role of the commander subcommittee

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deliberation session

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monday
january 13, 2014
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the panel convened telephonically
at 4:00 p.m., barbara jones, chair, presiding.

present:
the honorable barbara jones, chair
major general john altenburg, retired
professor geoffrey corn
joye frost
general carter ham, retired
professor elizabeth hillman
the honorable elizabeth holtzman
vice admiral james houck, retired
colonel lisa turner
ALSO PRESENT:

William Sprance, Designated Federal Official
Colonel Patricia Ham, Staff Director
Lieutenant Colonel Kyle Green, Supervisory Attorney
Ms. Shannon Green, Legislative Analyst
(4:07 p.m.)

CHAIR JONES: I think everyone has received the outline that was prepared by the staff, and I want to thank staff very much for that. It is terrific, and it will give us, I'm sure, a point for discussion and comment.

And I think the most important thing about this outline is it underscores the need for us to identify subjects we have to write about, because, at a minimum, they are informational in nature and it will -- if we can sign off on some or all of these, it will give the staff a chance to get started with respect to the report.

The other thing that we should all have is Professor Hillman's proposed findings. And, Beth, I want to thank you tremendously for that. It's great and beautifully written. No surprise.

PROF. HILLMAN: I figure I owed you, since I stalled the deliberations last
time by checking out early. So I was trying to --

CHAIR JONES: Well, I heard you offered to do some written comments, and you have gone way beyond that. It's wonderful. Thank you.

So I don't know where the -- I think probably starting with the outline may be the most helpful. And are there general comments, and then we could -- we could take it -- everyone has this, right, and has been able to take a look at it, or, if not, can do that now?

PROF. HILLMAN: Which outline are you referring to?

CHAIR JONES: Oh, I'm sorry. I'm talking about the -- I'm talking about the draft of the report outline that the staff prepared.

PROF. HILLMAN: Okay.

CHAIR JONES: And it's got nine sections, I believe. Wait a minute. Yes, I
think so.

LT COL GREEN: Ten sections, ma'am, the issue assessment.

CHAIR JONES: Joye, are you here? Are you on?

(No response.)

LT COL GREEN: Ms. Frost?

(No response.)

We haven't heard yet, ma'am, whether she is able to or not. So we'll keep checking.

CHAIR JONES: Okay. All right. So, I mean, the intent of this 10-section and multi-page outline was to sort of review everything that we have received information on, heard presenters on, spent time deliberating on, and thought about, I'm sure. And I think the intent is that we not miss anything, and may not -- it may not even end up being in the order that we might want to see it in, you know, a final report.

And, as we know, we haven't
deliberated on the actual proposed findings or recommendations yet. But can we just go through and sort of sign off on not -- obviously, we don't have a text, we just have subject matter that we agree or don't, that we should have in the report, final report, or other comments.

So, for instance, it seems to me it is always important to talk about your methodology and the structure, which would be our activity structure, and exactly what -- you know, what information we've got.

LT COL GREEN: We now have everybody.

CHAIR JONES: We do. So let me just -- hi. This is Barbara Jones. We should have -- you should have in front of you the draft of a report outline that was prepared by the staff, and also -- hello?

MS. FROST: Yes, we're getting it.

CHAIR JONES: Okay. Great. And also, some proposed findings drafted by
Professor Hillman.

What I wanted to do is to start with the report outline, and the point of the report outline is basically for us to go through, indicate whether yes, we think this should be in the report, these subjects should be in the report, and have the staff start writing.

Obviously, we haven't deliberated. We don't have -- we will have to do that at some point today, start today at least. We don't have proposed findings yet, but this is meant to be something to help the staff -- for us to tell the staff go ahead and start writing on some of the informational stuff.

(Muffled voice in background.) I'm sorry. I don't know -- I can't hear you. Sorry.

(Muffled voice in background.) Is anybody else -- is it just -- I can't understand what --

COL TURNER: This is Colonel
Turner. I'm at the airport. If the noise you're hearing is the background from the airport, I will just hang up and catch up with you later.

CHAIR JONES: No, no, I can hear you. I can hear you perfectly now. I just couldn't hear you a minute ago. Go ahead, please.

PROF. HILLMAN: Can you put your phone on mute? Then, we should be okay.

LT COL GREEN: Judge Jones, let me just say up front I did receive feedback from Ms. Holtzman on a couple of points to add, just kind of to maybe focus other people's thoughts in terms of the order of the outline, Representative Holtzman pointed out that we should move the arguments or issues regarding the pro and con discussion more towards the end.

So I think our goal will be to put all of the factual, sort of the predicate material up front. And so I think if you look
at the outline arguments for it --

CHAIR JONES: Yes. No, I agree.

LT COL GREEN: -- we will push

those towards the back. And then she had also

a couple of additional arguments that we have

heard from presenters, both proponents for

change and those recommending against change,

such as for the proponent arguments

eliminating potential conflicts of interest

for commanders; second, sending signals to the

survivor community; and, third, sort of the

catch-all, is nothing else has worked, so it's

time to try this.

On the other side for keeping

commanders in the role, the arguments are that

commanders rely on staff judge advocates in

the referral decisions, and that there's no

evidence that commanders have ever ignored

such advice in the making of decisions on

referral. And, then, too, some of the

problems raised by presenters in terms of the

alternative proposed.
So those were a couple of additional arguments that, I mean, I think are fairly represented by material that we heard, so we will look to add those to the sections, unless anyone has objection to it.

VADM Houck: This is Jim Houck. Can I ask a question? I apologize. I'm a little confused as to what we're talking about. Are we talking about the outline that Kyle sent out on the 6th of January? Or are we talking about the draft findings that Beth prepared recently?

Chair Jones: We're talking about the outline.

VADM Houck: Okay. Okay.

Chair Jones: Which was prepared by the staff --

VADM Houck: Right.

Chair Jones: -- and has 10 sections, the tenth being recommendations. I'm not sure what the date was that it was put out, but --
LT COL GREEN: The draft that we
sent out, sir, should say 9 Jan 14 across the
bottom. It was sent out on Friday.

VADM HOUCK: Okay. My apologies.

I will try to track that down.

LT COL GREEN: Yes, sir.

VADM HOUCK: Okay. Thanks.

LT COL GREEN: And we --

PROF. CORN: Kyle?

LT COL GREEN: Yes, sir.

Professor Corn?

PROF. CORN: This is Geoff -- yes,
this is Geoff Corn. I don't have any
objection to any of those additions. I just
had two minor points.

On the -- I think it's on IV.F,
fundamentals of the system and perception of
process transparency. I think we need to
emphasize fundamentals there to -- it's such
a general term for both victims and
individuals accused of the offense. So I
think that's one of the concerns that
typically I remember being raised by the defense -- was their concern that the focus is -- that the protection of an accused's rights has to be emphasized in the discussion.

And the other is probably -- I'm not sure whether it would fit under IV or V, but somehow I think we have to figure out how to fit in the conflation of -- the conflation of the role of the commander at different levels and how this may impact or distort the perception of the relative merits of the role of the convening authority. More specifically, conflating investigatory failures of junior level commanders with an overall failure of the convening authority system.

CHAIR JONES: Well, I know in here there is a -- there would be a description of the difference between commanders and convening authority. Is that part of what you're talking about, Geoff?

PROF. CORN: It may actually be
more of a finding, Your Honor, that one of the
-- if we -- I mean, I don't know if we would
agree on this, but if there would be some
consensus that there has been a general
conflation of command failures without a
necessarily precise dissection of where -- of
the nature and locus of those failures
generally. I think probably more of a
finding, but, yes, I think in the description
of the functions it would be some -- the
factual basis would be captured there.

GEN HAM: This is Carter Ham. I
think Professor Corn is right. I think
because of the pending bill by -- proposed by
Senator Gillibrand that we have focused -- and
perhaps properly so -- on the issue as stated
on the -- on the draft outline.

But it seems to me that that's --
that while that is perhaps -- and probably is
-- the single most important issue, when I
look at the first bullet of the subcommittee's
objectives and scope, I don't think that the
outline adequately addresses the point that Professor Corn is making -- is that there is -- and I would put myself in the category as a former commander that commanders in their commander role have had significant problems and challenges in addressing the sexual assault as distinct from the role as commanders as convening authority.

So I would -- I'm thinking out loud here a little bit, but I think the -- we could strengthen the discussion on the evidence we've heard of the role of the commander as distinct from the role of the convening authority. And that probably goes in -- I mean, it talks a little bit about that in III.B, but I think it probably needs to be strengthened.

CHAIR JONES: Yes. No, I actually think that's a very important area, because I think it's something that people don't understand. And I think there has to be a discussion of exactly who does what when in
the process of -- from the point of the
reported sexual assault through disposition.
So I would expect that to be in there.

And, Geoff, I think you were also
talking about the fact that there are also all
of these other proponents, military
investigators, many of whom are -- some are
all civilian, but the military investigation
portion, was that your notion?

PROF. CORN: Well, you know, the
stated issue on the outline is whether or not
to retain the role of the convening authority
as it is currently conceived. And I just --
you know, exactly what General Ham is
suggesting, if we are going to answer that
question, I think we have to be very precise
about some of our perceptions of the -- when
it comes to attribution for failures of the
system, whether that attribution was precisely
and accurately based on evidence of failures
of convening authorities or failures of other
components of the system ranging from response
to initial report to investigation to protection from retribution, and so on and so forth.

CHAIR JONES: I understand. Okay.

So I --

GEN HAM: Judge, this is Carter again. If I can -- if I can --

CHAIR JONES: Yes, sure.

GEN HAM: -- a little more.

Again, on V, arguments advocating for commanders to retain convening authority, I think we ought to address -- I guess in both IV or V, or somehow, what might be the personnel and resource costs. I think we have some evidence of that -- of implementing the system that is proposed in the legislation.

In V, General Franks used a word -- used a term that I think is important for that -- for paragraph V. And his phrase, as I recall, was "totality of command," which I think is -- it probably fits in V somehow.

The other point that I'm not sure
we have heard testimony, but we have heard a little bit of discussion about other significant changes in the military -- race, women, gay and lesbian, the Don't Ask, Don't Tell. And this is my personal review. And, again, I'm not sure we've heard testimony on this, but it seems to me that it has been -- in each of those instances, it was a change in law and/or policy implemented by commanders that resulted in change.

So somehow I think that notion ought to enter into the discussion.

CHAIR JONES: And what are you talking about specifically?

GEN HAM: Well, I think it --

CHAIR JONES: You're not talking about the elevation directive, right? You're talking about other things?

GEN HAM: I'm saying this is -- it is related to the Gillibrand amendment. So those -- again, the argument that says, you know, commanders have -- commanders have
failed to date, convening authorities, and
some would argue that commanders have failed,
so we've got to change the system and change
the law.

So my point would be that the U.S.
Secretary failed to racially integrate in a
proper manner, failed to accommodate expanding
roles for women, some would say failed with
regard to protecting gay and lesbian service
members.

In each of those instances, the
law and some policies changed, and commanders
were given responsibility for implementing
that law -- that change in law or policy.
And, obviously, I have some personal scar
tissue on the Don't Ask, Don't Tell stuff.
But the argument is the law changed in a
substantive way. Commanders were given
responsibility for implementing the change,
and it has worked pretty well.

CHAIR JONES: I understand exactly
what you are talking about now. Past models
of really important problems and issues, where
commanders have been part of the very
successful changes.

Okay. I've got it. Other
comments on the outline?

PROF. HILLMAN: Judge Jones, this
is Beth. I wonder if we could take care of
some of this by just -- I don't want to really
add more sections to the staff outline, if we
don't have to. Could we --

CHAIR JONES: Right.

PROF. HILLMAN: -- broaden Section
III and make it overview of the commander's
role in sexual assault cases, and then add in
there what would be sort of an -- rather than
having III.B be the place where we talk about
commanders' additional responsibilities for --
for preventing sexual assault and responding
to reports, which is in that first bullet of
our objectives and scope. Could we add
another section there that said, you know,
commanders' responsibility for the atmosphere
and culture.

And I also think, likewise, we could add something to -- I think this goes to what both Professor Corn and General Ham were saying, and then in II there, historical overview of the role of the commander, we could actually, again, cut out "in the military justice process" in Section II, and add another subheading there that said the commander's role in prior personnel challenges or --

CHAIR JONES: Right.

PROF. HILLMAN: -- integration -- General Ham's comment that we just heard.

CHAIR JONES: Right. I couldn't go too far down that road, because I find each one of those historical sort of trajectories very complicated, about why it worked and when it worked and how it played out. But I think it is relevant to note that we are talking about -- it flags the significance of the culture and legal change that we are looking
for here, and it connects this battle to those
other battles. And I think that's a useful
intervention.

So I appreciate that, that General
Ham brought that up.

CHAIR JONES:  Yes. I do, too, and
I -- it wasn't there before. Thanks.

COL HAM:  Ma'am, this is the
strategic leadership -- this is Colonel Ham.
This is the strategic leadership piece that
was raised at the last subcommittee meeting as
a subject that the subcommittee may want to
hear more on, if you determined it was
appropriate.

CHAIR JONES:  Okay. What was --
can you give more of an outline of what the
presentation would be like?

COL HAM:  General Ham can fill in
some of this, too, but there are -- leaders
are taught at the strategic level how to lead
change and how to lead cultural change as a --
both a part of their experience and a part of
their training. I think that's what General Ham is referring to, but I don't want to put words in his mouth.

CHAIR JONES: No. I think it is, too, and I think that it is something that is relevant, and it's also not -- not something that we have a lot of information before us on. So that may be an important piece here if we go ahead and do that.

LT COL GREEN: General Ham, you noted -- this is Kyle again. You noted that -- and we will go back and take a look at all of the presentations. I would agree. I don't recall offhand a lot of information presented by presenters. But if we incorporate that into the historical sections, perhaps had something in the findings section, that you -- my recommendation is maybe consider whether the subcommittee wants to look at that as a finding or have some consideration.

CHAIR JONES: Well, I mean, I think then we are basically all in agreement.
There isn't a lot on that before us, if much
at all, but we can -- I don't know, and how do
people feel about having a presentation on
this?

GEN HAM: This is Carter. I think
it's certainly worth considering. Do we want
to invite, you know, military historians or
military sociologists or someone who can give
us some perspective on the range of opinion?
There will be some who will say, you know,
these changes -- race, women, gay and lesbian
-- they are only changed because of
commanders. And there will be others that
say, "Well, it only changed because of the
law."

So we have to keep that -- I think
a couple of different folks with different
perspectives if we were going to do that. But
it's certainly worth considering.

CHAIR JONES: All right. Well,
why don't we let the staff see what they can
come up with with respect to both -- you know,
the different sides on this, and then we can see if we can arrange a presentation.

GEN HAM: And, Judge, this is Carter again. I'm sorry to be a spring-butt here. On IX.A, what I'm unclear about, I think it's -- actually, it's a great topic. I don't know -- has that information already been ascertained by the Comparative Systems Subcommittee? Did they already have that? Perhaps we could import some of what they have already garnered.

PROF. HILLMAN: What section are we talking about? IX.A?

CHAIR JONES: IX.A, yes. I think that's on -- give me one second and then I'll go to you. I think there are plenty of misperceptions about the whole process of the response and the resolution, and some of it is undoubtedly -- well, or may be part of what the Comparative Systems Subcommittee is looking at.

I also see this as what is going
to come out in terms of how things are
actually reported, cancelled, et cetera -- in
other words, where we talk about what is the
process. I mean, for me the misperceptions
can be anything from who the convening
authority is to you must report to your
commander to -- I don't know -- there are a
number of them. And I think those get
resolved with facts about how the process
works.

MS. FROST: This is Joye. I want
to jump in here, because I think that is
actually one of the most -- both VIII and IX,
because there are so many misconceptions. And
specifically the annual statistics, the
reporting statistics, has done a great
disservice, which should have been a good news
story, is being bandied about by the media.
All of these women are being sexually
assaulted.

And the average person in the
media, in the public, does not understand the
difference between forcible rape, sexual assault, and sexual harassment, but --

CHAIR JONES: So like the whole unwanted sexual --

MS. FROST: Right. And the whole thing is --

CHAIR JONES: -- unwanted touching.

MS. FROST: Right. A ball of wax and then, plus, you know, I think we -- I would really like to see some very specific recommendations about, yes, you may want to collect all of that data, but we need to be -- the military needs to be far more specific. And many of the questions that it asks -- or maybe it's not so much that they ask, but how they report it back, because if it's not military-on-military sexual assault, that needs to be treated somewhat differently, for example.

CHAIR JONES: I think from the beginning this has been a very important
issue, and it is almost something that would, to my mind anyway, go into, you know, what is the problem, and part of that will also be comparison with -- to the extent we could do it, with civilian systems.

And so I happily go to Beth Hillman. Beth, do you see this in the role of the commander's section or -- I think I see it in sort of the background. What's the problem? You know, sort of -- and some of the comparisons, and can the studies be done better by the military?

PROF. HILLMAN: To best honest, I'm feeling pragmatic here, and I'm looking at the subcommittee mission statement. And I'm trying to think how we are going to actually manage to come up with a report that has some limits on it, given how big the topic is, even that we just set out here, which is assess the role and effectiveness of commanders.

So I would -- I don't think that has much to do with public perceptions about
military response. So I would actually axe that from this Section IX here. And I don't think that the Comparative Systems Subcommittee has all of the answers on that issue, but I do think we will set out affirmatively what the -- in that subcommittee's report, which actually Kelly sent an outline earlier today I think that I haven't had a chance to look at yet, but we are meeting on Wednesday.

That I think we will set out affirmatively, not so much misperception because, frankly, we are not doing the work to poll everybody about what their perceptions are. So to set up misperceptions and knock them down would be a different task than what we have undertaken, but we will set out what the military data collection and compilation of analysis effort is like compared to comparable civilian -- or there is really no comparable civilian jurisdictions, but compared to available civilian jurisdictions
from the beginning, the culture and the atmosphere right through the adjudication and sentencing process of this.

And so we're -- you know, I do think that we will address some of that, because part of what I think you are all pointing at is that the military has been singled out. I don't really -- I don't think the best way to change that is to state the myth and then undercut it. I would rather set out what the reality is and try to undertake the educational effort from that direction. But I don't think -- I think it will be in the comparative systems piece.

CHAIR JONES: Yes, I agree. And I think it's really sort of just putting things in perspective, which I would -- that's all we can do to some extent. And I think it should be comparative systems.

REP. HOLTZMAN: Can I just raise a different point? Which is really to follow up on what General Ham said about how commanders
have implemented policies.

CHAIR JONES: Yes.

REP. HOLTZMAN: I mean, I think he's right, but what troubles me a lot about that is that we still don't have a policy of equality for women in the military. So, therefore, how does that fit into commanders who are carrying out the policy and their role? I mean, I think there's a kind of real ambiguity here, and, you know, the military is on kind of both sides of this.

You can't say, "We want women -- full respect for women; hold on, women can't do A, and they can't do B, and now, by the way, they've got to do these pullups in the Marines." And so I don't know how this fits in. I wasn't -- that's nothing that occurred to me before, but, I mean, if we're going to say, "Hey, they've done a great job," I mean, there's a kind of bigger issue here, which is, what's the overall policy in the military towards equality of women? They are still
trying to assess what combat roles women can play.

So, I mean, I -- if we are going to do that, we have to say something about -- I think, maybe I'm wrong -- you may all disagree with me about that, but --

PROF. HILLMAN: This is Beth. I do not disagree. If we get into the impact of commanders -- and I think the conclusion that commanders have to play a role in effective culture change is inescapable.

CHAIR JONES: Yes.

PROF. HILLMAN: But the question of what role they have played in all of these different -- and what point we're at in the evolution towards Shangri-La is an open question. And if you ask historians and sociologists, you are going to get a lot of different answers.

VADM HOUCK: This is Jim Houck. I may disagree. I don't know, shooting from the hip right off the top of my head, to what
extent the remaining barriers, such as they are, on women in combat are a function of the law, not commanders. I may be misspeaking, but my sense is is that to the extent that the armed forces have had the authority to integrate women, they have done so, and some would argue that they have gone beyond what their authority is. So I don't know if that's the issue that is in play right now, but that is just another perspective on it.

REP. HOLTZMAN: Well, I guess -- I mean, I was really speaking -- because I hadn't really thought this point through, but my point is not so much to blame, you know, the focus on the commanders, but if the overall policy is still one that disrespects women, then you have two -- I mean, then the military is going at this in a -- I mean, it's kind of a self-contradictory approach to this problem.

If you want to treat women with respect, then you've got to say, okay, you
know, we're going to do that. You can't -- I
mean, I don't really know -- I'm not a
sociologist, I'm not a group psychologist, I'm
not any -- I don't have those credentials. So
I can't really tell you what messages are sent
by, you know, that overall inequality, but I
would be surprised if no message was sent.

So I'm not necessarily blaming the
commander there. I'm just saying that that's
the context in which a commander also is
expected to function, and so we can't just
say, "Oh, they've done a great job of doing X,
Y, and Z," because in this case it's a little
bit more complicated, because we have a policy
that's not explicitly in favor of equality or
of full respect for women yet.

So whatever we do is against that
background. That's all -- that's really my
point. I don't know where that comes in here,
but --

LT COL GREEN: Ma'am, this is
Kyle. One of the things we looked at in terms
of scoping this report, this initial
assessment, was trying to get the dividing
line to where, I mean, we had a manageable
issue. And one of the concerns we had was
climate culture and command culture is a
bigger issue, and whether or not -- I'm not
sure how that directly relates to the
commander's role as convening authority and
oversight of the military justice system.

And obviously, I mean, this is an
interim or an initial report. I mean, the
larger report for June or the larger report
for the subcommittee in April or the larger
report for the panel in June can maybe address
that more, would be my recommendation.

MS. GREEN: That's a great point,
because there are so many issues related to
whatá--

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

LT COL GREEN: Shannon Green just
says that -- and she just pointed out that the
issues raised by Representative Holtzman spin off a lot of additional issues that would probably rate some consideration by the subcommittee or panel. And I just get concerned that we're -- we would move out to an area different from convening authority responsibility.

CHAIR JONES: Well, yes, I mean, I think the one thing that is clear is there is not -- we don't have enough force now, and we might never have enough to make -- you know, to be able to make a statement on this. I think it's a pretty broad concept.

I had taken General Ham's comments to mean more that, look, when faced with large, you know, important issues relating to equality, commanders got involved and were integral to the solution.

Now, I think, you know -- I don't know how much we can say about it, and we can -- you know, we can take a look at the strategic planning and presentation, but I
agree that it's a little broad, it's possibly
a little broad for the commander, and we might
not be able to do it in time for, you know,
our deliberating at the end of this month for
instance.

I would just take it off the
table. That's all.

REP. HOLTZMAN: Okay. I'm going
to refine my point just a little bit more
clearly now that you've responded, which is
simply in these cases what you're talking
about -- even those two cases areN'T
necessarily a complete analogy, is because in
those cases policy was explicit -- no racial
discrimination. No discrimination on the
basis of sexual orientation.

Here the policy is not completely
explicit with regard to no discrimination
against women. That's the difference I see.
It's a little bit more complicated.

Now maybe we don't put that in, or
maybe we leave it for a different point, but
that is the difference I think.

GEN HAM: This is Carter. So I guess fundamentally I think Professor Hillman -- and she always does -- gave it exactly right. The real issue is just to make the point to those who think that changing the law will solve all of the problems. It is -- maybe a change in law is necessary, but it will be commanders who implement a change in the law.

And with regard to women, obviously that is also a matter of law, as Professor Corn stated.

But I'd go back again to -- again, my scar tissue on Don't Ask, Don't Tell. When Don't Ask, Don't Tell became the law, it was highly unsatisfying to everyone, but it was the law and it was commanders who implemented that law, because that's what it was. And when that law was repealed, it was, again, commanders who implemented that change.

That's the only point I'm trying
to make.

PROF. CORN: Can I jump in? This is Professor Corn. It strikes me that this may be an introductory point emphasizing that whatever reforms are proposed or imposed, the commander is going to continue to play an essential role in implementing them.

I think -- I recall that that was General Pede's exact response to the question, what would happen if Senator Gillibrand's proposal was enacted? He said the Army would make it work. That's what we do. And I think that it's a fair comment that whatever the criticisms or accolades for commanders in any other context, we have to be confident that whatever changes are imposed on the system they are going to work with it and be instrumental in implementing it.

CHAIR JONES: I'm sorry. I can't hear. Is somebody speaking?

LT COL GREEN: I think that's just background noise, ma'am.
CHAIR JONES: Oh, I'm sorry.

Okay. I thought somebody was talking.

Well, I don't disagree with that at all.

We are going to have a lot more -- we are going to have a lot -- I'm sorry. I thought I heard someone again. I'm just going to keep talking. We're going to have a lot of things that we will be adding or changing or fine-tuning once we see staff's effort at filling in this report.

What if -- and I think everything so far in terms of re-ordering and putting things into different sections so far has worked, and putting a finer point on some of the topics. What else, if anything, with respect to this? Any other comments?

PROF. CORN: Ma'am, this is Professor Corn again. One issue that I thought might be worth addressing somehow that was discussed periodically was, in the current function as convening authority, the balance...
between the judicial or the function of the
military judge in pre-trial matters and the
convening authority.

Maybe it would be captured under
fundamental fairness, but what I'm getting to
are things like some of the discussions or
comments that we had on whether or not the law
should be changed to empower the military
judge to have authority over certain pretrial
issues prior to referral, as opposed to the
existing model where the convening authority
exercises that -- those functions.

And I don't know if that's worth
addressing in the initial outline, or whether
Kyle thinks that is already captured somewhere
within there.

CHAIR JONES: I would expect the
whole notion that the convening authority
relies on the Staff Judge Advocate's advice is
part and parcel of the -- sort of the
overview. And then, if we -- there is lots of
legislation and policy that we would probably
want to talk about after we, you know, have this laid out a little bit more -- with more definition.

Hello?

LT COL GREEN: Professor Corn, it's Kyle. I think we have -- under the procedural overview of the commander's role, you have the referral requirements and investigation responsibility for reports. I mean, we can certainly talk about the military judge's current role there, and then I guess it's a question for the subcommittee is, if there are findings specific to the military judge -- expanding the military judge's role, maintaining the military judge's role, that we could either make in this report or, I mean, I -- I guess my concern is whether the subcommittee has had time to really talk through those issues and whether you will be ready to make those types of recommendations within the next three weeks.

CHAIR JONES: You know what,
Geoff? I'm sorry, I didn't -- I didn't appreciate you were talking about the judge's role. Sorry.

PROF. CORN: Yes. Kyle, that's fine with me. I agree that we probably haven't had a chance to discuss it fully. I just think it's -- it just seemed to be a point where there was some significant consensus that even if we retain the current convening function, there may be wisdom in expanding the pretrial authority of a military judge. But we can leave that for another day if you think it makes sense.

LT COL GREEN: Or, sir, maybe something broad like that, but then more specific recommendations as time goes on. Certainly, that's -- I think it's a very good point for the discussion on findings.

VADM HOUCK: I wanted to raise a point -- Jim Houck here -- that is potentially complex, but I will raise it anyway and the group can do with it what it likes. There is
the notion that has been expressed -- that was expressed last week by some of the witnesses we had -- and I don't know whether it will show up in our writings or not -- that since 1992, since Tailhook, that the military has had a lot of good words, but has essentially sat still and done nothing on sexual assault and that the problem remains.

And, truly, the problem does remain. But if we are going to go down the road that the military has done, nothing has changed, basically. I think we need to explore balancing that with the notion that the social structure and the social dynamic within the military and within our young people who are coming into the military has changed as well and has made the problem in some ways much more complex.

And I'm referring to, by way of example, the situation that the prosecutor from New York referred to back in December and that Captain Manning talked about the other
day, about the culture today that commanders are faced with -- which is a different culture than it was in 1992 of alcohol abuse and mores of recruits, as well as the increased number of women that are in the military and -- which is a good thing -- but the additional exposure it creates for our young people of both genders to each other in a close environment, which is a decidedly different dynamic than existed in the early '90s.

And so whether or not that is beyond the scope of what we're trying to do on -- I can see that it might be, but I think that if there is a notion -- I don't want to accept at face value the notion that nothing has changed since 1992, and the military has been sitting with its hands -- sitting on its hands.

CHAIR JONES: I am always seeing that kind of information, which I think is important, as important as sort of what is the
problem, what are we dealing with here. And
I think it should be part of the report.

Again, I'm not sure it's -- I
don't see it in the role of the commander
necessarily. I mean, maybe a comment in the
role of the commander, but I think it's
something that has to be laid out in a -- all
right, so, you know, what are the
demographics? Things you just mentioned, the
statistics about who the sexual assault
victims are, their ages, some of the
information that the background report gives
us.

VADM HOUCK: My sense is that its
connection to the role of the commander is
this -- that the point is made to say that
commanders are -- you know, may well be
inadequate for the task, because they have had
20 years to fix this and they --

CHAIR JONES: Oh. I see your
point. Yes.

VADM HOUCK: And my point is that
the dynamic has been evolving and changing,
and it is the problem -- the problem is a
problem, but it's a different problem than it
was 20 years ago, and that we should not --

CHAIR JONES: Yes. A moving
target concept. Also, the amount of training
and the turnover in soldiers and sailors.

COL HAM: And there was no
measuring, ma'am. There was no measuring,
there was no DoD SAPRO report until 2008. So
there is a 2008, a 2010, and a 2012. I'm not
certain what there was before then.

REP. HOLTZMAN: Well, I mean, I
think that really makes a very good point in
the sense that the background here is really
useful in understanding the problem. But I'm
not so sure that we can -- I mean, I think --
I don't know that we really know that -- we
know what the mores are now, or at least as
they have been described. I'm not so sure
that we have enough information that we can
say they have changed from 1992. So that's
one question I have.

And, I mean, maybe we -- if
everybody feels comfortable saying that,
that's one thing. But the attitudes of
disrespect to women, and the attitudes towards
women in the society, I don't know that those
have changed since 1992. That's something
that I'm not so sure that things -- I mean,
that there has been this changing panorama for
us.

That's all I'm saying.

VADM HOUCK: I just -- I will
offer one last comment, and then I will stop
dominating the conversation.

I think the notion that has
emerged from some of the testimony is that the
social interactions, if not the mores -- mores
may be much too difficult to measure -- but
the way of interacting among young people has
changed. And that it is -- and combined with
the fact that our young people are together
now in close quarters and in ways that are
byproducts of positive change in the military, has just created a different dynamic.

And I think that part is difficult to dispute, if only because of the way the numbers have changed, as well as the fact that -- well, I'll leave it at that. And if, you know, we can -- I have no need to -- I have no desire to make this a prominent part of the report. But I think if we are going to make statements to the effect that nothing has changed in 20 years, that would need to be more nuanced in the way we talk about that.

And that's all from my standpoint.

CHAIR JONES: Right. And I think that without characterizing beyond what maybe we should about mores, we can do a lot of this with numbers and sort of what I keep calling the demographics of explaining what -- you know, where this is happening.

In any event, I think that's a piece that should be in the report, and then we can see how -- the numbers, if you will,
and how many women were there then and how
many are here now, and the extent we have
different roles. And then we can see how it
might fit into the role of the commander
piece.

But I think that just describing
the problem is a large part of what -- or some
part of what has to be done in this report in
the beginning, just to put everything in
perspective. And we could see where we go
from there.

Any other comments?

(No response.)

So maybe what we should do is sign
off to the extent that we'll have the staff
take a first shot at all of the parts of this
that are informational and all of the evidence
that is -- and testimony, et cetera, that has
been presented to us, so that they can get
started writing. And any of us who want to
also start drafting can send that in to the
staff as well. Does that make sense?
REP. HOLTZMAN: How do you hope to get to the unspoken issue here, which is any conclusions by the subcommittee? When are we--

CHAIR JONES: I think we are going there next, Liz. I just wanted to try to get a signoff on not -- not the findings part of this report -- well, there aren't really any findings. The rest of the report is questions, and that's really our deliberations.

Professor Hillman, you suggested these proposed findings for us. And I wonder if you would -- when I finished reading them, I thought they were largely great, but I wasn't sure that they were actually findings -- I mean, they are findings, but they are not the ultimate finding that we are -- that are the answer to the ultimate question we are being asked about whether or not commanders should remain convening authorities.

Shall we take it through your
proposed findings and then go to the next step
with respect to where you leave us, paragraph
by paragraph?

PROF. HILLMAN:  Sure.  We can do
that.  I wrote these in response to looking at
the outline and thinking that these are
intended not to answer the ultimate question,
but to sort of set out the things that became
apparent to me in the process.

So I am happy to walk through
them.  I'm aware of the sort of limited time
that we have, and there is likely to be
responses to this.  So maybe we should just go
and take -- I mean, does somebody not have
their phone on mute?  Is that why --

CHAIR JONES:  Yes.  I don't know.

I can hear -- I'm having trouble hearing as
well.

PROF. HILLMAN:  Well, now there
were some beeps, but it sounds a little
quieter.  Thank you.

So shall I just take objections to
these or -- I'm not sure they're in the right order or that they are --

CHAIR JONES: Right, right.

PROF. HILLMAN: But in terms of structure, I thought it will be most effective for us if on this issue we can actually zero in on what we think are the key findings on which our recommendations should be based, because my understanding of the way a report like this will be used in the future is that to the extent that this is adopted by the panel that the recommendation will be moments in time, but the findings will stand as a way to understand all of the information that we received.

I'm getting an echo on this now, but--

CHAIR JONES: Hello?

PROF. HILLMAN: Are you hearing an echo, too?

CHAIR JONES: I am.

PROF. CORN: Hey, this is...
Professor Corn. I'd just like to chime in.

First off, thank you for doing this, you know, starting off the discussion. I really wonder if it might -- I mean, I didn't get this -- I think we got this today. And if these are proposed or initial findings -- candidly, I was just caught a little off guard by it, because I didn't realize we were necessarily at that point.

I wonder if it might be more efficient to -- I don't know, to maybe give us a little bit of time to look at these and maybe comment on them or -- I just worry that trying to go through it paragraph by paragraph or line by line beyond maybe the first paragraph -- for example, just as an illustration, I totally agree with paragraph 2, but I think -- I think that it would be more logical to emphasize the primary responsibility of a commander, which is to prepare his unit for its warfighting mission.

And then, you know, an aspect of
that is to ensure exactly what you're saying. But it is little things like that, and then some other little bit more significant -- I think that if we could maybe comment on it in writing -- I don't know. That's just one thing I would raise.

VADM HOUCK: This is Jim Houck. I agree. I'd just like some time to spend with them.

CHAIR JONES: Maybe a different way to approach this, then, is to go to the outline where the staff has laid out, and now we have added to, arguments advocating for the removal of the convening authority, since we are focused on that, because at least one of them has been emphasized by Congress and the NDAA as an additional task for us, which is to evaluate what, if any, effect removing the commander will have on reporting. I don't know. Maybe we can get some preliminary discussion about that.

I see that as an issue that we
have to, you know, either say we can't make a finding, or make a finding, we're not sure, we are sure, and then where would that leave us. It will increase it, it won't increase it, we can't tell whether it would increase it. There are any number of conclusions we might reach based on what we have heard so far.

And, I mean, one of the things may be that we still want to know more. I don't know. But that seems to me to be an area that we have talked about a little bit before back in October, and we might want to talk about it again now if we have any time. I don't really know how much time we have left.

Kyle?

LT COL GREEN: We have about a half an hour, ma'am.

CHAIR JONES: Okay.

PROF. HILLMAN: Judge Jones, this is Beth.

CHAIR JONES: Yes.

PROF. HILLMAN: I would go with C
on your litany. Do we know what --

CHAIR JONES: I'm sorry. I can't

hear you, Beth. Sorry?

PROF. HILLMAN: I think that C of

your choices -- can you hear me now -- would

be my choice, which is that I just don't think

that we know whether this change will increase

reporting. If that's the empirical question

on the table, I don't think anyone can answer

that for us.

CHAIR JONES: Right.

PROF. HILLMAN: And I think we've

heard opinions on all sides of it. I also

don't think that hearing more from more people

will give us more traction on that issue.

I actually don't think we can say

with any sort of definitive evidentiary basis

that -- either that this change will increase

reporting or will not increase reporting.

That's my opinion.

CHAIR JONES: I agree with you.

There are certainly plenty of statistics, and
to some extent there is -- there is some thought that other programs might increase reporting, but I don't -- I'm not prepared to say that even those necessarily are enough to convince me about other programs.

But I agree that I don't think we have the ability to -- I don't think there is any empirical data that shows that removing a commander will increase reporting.

PROF. HILLMAN: Right. But if you don't mind, Judge Jones, I think that's the key. It's not that -- it's not that -- I mean, I think the key is that there has been no evidence adduced before us, no factual basis from which such a conclusion could be drawn or could not be drawn. It's speculation. That's all.

CHAIR JONES: Anybody else have any additional different thoughts on that? Disagree?

MG ALTENBURG: This is Altenburg. I agree with that, but I'm wondering if we
should address it in other contexts because that's one reason that has been proposed for removing the commanders. Some people have argued anyway, not persuasively, that taking the commanders away will somehow increase prosecutions or increase convictions, neither of which I think has been demonstrated empirically either, as Congresswoman Holtzman alluded to with regard to reporting.

But there are various criticisms of commanders in the role, and it may be that we should address each one. That there is not empirical data to support any of them.

CHAIR JONES: I don't disagree with that. And I think it is an argument that -- I think everything down here that the staff has already printed is an argument. I suppose there has been -- I don't know whether or not there is agreement that -- in the past by people who are in favor of removing the commander that there will be more convictions or somehow better results.
If there has been that argument, I would agree that I don't know there is any basis to find that, and I -- so I'm just not sure whether that's one of the arguments. I think -- well, or at least it's not -- to me, I think the argument is more -- it's almost one of "We don't care what the results are, but we want to have confidence in the system. We want to make it fairer."

Those are just my comments. I could not agree with you more that, based on what we know at the moment, I don't think there is anything to -- that would convince me that there is evidence that prosecution -- you know, investigations would be more effective or that there would be more prosecutions or there would be more convictions.

What do other people think about that?

PROF. CORN: Well, this is Professor Corn. I agree with everything that has been said. I think it's pure speculation
that removing the commander from the convening
authority role will increase reporting or
prosecution rates. It might, it might not,
but I don't think we know.

REP. HOLTZMAN: Well, I don't
think anybody knows. That's the point.

CHAIR JONES: Right.

REP. HOLTZMAN: If they are,
they're keeping it a big secret. But I think
also the point is, too, Judge Jones, sort of
a little nuance, a footnote to this, is that
while some people made the argument at the
beginning that it would lead to more
convictions or prosecutions, those arguments
have, to some extent, been abandoned to be in
favor of the argument that removing the
commander will make the system fairer.

CHAIR JONES: Right. And which
leads us to the question of, if we're talking
about fairness in general, is that our
mandate? Or are we supposed to be responding
to sexual assault?
So its fairness in the context of
the arguments that are made for proponents of
removing a commander I think is only relevant
if they mean fairness to sexual assault
victims.

PROF. HILLMAN: Judge Jones, this
is Beth. I think that's right. I think there
is an argument. I mean, I do think it's a
finding that there isn't evidence about the
direction in which this would tilt the
reporting rate. I think --

CHAIR JONES: That's right.

PROF. HILLMAN: I think that's
actually a finding. The conclusion, the
recommendation that you're aiming at is, does
this mean we recommend that the change not be
made? To me, I'm not -- those aren't the same
things.

The first one is easy; the second
one is more difficult. And I -- there are
other reasons to remove the commander that go
to fairness to victims of sexual assault and
the fundamental fairness of the system that -- in which those assaults get or don't get prosecuted and investigated, et cetera.

So, but on -- the first point is the easy one. The second one is the harder one. I'm in the minority on this. I don't see good reasons to leave commanders in this role for a number of --

CHAIR JONES: I'm sorry. I didn't hear you.

PROF. HILLMAN: I don't think there are good enough reasons to leave commanders in this role, but mine is a minority viewpoint among all of you, I realize. And I drafted the findings, which I agree, you should all have time to look at. I sent them around this morning. Kyle forwarded them to you immediately. So it was not our staff that held them up, it was me.

But I -- those findings are not intended to justify a particular recommendation, so -- because it doesn't feel
to me that I think the strong majority of the
subcommittee thinks commander should stay,
should retain that role of convening
authority.

So to the extent you want to get
us to that ultimate issue, I think you should
go ahead and get there and poll people. I
think that's where they are.

CHAIR JONES: Hello? Hello?

LT COL GREEN: Yes, Judge Jones.

You're there.

VADM HOUCK: I am still here.

CHAIR JONES: Oh, okay. I heard
you say, Beth, that you think we should get to
the ultimate issue. Is that right? I missed
a little bit in the middle, but --

PROF. HILLMAN: Isn't that what
you asked -- you'd like to get on this
particular piece, which is a small part of the
overall -- or whatever, one part of the role
of the commander, you'd like to know what we
think about that -- the convening authority
issue, right?

CHAIR JONES: Absolutely.

PROF. HILLMAN: I don't think we are going to get much more information that will help, so I do think we are prepared to reach a recommendation on that. Right? I mean, I'm opening this up to the rest of you. I mean, I'm not the one to articulate that because I disagree with what you're going to send out. But that's where I think we are, right?

CHAIR JONES: I agree. And I think there was a remark made back in October that keeps coming back to me, which is who -- is there a burden here? We have a system in place with commanders. Is there a burden for people who want to remove the commander to establish, you know, good reasons for it? And we don't think that increasing reporting is one of them.

I don't think that, basically, there will be more convictions, there will be
more trials is one of them. So if we start to
go to the next one, I think that makes a lot
of sense.

We have already decided this --
that there's little to glean from our
comparison with our Allies and their systems.
I think we have to focus on this whole notion
of, is there something -- is removing a
commander actually going to have an impact?
How is it going to have an impact on sexual
assault victims? What is it they say that is
going to happen here with the removal of the
commander that is going to improve the
military's response to the problem?

And I guess I would like to hear
you on that, Beth. I understand the
perception issue. Is that where we're going?
Is that where you're going? We haven't heard
from anybody else yet.

PROF. HILLMAN: There are sirens
outside now. I apologize if you hear them, as
well as me. But I -- to speak specifically to
that, I am reluctant to substitute the judgment of others for what -- the victims who have come forward through primarily the victims advocacy organizations.

And I understand the lack of representativeness of those organizations of the entire universe of victims, but I am not persuaded that we should substitute the judgment of senior military commanders or judge advocates or prosecutors who tell us that this is not what victims want, or what victims themselves are telling us they want.

And they have told us this is what they want and I don't -- the other reason that this seems a salutary change to me is I don't view it as undermining what I agree is essential as the unity of command -- General Ham called it the totality of command -- within -- any more than what many other things have already done in terms of altering the sort of absolute control of commanding officers over there -- over the system of
1      prosecution.
2             And, likewise, I do think it's a
3     fundamental fairness issue, so that certainly
4     has an influence on my -- my assessment. But
5     the key issue that you asked me to address
6     just now is the question of how it would help
7     -- how it would help victims, and I think that
8     victims at least -- you know, and I don't know
9     whether this would increase reporting rates,
10     I really don't.
11             But I don't feel like an
12     independent view of this issue is one that
13     privileges the viewpoints of those who have
14     the authority to resolve this problem as
15     opposed to those who have suffered at -- the
16     incidents in the past and ongoing, and so I
17     just would put my faith with them and suggest
18     that they have a perspective to -- that we
19     ought to privilege. That's it.
20             MS. FROST: This is Joye. I guess
21     I have to -- I think you have captured the
22     perspective of victims perfectly, but I guess
what I am concerned about are I think some pretty unrealistic expectations on the part of some victims. At the panel last week I -- one of the persons who was testifying basically said doing this would change military culture overnight.

I think there are some pretty unrealistic expectations, and I think everybody is -- we don't really know what would happen, but I -- but having seen some --

CHAIR JONES: I'm sorry. I just had to call back in. My phone went out. Where are we?

MS. FROST: Yes. I was just saying that I have some concerns about very unrealistic expectations, and I -- I do think that reporting might increase. I think convictions, successful prosecutions, will actually decrease. That's intuitive and that's not something that I would ever, you know, put in the report. But just seeing over and over the issues in the civilian sector,
and particularly on college campuses, that's my primary concern.

REP HOLTZMAN: Well, my view about this is that, I mean, I -- my initial predilection when I started was that, hey, you know, this sounds like a good idea, not being familiar with how the military works.

But I, frankly, haven't heard any argument that is coherent to me, aside from I think it's going to work or it's going to send a signal to the survivor group, which is important.

But if the signal is about something that is not necessarily going to work, I don't know that I want to say that this is going to work to anybody, nor do I think sending signals is necessarily the right -- I mean, maybe if it really sent a huge signal to those would-be perpetrators and victims, I could be persuaded. But I don't know what kind of signal this will send, because I don't know that most people in the
military even understand how -- what the
convening authority may do.

I mean, the arguments that I heard
last week were -- well, the fairness argument,
which has nothing to do with sexual assault,
so while I completely agree and sympathize
with the issue of fairness, I can't relate it
to the sexual -- to how this will affect the
incidence of sexual assault, which is what our
assignment was.

The second -- the major argument
they came up with was, aside from sending a
signal, was the conflict of interest, that
somehow because you are a commander with two
people from the same unit you cannot -- that's
a conflict of interest, but that is of course
not a conflict of interest. People have to
make decisions, employers have to make
decisions about two employees when they get
into a fight, parents have to make a decision
when two children get into a fight. Resolving
issues between two people is something that is
done normally. It's not -- just because there
are two people doesn't mean you have a
conflict. It's ridiculous in my view.

You have a conflict if you have
some connection with one of the people
involved in some way. This was a family
member, a client, somebody you worked with, a
colleague in particular, that's a conflict of
interest, but not just because someone is in
your unit without anything more.

So if I heard compelling
arguments, I would have a different point of
view. But I don't -- change for change's sake
is not something that grabs me, particularly
when what they are -- what our mandate is is
to find a change that will affect sexual
assault in the military. And I haven't heard
the arguments that -- for making this change
that are coherent to me. And I have been
looking for that since I got here. In fact,
I was sympathetic to the issue, so I'm
surprised where I'm finding myself now,
frankly.

VADM HOUCK: I think the conflict of interest point is -- I find it to be superficial in the sense that I think the argument for conflict of interest is that a commander will not make a just decision vis-à-vis a sexual assault because the commander is afraid to do anything that highlights a problem within his or her unit.

And the allegation is is that the commander will pull the punch, will not refer a case to a court martial, will "sweep it under the rug," because to do otherwise will make the commander look bad. And I think that's very flawed. It's a very flawed argument.

There are so many ways -- I mean, I am agreeing with your conclusion, just for -- just to put a different orientation on it. I think that there are so many ways today that the allegation of a sexual assault can be reported and is transparent, that to suggest
that a commander can fool the system by not
referring a case, and, therefore, sweep it
under the rug, and then make him- or herself
look good in the process, I think is deeply
flawed.

MG ALTENBURG: This is Altenburg.

I would look at another aspect of the
rationale supporting victims having more
confidence in the system. And that is to use
as a part of the logic construct that we ought
to do what victims want I think can be
dangerous.

And by no means do all victims
feel this way, but I think all of us would
agree that just because a segment of victims
believe that they really prefer a system where
they don't have to testify, or they don't have
to confront this beast again, why can't we
just, you know, kind of do away with Sixth
Amendment considerations because that would be
a lot easier for victims, and it truly would
be easier. But we don't let that drive us.
And, again, I'm not saying that
even most victims feel that way, but certainly
a segment of the victim society or victim
segment feels that way, and they would argue
they shouldn't have to testify. Writing a
sworn statement ought to be enough. And, you
know, we didn't even come close to considering
that seriously.

I'm only going at the rationale
of, well, we've got to -- we ought to be
motivated by what victims want.

REP HOLTZMAN: And I just -- if
you'll excuse me for saying one more thing and
then I'll shut up, really. But I think that
no one is really focusing enough on the
alternative. I use an example, when I became
DA in Brooklyn, just the idea that having
"professional prosecutors" handle a matter
means that it's going to be treated the way
you think it should be treated is not true
because you don't -- who is setting the
priorities in that "professional bureaucracy"?
Is that the individual prosecutors? Do we know what he or she thinks in terms of the importance?

Remember, this is going to be now all felony cases. So what is going to be the priority? Who is going to set the priorities? Who is going to say, "Yes, we should still go ahead, if there's probable cause, even if we're likely to lose the case"? Who is going to make that decision? And how do we know that's a fair decision?

When I became DA, I had 400 professional prosecutors. They would meet every single criterion that every one of those victims advocacy groups set up. And yet I wouldn't trust them in terms of how they would come out in the handling of sexual assault cases, because they would say, "Well, how is this going to affect my conviction rate?" They wouldn't know how they themselves were going to be judged. What were their own biases, and what were their own predictions,
and what were their own concerns? How would they feed into the process?

Just because you call someone a professional doesn't mean that you're going to get the right -- a fair -- even a fair result, an unbiased result. So I'm not persuaded that the alternative has been really carefully thought through, and my experience would suggest that that's -- that the idea that there is this ideal professional out there is just -- my own experience doesn't bear that out. That's all.

PROF. CORN: Yes. This is Geoff Corn. I'd just like to make two comments. First off, on the foundation issue of erring on the interest of the collective group of victims versus, for example, Beth, you mentioned, versus the opinions of judge advocates.

Everybody has an agenda. It is impossible to take an opinion on something without it. But certainly we would hope that
the senior level judge advocates that we have
heard of generally have a commitment to a just
disposition of an allegation.

And I think my concern -- I echo
General Altenburg's concern. I think the
views of victims and victims organizations are
very important, but I think there are all
sorts of aspects of the criminal justice
system that victims perceive fail them. One
that comes to mind is plea bargaining. I
mean, prosecutors know that victims frequently
feel that the system is flawed when there are
negotiated pleas, because they don't feel like
justice was done.

Another is indeterminate
sentencing, which is a huge feature of our
military justice system where victims will
assume that if a crime occurs they are
entitled to have punishment to the maximum
extent of the law, which often is not the
case.

And so I tend to -- honestly, I
came at it with the opposite perspective of
Representative Holtzman, but I also have such
great respect for you, Beth, that after I read
your op-ed I tried to step back and look for
evidence that this was compromising the
integrity of the decision of what cases should
go to trial. And, again, I don't see it, and
I share Representative Holtzman's concern over
unanticipated or not fully explored second-
and third-order consequences of change for the
sake of change.

And, most specifically, the
concern over the self-interest of some lawyers
who might want to avoid taking difficult
cases, that it appears from some of the
witnesses we've heard, is at times neutralized
by the role of the commander.

Over.

CHAIR JONES: All right. Well, I
guess at the end of the day I haven't been
convinced that this particular sought-after
remedy is going to have the impact of being
more effective in terms of combatting sexual
assault in the military.

And so for me, if I can't see that
it's going to produce a positive result, if
I'm not convinced of that, at least at this
stage I just don't see how I could recommend
it.

I remember one of the speakers the
other day saying, "And so I think we have to
go to this drastic solution" in talking about
his support for removing the commander. And
I don't think we -- you know, it's something
that should just be done, because it is the
opinion of some victims and apparently all of
the victims advocates that we have heard from,
that this is -- this has to be done and it's
going to improve things in terms of responses
to sexual assault.

What I have become completely
persuaded of is that commanders should be --
can be much more important in creating a
climate that prevents sexual assault, and
there should be a lot of complaints that this hasn't happened yet, because it has been an issue since 1991.

But I don't think that means that you then decide, okay, well, since they haven't achieved that goal yet, we should somehow reach this drastic solution. And I think that I'm impressed with what I believe commanders can do, and that's where we should go at this point, where we should start, particularly in holding them, you know, accountable and see where -- you know, see what results occur.

I'm just not persuaded. And, again, I honestly don't think that -- because it is the perception of some, many victims, and the victims advocate groups, that that means that it's right or that it's going to have -- that, you know, actually having this legislation go through is going to basically change anything.

And I'm very concerned that the
women in the military right now, the vast
majority of them -- and forgive me if somebody
said this already, because I was off the phone
for a little while -- that the vast majority
of them don't know who the convening authority
is, and so I don't think they are going to
understand necessarily what this is all about.
I just don't see the connection.

You know, it may be that evidence
develops and that we could all be persuaded
that this is the only and last resort. But I
just don't think we're there yet. And, again,
I see no -- I just can't see any -- I'm not
convinced it's going to help anything.

PROF. HILLMAN: Judge Jones, this
is Beth. I want to thank you for -- I don't
think -- you have all taken this seriously.
I don't think you should spend more time with,
you know, my angle on this. I think I differ
on -- I agree in many respects with lots of
what everybody said. I just disagree on --
where that leaves me with all of this.
And I don't think it is worth spending more time sort of responding to me on this. I think -- you know, I don't know that we have any more time now, but I think you should, you know -- I feel well taken care of in this process. I appreciate your concern with the arguments that I raised and that they're not convincing.

So, anyway, I just wanted to thank everybody for that.

CHAIR JONES: And, Beth, I think one of the things that we should be looking forward to here is that you may want to, and you should, well, in deliberations -- not only in deliberations dissent, but also write a dissent.

PROF. HILLMAN: Understood. Thank you.

CHAIR JONES: Great.

MG ALTENBURG: Beth, I'd like to thank you for the perspective that you brought to the analysis of this issue. I think you
made all of us -- you opened all of us up a
lot more and made us all drill down much more
depth than we might have otherwise, given the
experience we brought to it and the
preconceptions that we had. And you have made
us all be much more thorough, and for that I
think we all thank you. I certainly do.

PROF. HILLMAN: Thanks, General
Altenburg.

REP. HOLTZMAN: I do, too. And I
think if there are areas in which you can
agree with the concerns that we have suggested
that would be good, too. Just so that as much
of a consensus as is possible can emerge from
-- just from my point of view, because I think
that a lot of -- as you said, you disagree
with the final conclusion. But there may be
a lot of our argument that you can agree with,
so to that extent that would be great.

CHAIR JONES: Absolutely. All
right. Then I think we should conclude
tonight. Thanks, everybody, for spending an
hour and a half with interruptions and trains
and planes and everything else in the way.

And I think our next -- we are
having a public panel on January 30th.

Kyle, is there anything --

LT COL GREEN: Yes, ma'am. If I
could just --

CHAIR JONES: -- in between then
and now that we are supposed to actually meet
on as opposed to working on drafting?

LT COL GREEN: Well, and I guess
we'll see, ma'am. This has been a very --

CHAIR JONES: I'm sorry. I can't
hear you.

LT COL GREEN: Can you hear me,
ma'am?

CHAIR JONES: Hello?

LT COL GREEN: Ma'am, can you hear
me?

CHAIR JONES: Yes, I can now.

LT COL GREEN: Okay. Ma'am, this
has obviously been helpful, and we can start
to craft some findings based on this discussion. One thing I would just note is, I mean, the staff will try to capture thoughts and overall impressions, but anyone who wants to write or feels particularly compelled to start the analysis on any of this, you know, we will certainly either work directly with you or take any of that that anybody wants to do.

I tried to reverse engineer this a little bit. And with the meeting on the 30th, I think we have to have the report done to the -- and to the panel by the 28th, which means we probably need to finalize the subcommittee's report by the 24th, which is a week from Friday. So the goal of the staff is to finalize our draft of this report by the 20th and 21st, which will allow discussion and deliberation for three to four days next week prior to finalizing the report.

So all of you know -- and, obviously, we're on a very tight timeline on
this, so whether we need to have another
meeting, Judge Jones, I mean, we can leave
that and sort of wait and see how it develops.
But our goal is to try to start to draft the
sections of this report and get those out to
you for vetting and consideration as quickly
as possible, but our goal is to have
everything in everybody's hands by next
Tuesday hopefully.

CHAIR JONES: All right. Why
don't we see what we get on Tuesday, and then
we can go from there.

LT COL GREEN: Yes, ma'am. Just
one note. Obviously, I -- somebody talked
about maybe providing some written comments on
either the proposals or any other comments you
have on the outline. Just for FACA purposes,
if you could just send those to me and the
staff, and then I will consolidate all of
those and make sure that they get out to
everyone for everyone's consideration. But
just so that we keep the -- keeping our FACA
lines, please try to avoid just the communications among yourselves. Just send them back to us as we go through this.

CHAIR JONES: Okay, Kyle. Thanks.

MR. SPRANCE: And, ma'am, this is Bill. For FACA purposes, once we're done, I'll need to close this.

CHAIR JONES: Any last comments?

(No response.)

Okay, Bill.

MR. SPRANCE: Okay. This meeting is now closed. And also, for the record, it began at 5:00 p.m.

CHAIR JONES: Thanks a lot.

Thanks to everybody.

COL HAM: It began at 4:00 p.m.

CHAIR JONES: 4:00 p.m.

(Whereupon, at 5:36 p.m., the proceedings were concluded.)
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In the matter of: Response Systems to Adult Sexual Assault Crimes Panel Meeting

Before: US DOD

Date: 01-13-14

Place: Arlington, VA

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

______________________________
Court Reporter