-Martial, there is something called the pretrial advice.
CHAIR JONES: Right.

COL COOK: And you have all the information that you have to put into there. So that would go into it and it would just become another factor that trial counsel's got to put together and SJA would have to bring to discuss with the convening authority.

But it would be two parts though. Before the trial, so the case disposition. It would also be if a plea is put in later you'd also have to convey it at that same time.

MS. GARVIN: So, if I may?

CHAIR JONES: Sure.

MS. GARVIN: Is the subcommittee's intent was to ensure that both those moments happened. Obviously 31 and 32 address those two moments.

But the difference in them in part is that, in addition to the amendment that you are recommending is that one is a specific recommendation that the Manual for Court-Martial -- we specified in 32 the device by
which this should happen whereas in 31 we left it open.

And part of why 32 we went with a direct recommendation and I will defer to the military experts on this but part of why in our deliberations why we went with doing it right in the court-martial as well.

Congress can do it and others can do it. The current actual process in the court-martial right now does not allow for this. It doesn't specify specifically the victim input during the plea part.

And so if you -- when I reviewed it last night and went through the actual processes in the court-martial manual about plea, it didn't specifically say where the victim input for that piece came in.

So it seemed like the specificity that the subcommittee came up with with regard to directing it be in the courts martial manual with regard to 32 seemed important.

So I just want to raise that. I
COL COOK: Then I would need you to clarify, where are you -- in Number 32 then, tell me where you are advocating that a victim has the right to be heard regarding a plea?

MS. GARVIN: It's prior to the convening authority.

COL COOK: Then if you're leaving it the way it is right now, it's in the court-martial. The plea agreement's already been accepted. They've lost their opportunity.

If you move it to the other where you're saying the trial counsel has to convey it before the plea agreement is accepted, before the case is referred for some kind of disposition.
But whether it's in the manual or not, I will tell you if you put if that is becomes a process, whether it's in a regulation or whether it's in manual, the trial counsel's are going to abide by it.

MS. GARVIN: So, and again, I will defer -- oh, I'm sorry.

REP. HOLTZMAN: Judge.

CHAIR JONES: Yes.

REP. HOLTZMAN: Maybe I'm wrong here, Colonel Cook, and so I'm going to defer to you but VSS Recommendation 32B says the recommendators recommended changes include the right to be heard before the convening authority decides to accept, reject or propose a counter offer to a plea agreement offer submitted the accused. So that would --

COL COOK: That's what 32B says but then the 32 says it's the right to be heard regarding pretrial agreement.

It doesn't say where Recommendation 32 is so the trying counsel has
to convey those concerns to the convening authority, which means it's before as part of the decision by the convening authority.

What will happen is when the case goes to the convening authority to refer the case wherever it's going to go, there may be a plea agreement with it at that time.

Maybe not. I mean, it could be two separate actions that could be combined. But what Number 31, if it's changed as recommended, you're done.

It requires that if the plea agreement comes in after the fact, trial counsel, you still have to go to the victim, get what their input or their preference would be and you have to submit that to the convening authority as part of their deliberations on whether or not to accept that plea.

REP. HOLTZMAN: Are you saying that's under 31?

COL COOK: I'm saying that if you
put, right now what you're saying Recommendation 31 is trial counsel has to convey the victim's concerns.

I'm saying add it to 31 and you'll achieve both of the goals of they get the right to get their information put forward to the convening authority before they dispose of the case and they get the right to put it in front of the convening authority before they accept a plea.

And it doesn't need necessarily to be in the Manual for Courts-Martial. You'll still achieve the same thing. I agree with having victims' rights be heard.

I agree with General Dunn. In my 23 years being a combat division SJA or an SJA at different levels, I agree, it's always been done. Making it part of the process regards with whether it's in the manual or in a regulation, then it will be done.

Victims get that same satisfaction. But you do want it before the
convening authority sees it, not necessarily
the way Number 32 reads where it's -- is that
in the court when the Judge is listening to
it? MS. GARVIN: Again, you
know process far better than I and members in
the subcommittee certainly knew the process
better than I as a civilian. Your point's
well-taken though.

The intent of the subcommittee was
to ensure that victims had their information
heard and received so that it could have
impact along the way through the confer all
about what to do with the case as well as with
regard to plea.

The subcommittee also did want it
to happen in front of the court. So it was a
both/and. It was input before anything so
that there was no moment of finality that
occurred before the input was taken, which
would essentially eviscerate their rights
because they're meaningless then.

And if there is a proceeding in
front of the Court, also then. It was a both/and. And we may have drafted poorly.

But your iteration of it to ensure that it was before decisions were made certainly achieves a significant part of what the subcommittee was recommending. The second part was then there is a proceeding in court they also have it.

COL COOK: The challenge with putting it before the -- a plea agreement is what's considered during the findings portion of the court-martial.

The challenge with allowing a victim the opportunity, you know, maybe the convening authority does hear it because it's conveyed by trial counsel which is what it is now and what you'd be making more formal.

Maybe the convening authority disregards or makes another decision for whatever purpose? Now you're in the court-martial, the plea agreement in the military is the accused stands up and says everything
they're guilty of.

They can't just say, you know, I just plead guilty I'll get a better deal. They have to explain everything they did wrong. If the victim is allowed a say at that point before the judge hears it, the difference in the military system is the judge or the Panel depending on who the trial fact is, well, plea agreement so it's a judge, does not get to see the quantum portion.

So having a victim stand up in a court-martial at that point and make comments on the recommence about the quantum portion would deny the defense counsel or the accused the opportunity to persuade the judge to come up with a different result that maybe the convening authority had agreed to up front, so.

CHAIR JONES: So are you saying there isn't a public in court moment where the convening authority is saying --

COL COOK: I think there would be
for the victim during the sentence.

    CHAIR JONES: -- I am now making
my decision on the plea bargain obviously.

    COL COOK: That's kept in court.

    CHAIR JONES: Because they're kept
secret.

    COL COOK: Right. It's kept
secret.

    CHAIR JONES: Right. Okay.

    COL COOK: The victim can go in
during the sentencing portion, you know, once
the plea agreement is resolved with the Judge,
you can go to the sentencing portion and have
the impact statement.

    But that's not the place for a
victim to go in and discuss whether they agree
with the plea agreement or not. Not under the
current system. It would take away from the
right of the defense of an accused.

    MS. GARVIN: So, and I think --

    PROF. HILLMAN: Judge Jones.

    CHAIR JONES: Where are you, Beth?
PROF. HILLMAN: Sorry. Judge Jones?

CHAIR JONES: Yes.

PROF. HILLMAN: This is Beth.

CHAIR JONES: Okay, Beth. Go ahead.

PROF. HILLMAN: I'm sorry to interrupt everybody there.

CHAIR JONES: No, please.

PROF. HILLMAN: I just wanted to say that the Comparative System Subcommittee is making some recommendations with respect to the sentencing process and has an extensive discussion of the different pretrial agreements, plea bargaining process in the military as compared to civilian jurisdictions.

So while this is a useful discussion, I do wonder if we should bracket the precise way that this happens, whether it's on the record and at what point the military system would embrace this that we
want, the Victims' Services Subcommittee wants us to do in terms of making sure the process that General Dunn and Colonel Cook both said is routine already.

But just making clear that every victim has that chance to do it and the complicating piece here is the convening authority and the trial counsel aren't the single sort of prosecutor in the way it is in the civilian system.

So the precise way we do this is a little bit tricky. But I recommend we wait until we get the sentencing part of the CSS recommendations before the Panel to resolve this particular piece.

CHAIR JONES: Any objection to that? All right. Then on this, Meg, we'll wait on 32.

MS. GARVIN: Judge. Judge, may I just add one note --

CHAIR JONES: Yes, of course.

MS. GARVIN: -- for your
consideration when you get there and that is
one of the specific things that we were tasked
with looking at was the alignment of the CVRA
with military accommodating the differences
and specifically looking at how to integrate
the right to be heard on plea.

That is one of the specific pieces
of what we were supposed to do. And we tried
to accommodate the differences in what we were
recommending, acknowledging the difference of
the kind of bifurcated aspect of the plea, the
factual piece of a plea and the quantum piece
of a plea.

And we didn't use the word
quantum. You'll not find that in any parts of
our discussion during the subcommittee
meetings in part because there were a lot of
civilians on our subcommittee.

But we did talk about the reality
of what happens in civilian plea situations
and what they are allowed to say in front of
a court, what they know and what they aren't
allowed to know.

And we did try to factor that and so I just ask that when you get there that someone from the Victim Services Subcommittee also be allowed to talk about it because we did attempt to factor this and ensure it was a meaningful input but was a direct input, so.

CHAIR JONES: Well, let me just ask this is Recommendation 31 as amended by Colonel Cook acceptable to everybody of does that conflict, Professor Hillman?

PROF. HILLMAN: Judge Jones, can you tell me what the --

CHAIR JONES: I'm sorry. It's direct the creation and implementation of mechanisms where they are currently in place requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority.

Now what it does is then says, so the convening authority may consider the victim's concerns and preferences prior to
making a decision on case disposition or
accepting a plea bargain or entering into a
plea bargain.

I'm just wondering if that's
something we can deliberate and accept or not
without getting into the notion of appearing
in court.

PROF. HILLMAN: Yes, Your Honor.
That's fine with me. Does Professor Garvin
agree with that one?

MS. GARVIN: Yes. I believe that
that aligns with a significant portion of what
the subcommittee was recommending.

REP. HOLTZMAN: My only concern
about this is whether by dropping the
reference to the Manual for Courts-Martial we
are dropping some specific requirement that we
need to have. That's all.

MS. GARVIN: And as I noted
before, the subcommittee did spend time on 31
talking about -- I'm sorry, 32 talking about
a specific recommendation with regard to
quickly getting it into the Manual for Courts-Martial.

COL COOK: And I have no, I mean, I don't have an objection of saying it goes into the Manual for Courts-Martial so that became the recommendation as well.

I'm just saying that whether it's in that form or something else, trial counsel may say you have to do this. You're going to do it.

But I've got no objection to actually putting it in the manuals part of the pretrial advice or coming up with another portion that requires the affirmative passing of the victims as part of a pre-agreement packet when that goes forward.

I just don't think there's anything about that plea agreement piece in the manual right now so you'd be adding a new provision. But I'm not positive of that. You'd have to check with somebody who knows the current draft.
COL. HAM: Actually, I think it might be. This is Colonel Ham. It might require a change to Article 34 of what would be included in the pretrial advice and the corresponding rule for court-martial. But, so it may require actually statutory change but I'm not saying it has to but it might.

COL COOK: Right. That might take longer so you might want to put it in the rules up front with the intent that it later, you know, be considered by the joint service panel to put it as a permanent one later on. But the goal is affecting it to make sure it's mandated now. How, is not as important as getting it done.

MS. GARVIN: And mandating the last part of your statement, the now was part of the discussion, quickly getting it in.

CHAIR JONES: So where are we? Are we accepting 31 and holding on to discussions about 32A and 32C?

COL COOK: I think we're accepting
31 as changed --

CHAIR JONES: Right.

COL COOK: -- saying you have to convey it and the only part of 32 that's being delayed is whether or not the victim's got the opportunity to be heard during the court-martial process itself.

CHAIR JONES: Okay.

MS. GARVIN: And if I may?

CHAIR JONES: Sure.

MS. GARVIN: The specificity of the Manual for Courts-Martial where that fits.

CHAIR JONES: Right. All right.

So we're going to accept 31 as changed, as amended, and hold up on our discussion of Recommendation 32 until we've had the opportunity to review the CSS recommendation and findings.

REP. HOLTZMAN: Well, I'm still not sure that's quite correct, Your Honor, because I think what she's saying and I think that Colonel Cook was agreeing to was that
there would be a reference to the manual for
courts martial now that we would include that
as part of the amended 31. We would take that
to 32.

CHAIR JONES: I'm sorry. I missed
that.

MS. GARVIN: That's my
understanding.

CHAIR JONES: Is that what --

MS. GARVIN: There had not been
proposed language of exactly where to put that
in this conversation but the idea was the
subcommittee had strongly landed on making
sure it was in the manual for courts martial,
well, 32 was.

But the idea was to expedite that
process. But in this discussion there wasn't
a location of it. So I don't know if that's
something that the Panel needs to consider
where to put it. I don't believe I can
recommend where to put that in this amendment.

JUDGE MARQUARDT: May I ask a
question?

CHAIR JONES: Yes. Sure.

JUDGE MARQUARDT: Was the second sentence of 31 deleted?

CHAIR JONES: I'm sorry. I didn't quite hear that.

JUDGE MARQUARDT: Was the second sentence of 31 deleted?

CHAIR JONES: Oh, the text of 31?

MS. GARVIN: No. The second sentence.

JUDGE MARQUARDT: Yes.

COL COOK: I think the second sentence of 31 was more explanatory more than it created anything else. It just said that they were trying -- so it's not necessary but it's not harmful to leave it in there.

MS. GARVIN: Correct.

CHAIR JONES: It's still there. It was not deleted.

JUDGE MARQUARDT: Thank you.

CHAIR JONES: All right. I
confess. I'm confused.

MS. GARVIN: Judge, perhaps if I may make a suggestion in light of the recommendation and you all obviously have authority to correct me, if there's agreement on the Panel with regards to the amendment to 31 then maybe what is pending with regard to the amendment which is and/or accepting a plea, if what is still pending is there to articulate that the change should include a change to the Manual for Court-Martial, maybe that specific piece is continued with regard to the discussion of 32 and may or may not then reference back to integrating it in 31 when you have the next conversation unless you want to wordsmith and figure out where to put it now.

CHAIR JONES: Well, maybe what we should just say is that the text of 31 right now, I gather is acceptable to everybody. We won't formally accept the full recommendation until we see if we're going to be adding
something from 32.

REP. HOLTZMAN: We agree that we want to add the reference to the -- maybe I'm wrong. I don't mean to --

CHAIR JONES: You could be right.

I'm not --

REP. HOLTZMAN: I think we agreed that we wanted to add the reference to the inclusion of the change in the military in the Manual for Courts-Martial. Where that should go, maybe we could just let staff propose the language for us and that would be --

PROF. HILLMAN: Judge Jones, this is Beth.

CHAIR JONES: Yes, Beth.

PROF. HILLMAN: I agree with Representative Holtzman. I think it's fine for us to accept 32, that first, not necessarily the details or, I actually agree with A and B. They're fine with me. But I don't think we have to say exactly where it goes. But we can say that it should happen.
CHAIR JONES: All right. Let me just -- so are you saying that you think it should go in the Manual for Courts-Martial or not? That's where my confusion is.

COL COOK: Can we, in Recommendation 31, can we add the word, you know, in the first line can we add the word immediate in front of the word creation.

So that would say, the Secretary of Defense direct the immediate creation and implementation of mechanisms were not currently in place requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority so the convening authority may consider the victim's concerns and preferences prior to making a decision on case disposition or entering into a plea agreement.

That becomes one of them. And the second sentence unchanged. But Number 32 becomes, the Secretary of Defense recommends to the President changes to the Manual for
Courts-Martial that incorporate the right to recommend in Recommendation 3 above.

Because that will allow you to get the immediate process changed and allow the longer process of getting it put into the manual and having it solidified there.

CHAIR JONES: All right. I understand what you're talking about. Thank you, Liz. And you, Colonel. Any disagreement with that?

PROF. HILLMAN: Judge Jones?

CHAIR JONES: Yes, Beth.

PROF. HILLMAN: I'm just -- if we put a time element in one of these and not in all kinds of other ones where we're recommending things, I'm not sure where that leaves all the rest of the recommendations like go ahead and take your time with them.

REP. HOLTZMAN: I agree with that, Judge Jones, from just a drafting point of view.

CHAIR JONES: Right. I think that
makes perfect sense actually. So I would also say we should not put immediate in there. We haven't done it anywhere else, nor should we.

But are we in agreement then that 31 should read as Colonel Cook has described it which would include 32 in there as she's amended it? Is everybody in agreement with that? Okay.

Then we'll accept Recommendation 31 as amended. And as I just said, that will include the first -- Recommendation 32 will become part of 31 as amended, as 32 is amended. All right.

COL COOK: And I'm sorry. Just to clarify, Judge Jones, then for Recommendation 32A and 32B, I don't think that those are necessary right now.

CHAIR JONES: No, I'm not -- right.

COL COOK: Okay.

CHAIR JONES: 32A and B are not going to be any part of Recommendation 31.
MS. GARVIN: May I ask for one clarifying point? When the other subcommittee reports out that has a similar recommendation with regard to the structural analysis, some parts of 32A and B will be with regards to the victim being heard in court --

CHAIR JONES: Yes.

MS. GARVIN: -- on plea will be brought up at that juncture. Okay.

CHAIR JONES: That's my understanding from Professor Hillman. Then we can discuss it at that point.

REP. HOLTZMAN: Judge Jones.

CHAIR JONES: Yes.

REP. HOLTZMAN: Just to raise another issue about this. I don't mean to do this in a piece meal fashion but I'm just reading the last sentence of Recommendation 32B, which says that the convening authority should retain discretion to determine the best means to comply with this right and consider the victim's opinion, e.g. submission in
writing or in person.

Is that something that should be there? I mean it does give the Commander in the event he or she wants to the right to hear from the victim directly as opposed to through pretrial counsel.

I don't know. You probably know whether this was ever done or whether this is a meaningless suggestion. But I want to raise it just because I want to throw this -- if this is a baby in the bath water, I don't want to throw that out.

BG DUNN: Right. And the convening authorities certainly have the discretion now to meet with the victim and get his or her input should the convening authority make that decision.

I think, and I'm not on this particular subcommittee but I have an idea that that language is in there just to make sure Congress doesn't require a meeting with the convening authority, which would become
unattainable in most cases.

        CHAIR JONES: I'm sorry. Who's on

the line?

        MS. FERNANDEZ: This is Mai

Fernandez.

        CHAIR JONES: Hi, Mai. Go ahead.

What did you have to say?

        MS. FERNANDEZ: I was saying that

I have a plane that's about to take off so

I've got to get off the phone.

        CHAIR JONES: Oh. Well, that's

clear and unambiguous. Okay.

        MS. FERNANDEZ: Okay.

        CHAIR JONES: Thanks very much.

        MS. FERNANDEZ: Good luck,

everybody. Take care.

        CHAIR JONES: Thank you.

        COL COOK: Judge Jones? I would

agree. Put that language in there just to

make it clear so the discretion's not taken

away.

        I mean, if we're talking about
having a victim who's been transferred out of
the area, if you've got a Commander who's
deployed and not in the same place, you want
to make sure that those preferences are
conveyed and not strap the command in how
that's done.

If the opportunity to see somebody
is there, great. But if it's not you still
want to make sure that the written submission
is what's considered.

CHAIR JONES: All right.

MS. GARVIN: And that was -- the
subcommittee did talk specifically about this
piece and intending to leave discretion with
the method of delivery of the victim
information.

Albeit, in part this piece was
about the victim being heard directly rather
than via trial counsel also. So that's hence
the in-person in writing to align with what
happens in Federal courts when plea is
happening.
So, again, this should be, I believe, based on the conversation thus far this morning or this afternoon in part should be carried over to when you discuss the next one. But the discretionary piece that was intended to allow that to happen.

REP. HOLTZMAN: My view is that we should retain it right now as part of 31. And I think that's what Colonel Cook was suggesting.

COL COOK: Yes.

MS. GARVIN: My apologies.

COL COOK: Yes.

CHAIR JONES: And it's not you, Meg. It's me. I now have to go back to Professor Hillman. Professor, and I confess, I do not recall exactly what your recommendations from the CSS subcommittee are. Is there a reason for us to wait or just immediately adopt Recommendation 32B?

PROF. HILLMAN: No reason to wait, Your Honor. I was flagging it only because we
addressed potential changes in the sentencing process that do implicate the way that pretrial agreements and other, you know, they would roll out.

But it would not -- I'm happy to defer to Victim's Services Subcommittee on the importance of the victim being heard. And I just, in terms of the process of that, we may run this down the road. But there's nothing that conflicts with this and I recommend going ahead there. Sorry if I derailed things there.

CHAIR JONES: No. Not at all. Okay. With respect to 32B, any other issues? It sounds like everyone's in agreement?

Colonel Cook?

COL COOK: One clarification. As Rep. Holtzman just said, it'd be that last sentence that we're retaining but put it up at the end of 31 because it's going to apply to case disposition as much as it does to the plea. And then leave 32 as the portion to
ultimately incorporate it into the manual somehow.

BG DUNN: I am not sure. You know, I think that maybe the reason these recommendations were separated out at the very beginning is because in terms of case disposition it's the victim's concerns conveyed through the trial counsel up through the system.

And in the second one, based on what Meg just said, it is the victim's right to be heard. So either to submit a statement or to appear in person.

And that is different than conveyed through the trial counsel, you know, verbally or, you know, based on my discussion, et cetera. I mean that appears to be two different --

MS. GARVIN: That is accurate.

BG DUNN: -- processes.

MS. GARVIN: They were separated in large part in our discussion because they
are two distinct rights legally. The right to confer exists under the CVRA and under the NDAA.

And that is conferral with the decision maker, meaning you get to talk with them and have some level of discussion with them. That's 31. 32 is actually a right to be heard, which is an individual held right where you actually get to have the input.

The method by which that input happens may not be in person, it may be in writing. And the intent of both of those is to have an impactful moment before decisions are made, whether that be with regard to whether to go forward or what plea to accept.

So I think what has been done with regard to amending 31 including this last sentence on 32B achieves a portion of what the subcommittee talked about. But not the second portion of what the subcommittee heard evidence on, which is the importance of individuals being personally heard rather than
having it conveyed.

                  COL COOK: But where? To the
convening authority or in court?

                  MS. GARVIN: We discussed both.
We discussed both. And 31 we ended up leaving
it for -- I don't have -- I just flipped my
page. The implementation of mechanisms --
that's where that language came from because
we heard evidence that defense doesn't go
directly to the convening authority, generally
speaking.

            Most things go through trial
counsel to the convening authority and through
the SJA. That's how the convening authority
hears things with regard to whether to move
forward or not.

            So we were trying to leave in
place and not override all of that but figure
out the mechanisms by which the victim
actually gets heard by the convening authority
and the conferral process pre-decision about
whether to move forward with a case but with
regard to plea to make it align we wanted it to be meaningful, heard by the convening authority in both/and moments, both by the convening authority and the court to align with the Federal Crime Victims' Rights Act and the right to be heard.

BG DUNN: See, I think that regardless of where we come down on the heard on the pretrial agreement, that we should keep the two provisions separate or we're going to get ourselves in a position here of having the, you know, victim write a statement to the convening authority before he refers the case, which is not the recommendation of the subcommittee.

I mean, for all the discussion we've had about trying to combine 31 and 32, I think because we're talking about two different levels of input that we should separate those recommendations back out. Leave 31 the way it is and then deal with 32 and the pretrial agreement. And
if they go together, Holly, then, you know, however we sort out the victim's right to be heard on pretrial agreement could just go along with the pretrial advice.

MS. GARVIN: And if I may also the subcommittee intentionally kept them as the confer with the regard to whether to move forward with the case be heard with regard to plea and then sentencing is taken care of somewhere else.

There's a separate and discrete right to be heard at sentencing under federal law and that's different.

BG DUNN: That's right.

MS. GARVIN: And I think just making sure that that doesn't get conflated, the right to be heard about a plea agreement with regard to a plea agreement, which is the right, needs to be a separate right and acknowledged.

BG DUNN: And I think it's good to keep them separate because of the difficulty
of sorting through the quantum portion of the
plea agreement.

I mean that's got to be a
completely separate process because if the
military plea agreement process remains the
same whether or not the victim is going to
know what quantum portion is is going to be a
difficult process to work through.

COL COOK: And I'd be okay with
keeping the right to convey their interests in
the case disposition and the plea separate.
I'd be fine with that.

But if what you're building in is
the right to be heard in person in either one
of those, then I think that logistically
that's not always going to be feasible.

So I would like to keep them
separate if you want to say that there's two
separate rights, or two separate portions of
the trial, and leave it as the opportunity to
convey their thoughts, and a requirement to
convey their thoughts, to the convening
authority so the convening authority considers it both for case disposition and for a plea agreement, that's fine.

But if it's a right to be heard, you're going to go get to talk to the person in person, that may not be feasible in every situation. I don't think that we ought to make a recommendation to that affect.

MS. GARVIN: I may have confused the situation. The parenthetical in 32 with regard to "e.g., submission in writing or in person" was to accommodate that reality. When I said personally held and can personally convey, it was so that it wouldn't be translated through trial counsel.

It'd actually be, whether it's in writing or in person, at some juncture it's me. I write it. I say it. My counsel says it. Whatever it is. I get to do it. It's a personally held right, not one where I just get to informally tell trial counsel and then trial counsel gets to change it.
So with regard to the plea, that's what we meant by that. So it wouldn't always have to be physically in person. But the Subcommittee did not go there.

COL COOK: Is the victim going to understand that nuance?

MS. GARVIN: I'm sorry?

COL COOK: Is the victim who's personally involved in the case going to understand that nuance, do you think, based on everything you heard talking with the victims and the victims' advocates? Will they understand that nuance that -- to write a letter and get their input?

MS. GARVIN: If they have Special Victims' Counsel, which they all have the right to.

That's how this works in the civilian world, too, is counsel explains their rights to them and then they would then advocate for -- I should step back. We did not specifically address that as the
Subcommittee and I just put on my hat as a subject matter expert, which I'm happy to continue with, but I don't think that's my role unless you specifically ask it of me, so.

We did not hear evidence specifically about that. What we heard evidence on is that Special Victims' Counsel spends a lot of time explaining rights and what they mean and how you can execute them in court. So I would anticipate that would be true here.

COL COOK: And it's the last part of what you just said that probably concerns me the most, about how they can enforce or how they can execute those rights in court.

MS. GARVIN: Or in proceedings or before adjudicators or the decision makers. Special Victims' Counsel, the evidence we heard and the directives they've been given, they explain rights and how you can exercise your rights regardless of what that avenue of
that exercise is.

COL COOK: I have no objection to leaving, in Recommendation 31, the input on case disposition to separating out the input on a plea agreement for the victim and requiring it be part of the process. That I have no objection to. Keeping it flexible enough that it accommodates, at the convening authority's discretion, how that will happen, that's fine.

CHAIR JONES: So are we taking accepting a plea bargain out of 31 now?

COL COOK: I think that's what General Dunn was recommending and I don't have an objection to that.

REP. HOLTZMAN: We are keeping 31 and 32 the same. Am I wrong?

CHAIR JONES: Well, everybody knows that confer doesn't mean you have a right to appear in court, whereas the right to be heard, Ms. Garvin, and correct me, implies that you might have the right to be heard in
court? Or does it mean, you know, in the
civilian Victims' Rights Act, that you have a
right to be heard in court?

MS. GARVIN: It depends on where
the decision is being made. If the decision
is being made in a court proceeding you would
have and you have the right to be heard about
whatever is being decided. You would have the
right to be heard in that court proceeding.

If the decision is being made somewhere else,
you have the right to be heard about that.

That's where you have the right to be heard.

You execute your right to be heard
where the decision-making moment is. The
proceeding in which, or the opportunity in
which that decision is being made.

COL COOK: In the military court,
though, there are two parts to that. The
convening authority makes the initial decision
about whether to accept a plea on what might
be a potential cap on that plea.

The accused has then got to go
into the first part of a court-martial and say
what they are pleading to, why they think they
are guilty and then it's up to the military
judge to accept that plea.

If the victim, to the extent that
this right, you know, to convey your opinions
is saying that it's before the convening
authority, I have no objection.

If you're saying it's going to go
into part one of the court-martial, the
findings proceedings, then I would object to
that based on the system that we have and the
way the process is set up.

MS. GARVIN: And our
recommendation was for both.

CHAIR JONES: Well, I personally
couldn't agree to both because I don't know
how it could be done.

MS. GARVIN: Well, with regards to
the rights being heard -- I'm sorry. I'm
sorry, Judge.

CHAIR JONES: No, because of the
way, you know, the plea bargain works. I
don't know how it could be an in-court
presentation by a victim.

MS. GARVIN: Well, the victim
already has, and it's already operationalized,
the right to be heard at sentencing.

COL COOK: At the sentencing.

MS. GARVIN: Right. This is a
recommendation to be heard with regard to the
plea. That is what the Subcommittee is
recommending.

CHAIR JONES: When and where?

MS. GARVIN: We are recommending
both because there are two decision points
that happen. There is the first one, which is
the plea that includes the cap, that has the
quantum element. And then there is the second
piece, which is in court. And we were
recommending both in order to align it with
the federal CVRA.

My understanding from the
conversation is there doesn't seem to be a
dispute about the former of those, the convening authority. And perhaps the second of those might be the piece that is held until the conversation with the Subcommittee.

BG DUNN: Well, in the military, in the first part of a military court-martial where there is a plea agreement, there's a conversation between the judge and the accused about, you know, did you do this, did you do this, did you do this, did you do this, tell me how you did that.

What the judge is determining is whether or not that accused, you know, understands the plea, understands the consequences of the plea and actually committed the misconduct.

It's very different than it is in the civilian. Much more detailed and much lengthier process of making sure that the accused, you know, actually is in fact pleading guilty to all the elements of each offense on that charge sheet.
And then the military judge makes a decision purely whether to accept the accused's plea of guilty in that first part of the court-martial. And I do not see how the victim comes into that to be heard in any manner. I don't see where the victim belongs in that process or what or how that would work.

The second part, if the judge accepts the plea -- the judge can reject the plea, which means that we don't go any further. It doesn't mean the case is over. It means the government has to now try the case. But assuming the judge accepts the plea, then we move to the sentencing phase, you know, where clearly the victim has the opportunity to be heard on the sentence in the case.

MS. GARVIN: So our directive was to try to align the right, or see where the rights are different between the military and the civilian.
And with regard to the civilian, the victim actually is heard in that first moment, with regard to the plea. Under the federal Crime Victims' Rights Act, the victim can be heard on the pure plea moment, meaning, do you accept this plea or do you not, regardless of the latter terms of the plea that go to sentencing.

So the victim, they're not a decision maker in the civilian system under the federal Crime Victims' Rights Act. They are heard at the proceeding and can say, right, in the federal system the test of whether to accept a plea or not to accept a plea is, is it in the interest of justice?

The victim can be heard to say, in federal court, acceptance of this plea is not in the interest of justice. Or the term of this plea isn't in the interest of justice. That is what is not currently aligned. And then they also have the right to be heard at sentence. But they can be heard purely on
whether or not to accept plea.

BG DUNN: Right. But that is tied
to the term of the plea. It's not tied to
what the military judge is doing, which is
just merely determining if this accused in
fact committed those crimes, understands what
his or her plea means, et cetera.

I mean, I think that first part is
not comparable. And you have the whole
quantum portion issue because the military
judge goes through the whole process without
ever knowing what the cap is, and so the
victim cannot address that.

MS. GARVIN: The Subcommittee
certainly did understand the difference --
again, we did not speak about the quantum
piece in those terms. What we were talking
about is making sure it was meaningful and if
the plea is going to be accepted in that
moment.

The victim's right to be heard
about anything is essentially gone after that.
because you start to put in the cap in the military terms and so you start to not have a meaningful being heard about whether the plea is in the interest of justice or not.

So we were trying to ensure, early in the process, separate and apart from the punishment that might be imposed, which is the right to be heard at sentencing, or the rehabilitative terms that come into play at sentencing.

The victim has a separate and discrete right. We were trying to find the avenue by which that gets a play in the military system. We may not have found the right device.

But that's what the Subcommittee was grappling with, is how do you ensure that the victim has a separate and discrete right to be heard about the acceptance of a plea regardless of the terms of sentence? Which is what the right is in the federal system.

That's what we were trying to achieve.
COL COOK: May I ask a question about the federal practice? I'm sorry. Because I don't know that practice much. When they do that in the federal -- when the victim comes in and has their right to be heard in the federal system -- federal pleas, when an accused stands there and says I plead guilty, do they have to go into a lot of detail? Or can they just plead to whatever the agreed upon charge was and saying I'm pleading guilty, not to rape but to sexual assault?

MS. GARVIN: They have to argue to the facts that result in --

CHAIR JONES: They have to allocate to sufficient conduct to satisfy each and every element in their defense.

MS. GARVIN: There we go.

COL COOK: Okay.

CHAIR JONES: And I have to say, in 17 years, I never saw a victim come in and make a statement at a plea. I understand that it's in the --
MS. GARVIN: And it was only passed in 2004 and the first case interpreting the federal Crime Victims' Rights Act did not issue from an appellate court until 2006. So it's a relatively new, specific right in the federal civilian system also.

COL COOK: Do the victims, then, when they come in and the allocution is made, does the victim then make their statement under oath? And, I mean, how much do they say this would not be in the interest of justice, or do they start contesting some of the comments of the person?

I mean, is this under oath? Do they challenge, well, what that person said is not true, he or she or whoever it was, what they're saying is not true, this is what really happened. How far does that statement go? Just as a matter of practice.

CHAIR JONES: Again, I don't know because I've never seen it happen. I got off the bench a year ago and I've never seen it
happen. But, you know, one judge in one
district, so.

MS. GARVIN: Ma'am, I'm happy to
provide some information.

CHAIR JONES: What I want to know
is this. Look. I think the concept of a
victim having input with respect to a plea
bargain makes perfect sense and obviously you
have to correlate talking to the prosecutor in
the federal system who's going to be making
that decision versus going to the convening
authority hearing with the military justice
system.

But in the military system, I
assume -- or maybe I'm wrong. Does the
accused plead to every charge, or does the
plea bargain permit a plea of lesser than the
all charges? I know there's an agreed upon
term.

COL COOK: Whatever the charge
sheet says, all of them by the end will be
accounted for. The accused, they could not
enter a plea on some and maybe the trial
counsel will withdraw some of the charges or
just not proceed with them.

They could plea to the offence
itself. They can plea to lesser included, but
what's on that charge sheet is going to be
addressed in the court and they do plead to
each thing that's alleged unless there's been
an agreement to withdraw that charge or
dismiss it.

CHAIR JONES: But is that done by
the trial counsel or by the convening -- well,
that would be part of the convening authority.

COL COOK: Part of the deal that's
considered by --

BG DUNN: And the convening
authority -- and you really, if you get in a
situation where you're really not addressing
every charge, because there could be two
charges of the convening authority agrees to
dismiss after the plea is accepted and the
sentence is imposed. And when the convening
authority takes action, then, in accordance
with the pretrial agreement, he or she will
dismiss those remaining charges.

CHAIR JONES: So potentially a
victim might want to come in at the point
where this plea is being taken and say I don't
like this plea because there are three charges
that were originally referred and now they're
not here anymore. So is that the --

MS. GARVIN: Yes, and that aligns
with civilian.

BG DUNN: They can't do that. The
victim can't do that because the judge does
not know the quantum portion of the plea.

CHAIR JONES: Wouldn't the Judge
know what was referred and then what changed
afterwards?

COL COOK: Yeah, but for each of
the offenses that the accused pleas to, the
Judge is going through all of the elements of
that charge to make sure the defendant knows
what exactly are you saying you did and have
you met all the elements on each of the
charges that are plead to. And that has
nothing to do with the quantum portion of
itself. It's the --

BG DUNN: Right. But the problem
you could have is, say you have six charges,
and the accused comes in, has a plea
agreement, comes in and is going to plead to
charges 1, 4 and 5.

Then that's what the military
judge goes through the process with charges 1,
4 and 5. And the military judge doesn't
inquire or know what has happened to 2, 3 and
6.

CHAIR JONES: So he doesn't know
that 2, 3 and 6 were referred?

BG DUNN: Right. Well, he knows
they're referred, but he doesn't know, you
know, what the next step is going to be with
regard to those because the accused is
pleading to these.

MS. GARVIN: So, if I may, that's
actually relatively similar, in that when the victim comes in on the civilian side at the front end, one piece of what they could do is say this plea is inadequate because it's dropping critical charges that are relevant to the proceeding and therefore it's not in the interest of justice to accept this limited plea.

CHAIR JONES: That what I would imagine happens in the civil court.

MS. GARVIN: That's what they do. And I will say, when I say the victim, and one of our other recommendations is about the SVC, you know, in the civilian system right now, this is predominately done by victim's counsel coming in and saying, you know, the victim objects to this, has a right to be heard. They're exercising their right to be heard by saying this plea is not in the interest of justice because dismissal or releasing of charges 2 and 3, which are critical to understanding the facts, makes it not in the
interest of justice.

CHAIR JONES: I think I finally got it. No matter what the victim says, the judge can't do anything about it. This is already heard with the convening authority.

BG DUNN: Right. In that first part, the victim, I think we all agree, should be heard by the convening authority in some fashion, not necessarily face-to-face. And then on sentencing. But I think that first part of the court-martial is not constructed in any way for the victim to be --

CHAIR JONES: In other words, the victim, if I've got it, has already had their opportunity to let the convening authority know how they feel about what the charges should be, and actually then appearing when this has gotten to the military judge. The military judge can't change anything.

BG DUNN: Correct.

CHAIR JONES: You can accept the plea or you can say on whatever the guy's
willing to plea to. Or gal. But he can't
turn around and say, oh, and I think this
victim's right. You should have also plead to
that.

BG DUNN: Right. The military
judge has no authority in that regard.

MS. GARVIN: Part of the
Subcommittee's conversation though in
exercising or envisioning the right to align
with the CVRA is the judge still has the
authority to reject the plea.

CHAIR JONES: Only because there's
a failure to allocute. He can't reject it or
the whole plea because, oh, you didn't plead
to these and I'm sorry I'm not accepting this
plea. That's the difference.

BG DUNN: That's the convening
authority's decision.

CHAIR JONES: That's up to the
convening authority, so getting up there at
that stage wouldn't make any sense, I don't
think.
COL COOK: I agree.

CHAIR JONES: It's the convening authority that you have to get your information to and your position to. Which you know, I know.

MS. GARVIN: No. I appreciate the detailed descriptions that the Panel is going through in order to get through all the recommendations.

The Subcommittee's focus, and it sounds like you all have a grip on it. The Subcommittee's focus was the two rights, confer about whether things go forward and along the way and have an absolutely meaningful right to be heard about the plea itself separate and apart from the right to sentence.

As long as that is being achieved as a separate right, not being relegated to the right to sentence, the military will be coming in line with the federal Crime Victims' Rights Act.
If it is lumped into the sentencing portion, or only the right to confer about whether a case goes forward, there is a gap in the rights in the military.

CHAIR JONES: I don't think any of us intended there to be that gap. I think right from the get go we've been including the right to confer with the convening authority in whatever manner about any plea bargain.

And I think all we're talking about now is, is there an appropriate moment in a courtroom to be heard? And I think at the point of an allocution before a judge doesn't make sense.

So, I mean, are we talking now basically about when else can a victim be heard in court about a plea bargain? We all agree that --

MS. GARVIN: They get to be heard by the convening authority.

CHAIR JONES: -- at every stage that a convening authority should be conferred
with about a plea bargain, the victim should be able to do that.

MS. GARVIN: So, just for clarification --

CHAIR JONES: I'm only confused about what court proceeding is it that you believe that they need to be heard in. And so maybe we can go to the second one.

MS. GARVIN: So just for language clarification, so the Subcommittee used the right to confer in one recommendation and the right to be heard in a second recommendation intentionally. Heard not meaning in person, but heard meaning something other than two-way communication. Heard meaning one-way communication I get to pass along to you.

And then we wanted to make sure it was meaningful to align with the civilian rights, meaning before it was accepted. We believed that was both in court and out of court. If what the Panel is saying is there's not an opportunity in court for that, then I
believe the Panel needs to figure out, if it's 
going to accept the recommendation in theory, 
where is the moment to ensure the victim is 
heard on plea in the proceedings or in the 
process? I should use the word process rather 
than proceedings.

        CHAIR JONES: You say heard means 
one-way communication, is that right? And 
that's how you're --

        MS. GARVIN: Heard means it is me 
saying to you, writing to you, telling you 
exactly what I think. It is the victim's 
voice being present, actively present, 
somewhere in the process.

        MR. BRYANT: In the State of 
Virginia's process, our own Victim Rights Act, 
and my memory of what goes on in the federal 
Victim Rights Act from having been in the U.S. 
Attorney's Office, is that they come in and 
they can speak directly.

        It doesn't mean it's going to 
change the judge's mind or that he's not going
to accept the plea, but sometimes it might. But they actually can come into court, in the State of Virginia's system, and address the judge and say I don't think this plea is adequate or covers the offenses committed against. And even if they're not there, the prosecutor has an obligation by law to inform the judge if the victim disagrees.

"Your Honor, we are reducing this to attempted rape and I want you to know that the victim totally disagrees with that decision to reduce this, as well as she totally disagrees with the recommended sentence." So sometimes the victims don't want to come in and be in open court but the prosecutor still has that obligation if they don't come.

Sometimes I've seen it work the other way. The judge is leery that the prosecution gave up on the case and I've had a couple of instances where my prosecutors have had the victim there to say, no, judge.
I'm the victim of this and this is what I want. And the judge still rejects the plea. So at least it's the opportunity to be heard.

MS. GARVIN: And that aligns with the federal, the state practice you described aligns with the federal that you've also described. And that's where the Subcommittee was trying to get to.

MR. BRYANT: But I have to say, like Judge Jones, in my own federal experience, I can't recall, in the 13 years, where we actually had a victim come in and say they disagreed with what was going on, what the full agreement was.

But at the same time, the prosecutor's still required to say, "Your Honor, the victim in this case does not agree with the government's plea agreement."

And the other thing is, I think this came up, yes, in every system there's a witness stipulation of facts that the judge, in the state system, in the federal system,
like the military system, goes over ad
infinitum.

The first time, when I first got
out of law school and went and had a case as
a defense attorney in federal court, after all
that judge went through I wondered why this
guy was pleading guilty myself. You know, why
would you do that with all the warnings?
That's what you get from a federal judge.
Anyway, that's just an aside.

CHAIR JONES: So where does confer
turn into heard? I mean, we know that a
victim can confer on a plea bargain, right,
with the convening authority?

MS. GARVIN: The way we crafted it
in our recommendations was confer about
whether the case is moving forward or not.
Charges.

CHAIR JONES: Okay.

MS. GARVIN: Heard was about the
plea.

CHAIR JONES: Oh, so you're not
using the conferral, here are my thoughts
about -- are we talking about a written
statement to the convening authority? That
would be a one-way statement that says this is
what I think happened in this case, he should
plead to everything or he should plead to
this?

MS. GARVIN: That's where
Recommendation 32(b) came in with the
parenthetical that said could be in writing or
in person, because we were acknowledging that
piece here.

We separated confer and the right
to be heard on plea because confer is the
right to be a part of things along the way and
understand what is happening along the way.
That is what the right to confer under the
federal CVRA and under the NDAA means. It
means you understand how things are going,
what's happening.

We grounded it in conferring with
regard to charge referral because that is a
critical moment along the process that we heard testimony and took evidence on that was a gap.

And then the right to be heard was about this critical moment, the second critical moment about whether the case is going to go away or go in a very different direction. Yes, I'm sorry.

REP. HOLTZMAN: I just have read the whole of Recommendation 32, including 32(a) and 32(b). I think, as drafted, it solves the other problems that you've raised because it says the proposed changes -- look at A. It says the proposed changes should provide the victim the right to be heard regarding a plea with appropriate consideration to account for military pre-trial agreement practice. So if it doesn't make any sense, then it doesn't have to happen.

MS. GARVIN: That is where the Subcommittee landed, as we did not specify the
moment.

REP. HOLTZMAN: Right. So that if the moment to be heard is vis-a-vis the convening authority, then the victim would have a right to submit a written document to the convening authority or to ask to be heard and could be accepted, could be rejected.

In terms of being heard in court, which what you're saying, General Dunn, is that it's a meaningless point to make a comment because the judge is just bound by accepting the plea or rejecting the plea as to whether or not the facts stated meet the legal standard.

Okay, so there's no real discretion there, just a dissent, you know, so you can't say in the interest of justice I'm for or against the plea. Well, if it doesn't make sense, there's nothing in Recommendation 32 that would require that the victim be heard at that point.

MS. GARVIN: You are correct.
REP. HOLTZMAN: You know, so I think maybe the language solves the problem.

MS. GARVIN: Representative Holtzman, you're correct. What the Subcommittee did was try to leave this, the moment of what this right looks like, to a later time to accommodate what is and isn't appropriate.

REP. HOLTZMAN: So I'm just trying to say that the concerns that have been raised appropriately here by Colonel Cook and General Dunn, I think is solved by the language. And then we don't have to worry that we're imposing something new on a system that would be irrelevant to how it actually works.

And if that's the case then perhaps we can just go forward and accept Recommendation 32. Would that be too radical?

MS. GARVIN: I retract everything I said and leave it to Representative Holtzman.

REP. HOLTZMAN: Is that something
we could do? I want other readers here to validate what I --

BG DUNN: No, 32 and all of its associated findings, I mean, it says an analogous opportunity for the victim to be heard in the military justice system is before the convening authority decides to accept the plea. I agree with that 100 percent. I was concerned because, Meg, you said both/and in court. Sorry, that's what started me down that path.

MS. GARVIN: So let me be clear --

BG DUNN: The language that's on the slides, I am fine.

REP. HOLTZMAN: So you have no problem with it?

BG DUNN: I have no problem with it.

REP. HOLTZMAN: Colonel Cook, what do you think?

COL COOK: When I had made the suggestion to combine the two is because I
didn't necessarily think there was much -- I don't mind. They can be done the same way. I don't mind having it separated so that we are recognizing two different things.

I will note that your recommendation for Number 31 never says the right to confer. It says the findings where you note what's going on in the civilian statute, and you just talk about the fact that they can convey it. That's all fine.

The language in 32 is fine with me, for the most part. The only question I want to clarify is, as long as 32(a) is the right to be heard regarding a plea, it's by the convening authority because it's not a question of the perfect consideration for the military pre-trial practice, it's because that's what it is. It's got to be the convening authority.

But the second part that says the recommended changes include a right to be heard before the convening authority decides
to accept or reject. That's what the first one says. What else does it include, is what my concern is.

If you are saying in any way by the language that's there it includes this, and if you want to change that to say the recommended change means the right to be heard before the -- the recommended change provides a right to be heard before the convening authority decides, fine.

But if it includes I'm just concerned that when we've opened the suggestion that you're also saying it might include the right to be heard in front of a military judge. And at that point I think it's too late based on all the things we've just discussed.

CHAIR JONES: Any other thoughts?

REP. HOLTZMAN: But 32, if I might just say, doesn't discuss the judge. It talks about the convening authority.

So includes the right to be heard
before the convening authority decides to
accept, reject or propose it. So I don't see
how the judge comes into that.

    Am I misreading it? Because I'm
just trying to allay your concerns and if we
need to change language here then we should
change language. But if we don't really --

COL COOK: I'm wondering, Meg, was
there anything else that it was going to
include? That's the only question I have, is
it says it includes --

MS. GARVIN: I don't have a
specific recollection of the Subcommittee.
When I said both/and the court, that was part
of a conversation. We did not specifically
say here the include was more than that with
regard to the convening authority. I don't
have a recollection of that.

COL COOK: If it's limited to the
convening authority then I have no objection.

CHAIR JONES: Well, neither would
I, but I don't know if it's limited.

COL COOK: Because that's not clear.

CHAIR JONES: Yes. On the phone.

PROF. HILLMAN: Sorry, Judge Jones. This is Beth. I have to sign off in eight minutes so I don't know if we're going to -- just to let you know on that. I think the language that's drafted, I'm in support of the language as drafted.

CHAIR JONES: You think the language in this recommendation is what?

PROF. HILLMAN: I just said I am in support.

CHAIR JONES: Oh. Okay. Thanks.

REP. HOLTZMAN: Well, I think that if the Committee conversation suggests that we're not talking about the right to be heard before the judge, in 32(b), that should satisfy everybody's concern about the meaning of that one section.

CHAIR JONES: I understand Colonel...
Cook's concern with the word include. So maybe we could just modify that, unless you're talking about being heard by anyone but the convening authority. Are you saying the recommended changes ensure the right to be heard before the convening authority?

REP. HOLTZMAN: Is that fine with you?

COL COOK: That it ensures the right to be heard by the convening authority, yes. In 32(a), I would just add after the words "regarding a plea" -- the right to be heard regarding a plea, the right to be heard by the convening authority regarding a plea. I'd put the words convening authority into 32(a).

My concern is these are going to be stand-alone recommendations. Nobody's going to go and look for some of the background discussions. So I'd rather leave this is what was intended and make it clear that they don't have to go search for it and
nobody can misinterpret it.

REP. HOLTZMAN: Are you talking about (b)?

COL COOK: I'm talking about in 32(a) where it says the proposed change should provide victims with the rights we heard regarding a plea.

I just want to modify that to say the right to be heard by a convening authority regarding a plea with appropriate consideration to the pre-trial agreement practice.

So the convening authority goes into Part (a). And (a) gets clarified to say this is what it ensures. It doesn't mean it includes anything else other than what it currently states.

CHAIR JONES: And would accept it with that additional language. Does anyone else still have a disagreement with respect to this?

PROF. HILLMAN: Judge Jones, let
me just ask, for the Subcommittee. This
means, if we put this in, then the victim is
never going to be heard in court.

CHAIR JONES: I'm sorry. I
couldn't understand what you said, Judge
Hillman.

CHAIR JONES: I think Professor
Hillman's saying that if we put this language
in, it means it's not going to be heard in
court. Well, I think this language doesn't go
there. That's right.

At the moment, it ensures the
right to be heard before the convening
authority, which we're all in agreement makes
sense. And also amended in 32(a), again, it
reiterates it's the right to be heard by the
convening authority.

So we're saying yes to that and we
really haven't found a moment in court yet
where we think there is an appropriate moment
for the victim to be heard with respect to the
plea bargain. I think that's a fair --
PROF. HILLMAN: My only question, for the Victims' Services Subcommittee, is that sufficient? Because we're not only saying we haven't found a moment. We're saying there's no right to be heard in court if we narrow it to the convening authority because the convening authority is never in court. And I just want to understand what we're saying will not happen.

REP. HOLTZMAN: Well, this doesn't apply to sentencing, isn't that correct?

CHAIR JONES: Right. Right.

MS. GARVIN: The victim has a separate and distinct right to be heard at sentencing. This would not touch -- I will say the preclusion of the opportunity to be heard in court if, by chance, there is an opportunity. I hear the Panel clearly saying they do not believe that currently with regard to plea there is an opportunity in court that makes sense. The Subcommittee did, during discussions, contemplate that if there was a
moment that made sense in court that it would be available.

So if the Panel is precluding that future potential, that would be in conflict with the Panel contemplating it.

CHAIR JONES: Well, right now all we're doing adopting the right to do what can be done by a victim right now. And at the moment, we can't contemplate a moment that makes sense. So I don't think we're precluding anything, but I'm not sure there's anything out there that's an opportunity that we are precluding.

Obviously, Professor Hillman, we'll hear more from your Subcommittee on this issue. Correct?

PROF. HILLMAN: You Honor, not on the victims' rights so much because that went with the Victims' Services Subcommittee, but recommendations on how to bring sentencing in alignment with the civilian practices, yes, you will hear more on that.
CHAIR JONES: Okay. And then we can think about it then. Okay, then I think with the amendments that make it clear what we're talking about their right to be heard by the convening authority from the victim, 32, 32(a) and 32(b) are accepted. Okay. Next, Meg.

MS. GARVIN: Recommendation 37 is next. Recommendation 37 was discussed during the last meeting and there were some changes proposed, but the Panel did not loop back around and finish discussion of it.

The findings with regard to this one, which is labeled Victim Unsworn Statement During Sentencing. The findings with regard to this, the Subcommittee, again, did a comparison.

Our job was to look at the civilian rights, the CVRA, and see if they were incorporated. The CVRA includes an opportunity for the victim to be reasonably heard at sentencing by allowing a statement
that's neither under oath nor subject to cross examination.

In fact, in the materials you'll see the Subcommittee reviewed and was presented with, the case of Kenna v. District Court, which interpreted the federal Crime Victims' Rights Act and the right to be heard and noted that it was akin to a defendant's right of allocution, which is an unsworn, not under oath moment.

Under military rules, a sexual assault victim may present evidence of impact. That is, financial, social, psychological and medical impact of an offense, that unless there's an agreement from the defense, the victim has to testify under oath and is subject to cross-examination. So in order to bring it in line with the Federal Crime Victims' Rights Act, it was a clarification that the victim's right in military proceedings to be heard at sentencing when it is not with regard to aggravation on
mitigation, but it would be a right of allocution.

So in the federal system if the victim is being used as aggravation or a mitigation with regard to a sentence rather than with regard to impact, those moments, they are subject to cross-examination and it's under oath. But when they are doing their allocution, which is impact, they are not subject to cross-examination. And so the subcommittee made a recommendation that they be allowed to do it unsworn.

The language in front of you is the modification that came out of your deliberation last time. So I will read the modified version that you all have in front of view and make a comment from the subcommittee with regard to one piece of it.

So the current amended Recommendation 37 is that the Secretary of Defense recommends the President changes to the manual for the court's martial and
1 prescribe appropriate regulations to provide
2 the right to make an unsworn victim impact
3 statement not subject to cross-examination
4 during the pre-sentencing proceeding with the
5 following safeguards.
6             The members should be instructed
7 similarly to the instruction they received
8 when the accused makes an sworn statement. If
9 there was a, quote, new matter that could
10 affect sentence brought up the in victim's
11 unsworn statement, sentencing could be delayed
12 so they have time to respond. And the unsworn
13 statement should be in writing and available
14 to the defense counsel before sentencing,
15 subject to the same objections available to
16 the government regarding the accused's unsworn
17 statement.
18             With regard to the subcommittees,
19 that is your modified language that is
20 currently before you with regard to the
21 evidence and information that the subcommittee
22 received. We did spend significant time
talking about whether it should be in writing and available to the defense prior to the moment and we had concluded it should not be in order to align it with the CVRA and to align the practice, in large part because asking a survivor to -- and we had significant conversation about the impact that sentencing has on survivors -- asking a survivor to put their statement in writing in advance and submit it to others to read in advance can actually add to the trauma they experience.

And so we made the recommendation that since the federal courts have determined the Federal Crime Victims' Rights Act right to be heard at sentencing is right of allocution, we are making it a right of allocution to alignment.

MS. KING: And just for the subcommittee or for the committee's recollection, there was an alternative statement from Mr. Cassara that I read. It's on Page 153 of your report, for the people who
may not have been here at the last meeting.

MS. GARVIN: So you have language
in front of you that was crafted by the Panel
last time. The first edits in bullet 2 align
with the subcommittee's conversations and
deliberations. The last one with regard to
the writing does not align.

BG DUNN: Yes, but I think worked
-- we tried to work it out last time to
comport with the military sentencing process,
which is so different in terms of the
immediacy and the time than the federal
sentencing process is.

So, you know, there has to be some
mechanism that allows the defense a quick
opportunity to respond to matters that the
victim may raise on sentencing.

Unlike in the federal system,
where you've got really all the facts laid out
and probably any rebuttal to what the victim
might say unless one statement is available
there, but that's not the case in the military
proceedings.

MS. GARVIN: I just wanted to -- I was asked to re-present this one and note that we had discussed that and that was not where we had landed, so I was asked to kind of put that before the Panel again.

And also to note that after having reviewed the transcript from the last hearing, I did see the conversation about this and the very detailed and substantive conversation about this.

What I will say with regard to that is there was discussion about in the federal practice there is a pre-sentence report and the victim participates in that and therefore I believe it was actually said on the record there are no surprises in federal sentencing, and I think that's a misstatement with regard to what happens in federal practice with regard to victims.

They may participate in a pre-sentence report. They do not always submit an
independent statement. Their pre-sentence report writer generally writes their statement or can write their statement. They may attach a statement to the pre-sentence report, but very often their actual statement is the allocution that has not been heard by anyone before and that happens at sentencing and the constitutional right of the defendant in that moment is to rebut that statement but not to cross-examine. So I just wanted clarification on the record of that.

COL COOK: Going back to the point that General Dunn had just said. One of the safeguards that you have included into the recommendation says, well, you know, if there is a surprise, we can always get a delay and let the defense the opportunity -- it doesn't work. It's not that easy.

I mean, the courts martial where the cases are. They can happen incredibly quickly. You took out the safeguard that Mr. Cassara had recommended on Page 155 that said
that if a victim doesn't agree to at least a
pre-sentencing interview, they don't get the
opportunity to be spoken to.

So the way I'm reading this now is
the defense would get no rights. There's not
an absolute right for them to get access to
the victim to at least understand what might
come out in court. They wouldn't necessarily
see that statement in advance because we hold
the victim's rights. And when it comes out in
court, if they don't like what comes out, then
your case gets the opportunity to request a
delay and go out and get evidence.

In a military court-martial
process, I don't think that there's an
adequate safeguard that protects the rights of
the accused as well and this is a justice
system. The victim does have that right to be
heard and should be heard and should be able
to say how this has detrimentally affected
every aspect of their life. I agree with
that.
I also agree with the concept that there is a person sitting there who's now been convicted of a crime, about to be sentenced for a crime, their due process rights are at issue as well and then a constitutional piece of that's going to outweigh. I don't think that just saying we can delay, but you're sitting in Afghanistan or Baghdad or Nigeria, wherever it is we are, that that will adequately protect the defense interest in that case.

MS GARVIN: I certainly respect your assessment of it. The conversation we had as a subcommittee was the analysis of what constitutional right actually attaches to the defendant at the time and it is a right of rebuttal.

It is not a right of cross-examination. And rebuttal in the federal system happens on the fly and we were making a recommendation to align it. And the subpoints here came after substantial
negotiation at the subcommittee level. It did not originally include those. And then the recommendation to ensure that defendant's rights were protected included the three bullets that we had put forward.

So I certainly understand the Panel's position on this and have been asked and am representing the subcommittee's position that in writing and available to defense before sentencing is not in line with the Federal Crime Victims' Rights Act or the rights that a victim of sexual assault would have in the civilian world and may be detrimental to victims.

CHAIR JONES: All right. Well, let me ask this, does anybody disagree with Recommendation 37 as it was amended. And I think it was the last thing we spoke about either -- at the end of the day the last time.

COL. COOK: Yes. I would disagree with it.

BG MCGUIRE: Disagree.
CHAIR JONES: Recommendation 37 as amended?

BG MCGUIRE: Yes.

PROF. HILLMAN: This is Beth. I disagree with the amendment.

CHAIR JONES: Okay.

COL. COOK: Now, I disagree with it as is and I disagree with it as amended. So that's the distinction. I disagree with the recommendation.

REP. HOLTZMAN: I disagree with it as amended.

CHAIR JONES: All right. Well, you know what, I think it could take us a very long time to unravel this. And this is not an easy one. I personally would like to go back and reread the sections in the report and think about this. So, Ms. Garvin, you have brought us to an impasse.

(Laughter.)

CHAIR JONES: I'm joking. All right. Let's go to 38 then and we're still
holding on to 37.

MS. GARVIN: So again, this was brought up in your last discussion but was not resolved. It was asked to be continued until today. The finding 38-1 and 38-2 are the findings that support it.

Finding 38-1 discussed the Kastenberg decision, which is that the court of appeals for the Armed Forces had addressed the issue of whether a victim has the right to be heard through counsel with regard to certain issues, absent formal clarification regarding whether references to a victim's right to be heard includes through counsel litigation on this issue is likely to continue.

Our recommendation is that the Secretary of Defense recommend to the President changes to the manual for courts-martial and prescribe appropriate regulations to clarify that all victims rights include the right for the victim to be heard include the right to be heard through counsel.
I did review, again, the transcript from the last hearing and I noted that there was discussion about whether this recommendation coming from the subcommittee was about would allow for the counsel to be the one that testified or presented the -- it's about the right to be heard and ensuring that the right to be heard is meaningful. It's not about evidentiary submissions. It's about presentation of information to the adjudicator, decision maker, whoever is on the receiving end of the right to be heard.

Kastenberg -- this was squarely presented in Kastenberg, but it was on a narrow moment of rape shield. And it was, the discussion was, does the victim have to be the one that stands up there by herself or himself and debate the legal aspects of rape shield, right, or can their lawyer do it for them. That was a core piece of Kastenberg that actually had to be litigated and decided whether the right to be heard included that
the lawyer could stand up and make the
argument.

And I will tell you, and I told
the subcommittee so it's part of our
deliberations, this has actually had to happen
in civilian systems across the country, that
you have to figure out -- when it says the
victim has the right to be heard -- does that
mean through counsel, when it has legal
argument or not?

And so the committee made the
recommendation about that counsel, that when
the victim has a right to be heard, not when
they're a witness because they don't have a
right to be a witness. Testimonial
introduction is not a right. But when they
have the right to be heard, does that
contemplate that that could be exercised
through counsel? And we here make the
recommendation that your clarify that, yes, it
contemplates that counsel can present
information.
COL. COOK: Then can you clarify
the wording of the recommendation itself to
say it includes the right to be heard on legal
aspects of opinion case as opposed to -- to be
taken out of saying, is it anything
evidentiary, is this person now going to
testify in terms of information that would
have otherwise.

If it's put that way and we're
asking the Secretary of Defense to clarify
that piece of it, and you could say to clarify
-- maybe it's what right the victim has to be
heard during the case. And just leave it and
that and let them consider it. So look at the
cases, what's out there and carve out what's
there but I just, as long as it's not the
evidentiary piece, the fact that you have a
victim standing up and arguing at a rape
shield statute, I think that's ridiculous and
unfair probably.

But that doesn't mean if you're
asking for the factual basis behind it and
providing evidence to that affect but that wouldn't be the counsel providing it, it would be the victim at that point. But that's a line that could be drawn through the court proceedings.

MR. BRYANT: May I ask a question? This is a curiosity question really, but it's related to this. I ask everybody. Was it ever contemplated that victim counsel from the military would be victim counsel in a civilian prosecution?

Because I learned last Friday that in the city of Virginia Beach and this is just -- I'm quoting now. We have -- we meaning I'm talking to the prosecutor -- we have a have a handful of Navy cases that we are prosecuting and we are getting calls from victims' counsel in the civilian prosecutions. Now, there was no information that they were causing a problem. They were just getting calls saying, I'm victim's counsel and, yes, you have the right to talk to my client.
So I'm just wondering what in the concept of this if anybody ever thought or understood that this was going to carry over to, in our area, many, many, many sexual assault prosecutions in the civilian courts involving military victims?

MS. GARVIN: I don't believe I can answer that question. I don't know if it was contemplated by anybody. I don't know.

MR. BRYANT: Okay.

CHAIR JONES: Can I just ask you, because I haven't read Kastenberg. What did they decide in Kastenberg? What did the court --

MS. GARVIN: Victim counsel can represent the victim and has standing to aid in the assistance in presenting legal arguments.

CHAIR JONES: So isn't that the end of the story?

MS. GARVIN: It was limited to 412, rape shield. So the issue is, is are we
going to have to, well, someone may correct me. I don't believe they decided on 513 but I could be wrong. I'm looking to see if anyone can shake their head yes or no.

COL. HAM: It's a 412 issue. This is Colonel Ham and it did not specify that the attorney had the right to speak. That was left to the discretion of the military judge, if I recall correctly. Is that right, Ms. Garvin?

MS. GARVIN: Yes. Yes. So what the scope of what the right to be heard counsel gets to do is slightly up in the air. It was a narrow 412 issue, so rape shield, not a 513, which is the privileges issue. And now there's a whole myriad of other rights that the victim now has the right to be heard on and so the subcommittee discussed are we going to -- is there going to be litigation on every single right to be heard about what it means. And we were recommending that you preempt that because when a victim is about to
be heard about their right, their lawyer should have standing. The order specifically asked -- I just wanted to point this out to you. In part of our directives, we were asked to look at this issue about legal standing to represent the victim by counsel. And so this was one of our areas to look at and this was where we came down on it.

COL. COOK: Can we just refer the issue to the joint services committee to consider it as part of the, or the UCMJ Review Board that's actually looking at potential changes, instead of us making that change.

I mean, this thing's just saying SECDEF tell the President the changes, but it doesn't tell them the substance of that those changes should be. I think there's going to need to be more input and probably more input than what we can provide from the point of view of this Panel.

CHAIR JONES: Well, we are -- go ahead, Liz.
REP. HOLTZMAN: I think this is relatively simple and straightforward. It just says that when the victim has a right to be heard, that that right include the right to be heard through counsel.

And if that's going to avoid litigation, isn't that a good thing? Especially on an issue like this where I don't think everyone in this room would find objectionable the fact that the victim's counsel can represent the victim in court.

That's what they're there for. So if anyone's going to litigate it, let's just avoid -- that's what I thought the objective here was, a potential issue of litigation.

COL. COOK: Then I would add the words you just said, on has the right to be heard on legal issues. It just says the right to be heard. So that concept of whoever's testifying or whatever, has the right to be heard on legal issues. Let the person advocate for them.
MS. GARVIN: That would accommodate the discussions that the subcommittee had. I will note this one. I'm not trying to throw a hank out. That's the wrong word. Whatever word. I was thinking some wrinkle in things, that's the word.

I don't want what you all decide to be perceived as limiting something that already exists, which is folks can read other folks' victim impact statements into the record, generally speaking. So, and victim counsel sometimes read victim impact statements. So they wouldn't -- they would be being heard, so I don't want it to be perceived as taking that component away, but heard on legal issues would accommodate the discussion otherwise, so.

CHAIR JONES: Well, I guess I was surprised we needed this. So maybe that means we should make the recommendation and avoid litigation. And so the only question is do we put on -- I can't imagine anyone would not
permit someone, a counsel, to read on behalf
of his client a statement. But you are
shaking your head and you say, you never know,
right.

MS. GARVIN: I have been befuddled
by this for 11 years in my practice. I've --

CHAIR JONES: So are you objecting
to on legal issues?

MS. GARVIN: Not at all. I think
that align with the subcommittee's
discussions.

CHAIR JONES: All right. Then
does anyone dissent from this recommendation,
adding the words on legal issues. No? Okay.
38's accepted. How many -- who do -- let's
see.

Professor Hillman, are you still --
- I think you're gone. Professor Hillman, are
you still there? Okay. And Mai's gone, so I
think we might have to adjourn.

COL. HAM: Ma'am, we have one
public comment.
CHAIR JONES: Oh, okay.

COL. HAM: In person.

CHAIR JONES: Then we should definitely -- Ms. Garvin, I'm really sorry that we weren't able to get through everything --

MS. GARVIN: I certainly understand the importance of public comment.

CHAIR JONES: It was still very helpful.

MS. GARVIN: Absolutely.

CHAIR JONES: It's been very helpful having you here and I do want to take the time now to have the public comment. Thanks a lot. We'll be seeing you again.

MS. GARVIN: Yes.

COL. HAM: Ma'am, the public comment is Ms. Jen McClendon. And she's here. Her written statement is in your folders and also posted to the website.

CHAIR JONES: Thank you.

PUBLIC COMMENT
Chair Jones: Good afternoon, Ms. McClendon.

Ms. McClendon: Good afternoon.

Can you hear me?

Chair Jones: Yes.

Ms. McClendon: Okay. I'm going to attempt to make this a little bit more brief than I had originally developed it to be. I want to thank the Panel for hearing me today.

My name is Jenny McClendon and I'm coming before this Panel to introduce myself as the founding mother of a collaborative think tank that wishes to address this and other sexual assault related issues.

I wish to address finite questions of this Panel and other Panels that have to have anything to do with rape in the military. This think tank is about a year old. We didn't necessarily expect to come forward this quickly, but your Panel was convening and your Panel is eventually going to disband, so we
wanted to be heard here first.

My cofounder is Diana Danis of the National Women's Veteran's Conference and former professor at the University of Colorado at Denver. Together, we have hand-selected people from a number of age groups, people who served at different times and people who have varied experiences in and outside of the military.

Our think tank includes myself. I'm a philosophy, ethics, logic, humanities and history professor. I'm a public educator and a mother, protector and provider for four young children.

My cofounder, Diana Danis, is a former faculty of the University of California -- I'm sorry, I work for the University of California. University of Colorado at Denver. Sociologist, speaker, cultural diversity instructor and social activist.

Amber Mathwig is a graduate student of Gender Studies. She's a veteran
Master-at-arms, which means that she is a military police officer who would have investigated some of these cases. Today, she's labeled as a feminist on gender in the military.

Monisha Rios is a licensed clinical social worker and macro social worker and she's a post-graduate student in humanist psychology relating to trauma care.

Geri Lynn Weinstein Mathews is a licensed clinical social and she's the coproducer of the film Justice Denied, which has to deal with specifically men who were assaulted in service.

Ginny Branam you heard from last week. She's a registered nurse, activist, educator. She is also a teacher. And she's currently decided to go back to school to become a forensic psychologist.

Rosie Palfy served as a combat correspondent in the Marine Corps, and she's currently a veteran advocate for homeless
veterans in Cleveland, Ohio. And she's well awarded in both the military and in her practice outside the military.

I'm going to skip an entire paragraph for the sake of time. At this time, I'm reporting to you that I really like the way that your legal discussions are going. I might comment that when a victim's statement is written, there might be some undue command influence on that statement.

When I was on active duty, some of the things that I witnessed, I was encouraged to see them differently than I see them today. I was encouraged to understand things through watered-down terms. And I think that that's something that you may want to consider, when it comes to victim's statements.

A lot of victims, if they want to keep their career are going to have to go along to get along and say, you know, it was terrible but I'm getting past it. It's not a very good victim impact statement if you want
a long sentence for a perpetrator. And if you want a discharge for a perpetrator, that's not going to be helpful.

There's been significant advocacy on this issue. My think tank doesn't deviate from any of the advocacy. There have been films such as Service: When Women Come Marching Home, the Invisible War and Justice Denied which I mentioned earlier. We don't deviate from any of their requests either. We don't deviate from the idea of taking the reporting out of the chain of command, but that's not, by itself, going to solve the problem.

What we're here to talk about is culture change. And legal action, legal activity can drive culture change. That's part of the reason that we selected an interdisciplinary team is because culture change is going to require people from varied backgrounds.

We're developing a set of courses
that we want to present to the war colleges. We want to present to several universities, and the goal of these courses is to help facilitate culture change through a transformative, competency-based instruction that will be offered to both senior, enlisted leadership and senior officer leadership.

What I witnessed on active duty is middle management problems, and I don't mean to deviate that much from my statement, but middle management problems were really, really critical to whether a case got out of the chain of command, got out of the division. So the first class petty officer in the Navy, the Chief, the junior officers, the Department Head, they would hear of a case and sometimes the Commanding Officer couldn't. In fact, on behalf of my own Commanding Officer, when he got the information, he was absolutely flabbergasted. It was the first time he had heard of it, of some of the issues that were happening on the ship that I was on.
So we're developing this set of competency-based courses to help facilitate culture change, kind of in tandem with the legal activity that you guys are discussing and hashing out here. I'm going to skip another paragraph except to say one thing out of this paragraph.

When I went into the military, I was already well-educated. Not as well educated as later in life but was already well-educated. I was a strong woman and still am. I was a self defense instructor and still am. And I never expected in any way -- I was one of those people who thought oh, well, that would never happen to me. It just doesn't happen to people like me.

And I'm sorry to say that that wasn't true. I didn't expect to see the blatant violence that I saw. And what shocks me and what I want to bring forth to you guys today, because it needs to influence legal discussion on this, is there are blatant
excuses for violence within the ranks.

When I was on active duty, I witnessed a first class petty officer telling me basically, we need to torment each and every one of you junior enlisted people in case we're ever captured as a division, we might say to the enemy, well, at this point, this person's going to break. You need to stop.

I don't -- if the enemy is going to torture prisoners of war, I don't think they're going to stop because senior leadership within the division says oh, you've hit their breaking point. So some of these excuses really need to be addressed. And if they can be addressed legally, that would be helpful.

When I challenged service members, they would give outrageous excuses. You ever think about the prisoner of war status that was used as an example of why we need to torture our junior enlisted personnel?
As an undergraduate, I was a Holocaust Studies major. Well, Holocaust Studies minor. History major with an emphasis in Holocaust Studies. I sat in hearings with Holocaust survivors. I listened to testimony of Holocaust survivors. And I've personally interviewed at least two Holocaust survivors, one of which was a political prisoner of war during the Holocaust. And not one of them needed to be tortured by somebody in order to be ready to be tortured there.

So some of the things that, some of the conversations that go on as a junior enlisted, toward junior enlisted people need to be brought forth and perhaps addressed legally. Excuses for violence probably should have some type of legal ramifications. Now I know that in our American culture, we don't like to police verbiage. We don't like to police words. But the military does answer to a different calling. And, again, I don't mean to deviate so much.
I'm going to skip another paragraph. After a training episode, a senior enlisted person, I want to talk about the concept of anti-training. When the military comes forward, we often hear about their training improvements. And I believe that they're improving their training processes. I'd like to sit in on some of the training processes that are going on, but I believe that most members of the military are on the right side of this.

The problem is is that the people who are on the wrong side of this can provide a pretty convincing argument. And a lot of times after there's been a training episode, you'll have an anti-training episode, which is where perhaps a training episode would include some victim testimony, would include some problems with not using victim-blaming language. And maybe the training episode is fantastic. It could be a remarkable experience for the soldiers and sailors that
witness this. Then the next morning at quarters, a senior enlisted person would say something like, look, those people that are complaining about rape, maybe 20 percent of them are honest people and maybe this does happen, but in reality most of them are guilty of buyer's remorse.

Buyer's remorse is probably -- buyer's remorse and the character of the victim fallacy are probably the number one excuses for rape going on in the military, rape and sexual assault and harassment. Anti-training happens probably every time there's a training evolution, which almost negates training.

Another problem with training is the -- that if I tell you this is not allowed in my Navy anymore. I'm a Navy veteran, so this is not allowed in my Navy anymore. A lot of times what's been said is not allowed in the Navy will be renamed. So when hazing was declared illegal long ago and far away, it was
now termed extra-military instruction, paint locker counseling.

So you were not being hazed anymore, but you were still being taken into a paint locker and physically assaulted by your Chief. It was just called something else. So you can't charge somebody for something that's not currently on the books. These things that make the legal conversation very difficult. So I've covered anti-training and I've covered some of the problems with training.

Another problem with training is -- and I use an example from math. When I was on active duty I was asked to be the command math tutor. And I enjoyed that part of my position. If I teach you the Pythagorean theorem as A squared plus B squared equals C squared and then I say, now that you understand the Pythagorean theorem, please reconstruct this wall behind you.

That's not really taking the
training to the level that it needs to go.
It's basically asking you to apply a theory to
a set of circumstances that you haven't
necessarily been prepared for. For that
reason, I'd like to have people, like my think
tank and some of the other advocacy groups,
heard a little bit more often by the
Department of Defense and by members of the
Congress because I've sat in almost every one
of these hearings one way or another, whether
it was sitting at home with my kids watching
them or -- not having the kids watch them
necessarily, but sitting at home -- or in the
hearings themselves.

And I hear over and over again the
we're training, we're training, we're
training. When I sat in the civil rights
hearing authority training, hearing authority
inquiries, one of the SAPRO officers said, I
don't even use PowerPoint in my training. I'm
not sure that the method or modality of the
training is as important as the content of the
training and how to apply the training. So I'd like to be heard more often about this training matter. I mean I am, after all, a teacher after I got out of the military.

So some of the things that are said in these training episodes when I was on active duty are -- I gave a list, and the list I'll explain in a minute. I suspect that this training is well-intended. Treat others with respect. Real soldiers don't rape. That's a great message, real soldiers don't rape. It's not the message that's happening, but it's a great message.

Not in my service. One of the -- I used to hear it all the time. Not in my Navy. Don't talk to women. I'm just going to look around at the women in the room, see what you're thinking. We don't retaliate. That has not been the experience that you guys have heard from anybody, has it? We don't retaliate. We take all allegations seriously. Ad infinitum.
All of these have some merit except for the don't talk to women, and I put that in there because that's what I heard when I was being trained in the mid-1990s at Fleet ASW Training Center in California, out in San Diego. Don't talk to women. If you talk to women, they'll charge you with rape. That does two things. It gives men the idea that women are the enemy. And it gives women who've been assaulted the idea that you'd better not report that because it will just prove Statement A.

It seems to lend too much credence to Statement A. Some male veterans, after they get out of the military, because they've been taught such harsh attitudes toward women have difficulty maintaining employment. I have a person that I know. Actually, it's a family member who hired two male veterans. They couldn't work for her because they couldn't work for a woman. And here she was trying to do her due diligence as an American
citizen. America hires heroes. But both of these male veterans walked off the job at different times.

I'm going to skip this next paragraph. I'm interested in continuing this conversation. I know that the lifespan of this Panel is limited. The conversation needs to continue even after you guys disband. I'm asking this Panel to hear my colleague, Monisha Rios, at the end of the month. She's already contacted people in New York. I'm asking the Department of Defense to continue to hear from me. I live in the DC metro area. I can be reached. And I can get time. I can make time happen, despite my many responsibilities. I can make time happen. I thank you for hearing me and I want to thank everybody that is on the right side of this matter.

I want to thank the members of the Department of Defense that are very uncomfortable with these hearings because
they've been standing on the right side of this matter for their entire careers. Hopefully for the world, the kids that are coming up today, to include my own, I'd like us to have a safer world for them to live in.

Thank you.

CHAIR JONES: Well, I want to thank you, Ms. McClendon. That was a very worthwhile presentation for us to hear. And the specific examples you were there, you are a person who can speak with authority. Your group sounds terrific with -- between their education and their experience. And I guess I should add that, you know, obviously I come to this task with a great deal of energy. So I can't thank you enough for coming. We'd very much like to hear from your colleague and you say she'll be coming to New York --

MS. MCCLENDON: Yes, I believe so.

CHAIR JONES: -- near the end of the month. And we'd be delighted to hear from
her.

MS. MCCLENDON: We should have the white paper that we promised last hearing ready for you guys. It's in production now.

CHAIR JONES: Is that the one Jamie Wi was talking about?

MS. MCCLENDON: Yes. Yes.

CHAIR JONES: Okay. Thank you.

MS. MCCLENDON: And we'll have more if you need more.

CHAIR JONES: No. I very, very much appreciate this. Thanks very much.

Yes. I can't hear you, Maria.

Are you closing the meeting?

COL. HAM: The Panel has finished its work for today, ma'am.

CHAIR JONES: All right, anybody else? The Panel has finished its work for today. Thank you.

(Whereupon, the hearing in the above-entitled matter was concluded at 1:35 p.m.)
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**Phone Number:**

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202-234-4433
CERTIFICATE

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: 05-16-14

Place: Washington, DC

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

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Court Reporter

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