

UNITED STATES DEPARTMENT OF DEFENSE
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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

ROLE OF THE COMMANDER SUBCOMMITTEE

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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

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

2 (4:07 p.m.)

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

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

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

21 PROF. HILLMAN: I figure I owed
22 you, since I stalled the deliberations last

1 time by checking out early. So I was trying
2 to --

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

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

14 PROF. HILLMAN: Which outline are
15 you referring to?

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

20 PROF. HILLMAN: Okay.

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

1 think so.

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

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

6 (No response.)

7 LT COL GREEN: Ms. Frost?

8 (No response.)

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

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

22 And, as we know, we haven't

1 deliberated on the actual proposed findings or
2 recommendations yet. But can we just go
3 through and sort of sign off on not --
4 obviously, we don't have a text, we just have
5 subject matter that we agree or don't, that we
6 should have in the report, final report, or
7 other comments.

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

13 LT COL GREEN: We now have
14 everybody.

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

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

21 CHAIR JONES: Okay. Great. And
22 also, some proposed findings drafted by

1 Professor Hillman.

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

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

16 (Muffled voice in background.)

17 I'm sorry. I don't know -- I
18 can't hear you. Sorry.

19 (Muffled voice in background.)

20 Is anybody else -- is it just -- I
21 can't understand what --

22 COL TURNER: This is Colonel

1 Turner. I'm at the airport. If the noise
2 you're hearing is the background from the
3 airport, I will just hang up and catch up with
4 you later.

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

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

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

20 So I think our goal will be to put
21 all of the factual, sort of the predicate
22 material up front. And so I think if you look

1 at the outline arguments for it --

2 CHAIR JONES: Yes. No, I agree.

3 LT COL GREEN: -- we will push
4 those towards the back. And then she had also
5 a couple of additional arguments that we have
6 heard from presenters, both proponents for
7 change and those recommending against change,
8 such as for the proponent arguments
9 eliminating potential conflicts of interest
10 for commanders; second, sending signals to the
11 survivor community; and, third, sort of the
12 catch-all, is nothing else has worked, so it's
13 time to try this.

14 On the other side for keeping
15 commanders in the role, the arguments are that
16 commanders rely on staff judge advocates in
17 the referral decisions, and that there's no
18 evidence that commanders have ever ignored
19 such advice in the making of decisions on
20 referral. And, then, too, some of the
21 problems raised by presenters in terms of the
22 alternative proposed.

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

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

13 CHAIR JONES: We're talking about
14 the outline.

15 VADM HOUCK: Okay. Okay.

16 CHAIR JONES: Which was prepared
17 by the staff --

18 VADM HOUCK: Right.

19 CHAIR JONES: -- and has 10
20 sections, the tenth being recommendations.
21 I'm not sure what the date was that it was put
22 out, but --

1 LT COL GREEN: The draft that we
2 sent out, sir, should say 9 Jan 14 across the
3 bottom. It was sent out on Friday.

4 VADM HOUCK: Okay. My apologies.
5 I will try to track that down.

6 LT COL GREEN: Yes, sir.

7 VADM HOUCK: Okay. Thanks.

8 LT COL GREEN: And we --

9 PROF. CORN: Kyle?

10 LT COL GREEN: Yes, sir.

11 Professor Corn?

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

16 On the -- I think it's on IV.F,
17 fundamentals of the system and perception of
18 process transparency. I think we need to
19 emphasize fundamentals there to -- it's such
20 a general term for both victims and
21 individuals accused of the offense. So I
22 think that's one of the concerns that

1 typically I remember being raised by the
2 defense -- was their concern that the focus is
3 -- that the protection of an accused's rights
4 has to be emphasized in the discussion.

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

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

22 PROF. CORN: It may actually be

1 more of a finding, Your Honor, that one of the
2 -- if we -- I mean, I don't know if we would
3 agree on this, but if there would be some
4 consensus that there has been a general
5 conflation of command failures without a
6 necessarily precise dissection of where -- of
7 the nature and locus of those failures
8 generally. I think probably more of a
9 finding, but, yes, I think in the description
10 of the functions it would be some -- the
11 factual basis would be captured there.

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

18 But it seems to me that that's --
19 that while that is perhaps -- and probably is
20 -- the single most important issue, when I
21 look at the first bullet of the subcommittee's
22 objectives and scope, I don't think that the

1 outline adequately addresses the point that
2 Professor Corn is making -- is that there is
3 -- and I would put myself in the category as
4 a former commander that commanders in their
5 commander role have had significant problems
6 and challenges in addressing the sexual
7 assault as distinct from the role as
8 commanders as convening authority.

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

18 CHAIR JONES: Yes. No, I actually
19 think that's a very important area, because I
20 think it's something that people don't
21 understand. And I think there has to be a
22 discussion of exactly who does what when in

1 the process of -- from the point of the
2 reported sexual assault through disposition.
3 So I would expect that to be in there.

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

10 PROF. CORN: Well, you know, the
11 stated issue on the outline is whether or not
12 to retain the role of the convening authority
13 as it is currently conceived. And I just --
14 you know, exactly what General Ham is
15 suggesting, if we are going to answer that
16 question, I think we have to be very precise
17 about some of our perceptions of the -- when
18 it comes to attribution for failures of the
19 system, whether that attribution was precisely
20 and accurately based on evidence of failures
21 of convening authorities or failures of other
22 components of the system ranging from response

1 to initial report to investigation to
2 protection from retribution, and so on and so
3 forth.

4 CHAIR JONES: I understand. Okay.
5 So I --

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

8 CHAIR JONES: Yes, sure.

9 GEN HAM: -- a little more.
10 Again, on V, arguments advocating for
11 commanders to retain convening authority, I
12 think we ought to address -- I guess in both
13 IV or V, or somehow, what might be the
14 personnel and resource costs. I think we have
15 some evidence of that -- of implementing the
16 system that is proposed in the legislation.

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

22 The other point that I'm not sure

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

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

13 CHAIR JONES: And what are you
14 talking about specifically?

15 GEN HAM: Well, I think it --

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

19 GEN HAM: I'm saying this is -- it
20 is related to the Gillibrand amendment. So
21 those -- again, the argument that says, you
22 know, commanders have -- commanders have

1 failed to date, convening authorities, and
2 some would argue that commanders have failed,
3 so we've got to change the system and change
4 the law.

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

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

21 CHAIR JONES: I understand exactly
22 what you are talking about now. Past models

1 of really important problems and issues, where
2 commanders have been part of the very
3 successful changes.

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

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

11 CHAIR JONES: Right.

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

1 and culture.

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

12 CHAIR JONES: Right.

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

15 CHAIR JONES: Right. I couldn't
16 go too far down that road, because I find each
17 one of those historical sort of trajectories
18 very complicated, about why it worked and when
19 it worked and how it played out. But I think
20 it is relevant to note that we are talking
21 about -- it flags the significance of the
22 culture and legal change that we are looking

1 for here, and it connects this battle to those
2 other battles. And I think that's a useful
3 intervention.

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

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

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

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

18 COL HAM: General Ham can fill in
19 some of this, too, but there are -- leaders
20 are taught at the strategic level how to lead
21 change and how to lead cultural change as a --
22 both a part of their experience and a part of

1 their training. I think that's what General
2 Ham is referring to, but I don't want to put
3 words in his mouth.

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

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

21 CHAIR JONES: Well, I mean, I
22 think then we are basically all in agreement.

1 There isn't a lot on that before us, if much
2 at all, but we can -- I don't know, and how do
3 people feel about having a presentation on
4 this?

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

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

20 CHAIR JONES: All right. Well,
21 why don't we let the staff see what they can
22 come up with with respect to both -- you know,

1 the different sides on this, and then we can
2 see if we can arrange a presentation.

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

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

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

22 I also see this as what is going

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

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

21 And the average person in the
22 media, in the public, does not understand the

1 difference between forcible rape, sexual
2 assault, and sexual harassment, but --

3 CHAIR JONES: So like the whole
4 unwanted sexual --

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

7 CHAIR JONES: -- unwanted
8 touching.

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

21 CHAIR JONES: I think from the
22 beginning this has been a very important

1 issue, and it is almost something that would,
2 to my mind anyway, go into, you know, what is
3 the problem, and part of that will also be
4 comparison with -- to the extent we could do
5 it, with civilian systems.

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

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

21 So I would -- I don't think that
22 has much to do with public perceptions about

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

11 That I think we will set out
12 affirmatively, not so much misperception
13 because, frankly, we are not doing the work to
14 poll everybody about what their perceptions
15 are. So to set up misperceptions and knock
16 them down would be a different task than what
17 we have undertaken, but we will set out what
18 the military data collection and compilation
19 of analysis effort is like compared to
20 comparable civilian -- or there is really no
21 comparable civilian jurisdictions, but
22 compared to available civilian jurisdictions

1 from the beginning, the culture and the
2 atmosphere right through the adjudication and
3 sentencing process of this.

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

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

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

1 have implemented policies.

2 CHAIR JONES: Yes.

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

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

1 trying to assess what combat roles women can
2 play.

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

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

12 CHAIR JONES: Yes.

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

20 VADM HOUCK: This is Jim Houck. I
21 may disagree. I don't know, shooting from the
22 hip right off the top of my head, to what

1 extent the remaining barriers, such as they
2 are, on women in combat are a function of the
3 law, not commanders. I may be misspeaking,
4 but my sense is is that to the extent that the
5 armed forces have had the authority to
6 integrate women, they have done so, and some
7 would argue that they have gone beyond what
8 their authority is. So I don't know if that's
9 the issue that is in play right now, but that
10 is just another perspective on it.

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

21 If you want to treat women with
22 respect, then you've got to say, okay, you

1 know, we're going to do that. You can't -- I
2 mean, I don't really know -- I'm not a
3 sociologist, I'm not a group psychologist, I'm
4 not any -- I don't have those credentials. So
5 I can't really tell you what messages are sent
6 by, you know, that overall inequality, but I
7 would be surprised if no message was sent.

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

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

21 LT COL GREEN: Ma'am, this is
22 Kyle. One of the things we looked at in terms

1 of scoping this report, this initial
2 assessment, was trying to get the dividing
3 line to where, I mean, we had a manageable
4 issue. And one of the concerns we had was
5 climate culture and command culture is a
6 bigger issue, and whether or not -- I'm not
7 sure how that directly relates to the
8 commander's role as convening authority and
9 oversight of the military justice system.

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

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

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

21 LT COL GREEN: Shannon Green just
22 says that -- and she just pointed out that the

1 issues raised by Representative Holtzman spin
2 off a lot of additional issues that would
3 probably rate some consideration by the
4 subcommittee or panel. And I just get
5 concerned that we're -- we would move out to
6 an area different from convening authority
7 responsibility.

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

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

19 Now, I think, you know -- I don't
20 know how much we can say about it, and we can
21 -- you know, we can take a look at the
22 strategic planning and presentation, but I

1 agree that it's a little broad, it's possibly
2 a little broad for the commander, and we might
3 not be able to do it in time for, you know,
4 our deliberating at the end of this month for
5 instance.

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

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

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

21 Now maybe we don't put that in, or
22 maybe we leave it for a different point, but

1 that is the difference I think.

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

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

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

22 That's the only point I'm trying

1 to make.

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

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

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

21 LT COL GREEN: I think that's just
22 background noise, ma'am.

1 CHAIR JONES: Oh, I'm sorry.

2 Okay. I thought somebody was talking.

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

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

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

18 PROF. CORN: Ma'am, this is
19 Professor Corn again. One issue that I
20 thought might be worth addressing somehow that
21 was discussed periodically was, in the current
22 function as convening authority, the balance

1 between the judicial or the function of the
2 military judge in pre-trial matters and the
3 convening authority.

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

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

17 CHAIR JONES: I would expect the
18 whole notion that the convening authority
19 relies on the Staff Judge Advocate's advice is
20 part and parcel of the -- sort of the
21 overview. And then, if we -- there is lots of
22 legislation and policy that we would probably

1 want to talk about after we, you know, have
2 this laid out a little bit more -- with more
3 definition.

4 Hello?

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

22 CHAIR JONES: You know what,

1 Geoff? I'm sorry, I didn't -- I didn't
2 appreciate you were talking about the judge's
3 role. Sorry.

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

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

19 VADM HOUCK: I wanted to raise a
20 point -- Jim Houck here -- that is potentially
21 complex, but I will raise it anyway and the
22 group can do with it what it likes. There is

1 the notion that has been expressed -- that was
2 expressed last week by some of the witnesses
3 we had -- and I don't know whether it will
4 show up in our writings or not -- that since
5 1992, since Tailhook, that the military has
6 had a lot of good words, but has essentially
7 sat still and done nothing on sexual assault
8 and that the problem remains.

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

19 And I'm referring to, by way of
20 example, the situation that the prosecutor
21 from New York referred to back in December and
22 that Captain Manning talked about the other

1 day, about the culture today that commanders
2 are faced with of -- which is a different
3 culture than it was in 1992 of alcohol abuse
4 and mores of recruits, as well as the
5 increased number of women that are in the
6 military and -- which is a good thing -- but
7 the additional exposure it creates for our
8 young people of both genders to each other in
9 a close environment, which is a decidedly
10 different dynamic than existed in the early
11 '90s.

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

20 CHAIR JONES: I am always seeing
21 that kind of information, which I think is
22 important, as important as sort of what is the

1 problem, what are we dealing with here. And
2 I think it should be part of the report.

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

14 VADM HOUCK: My sense is that its
15 connection to the role of the commander is
16 this -- that the point is made to say that
17 commanders are -- you know, may well be
18 inadequate for the task, because they have had
19 20 years to fix this and they --

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

22 VADM HOUCK: And my point is that

1 the dynamic has been evolving and changing,
2 and it is the problem -- the problem is a
3 problem, but it's a different problem than it
4 was 20 years ago, and that we should not --

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

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

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

1 one question I have.

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

11 That's all I'm saying.

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

15 I think the notion that has
16 emerged from some of the testimony is that the
17 social interactions, if not the mores -- mores
18 may be much too difficult to measure -- but
19 the way of interacting among young people has
20 changed. And that it is -- and combined with
21 the fact that our young people are together
22 now in close quarters and in ways that are

1 byproducts of positive change in the military,
2 has just created a different dynamic.

3 And I think that part is difficult
4 to dispute, if only because of the way the
5 numbers have changed, as well as the fact that
6 -- well, I'll leave it at that. And if, you
7 know, we can -- I have no need to -- I have no
8 desire to make this a prominent part of the
9 report. But I think if we are going to make
10 statements to the effect that nothing has
11 changed in 20 years, that would need to be
12 more nuanced in the way we talk about that.
13 And that's all from my standpoint.

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

20 In any event, I think that's a
21 piece that should be in the report, and then
22 we can see how -- the numbers, if you will,

1 and how many women were there then and how
2 many are here now, and the extent we have
3 different roles. And then we can see how it
4 might fit into the role of the commander
5 piece.

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

12 Any other comments?

13 (No response.)

14 So maybe what we should do is sign
15 off to the extent that we'll have the staff
16 take a first shot at all of the parts of this
17 that are informational and all of the evidence
18 that is -- and testimony, et cetera, that has
19 been presented to us, so that they can get
20 started writing. And any of us who want to
21 also start drafting can send that in to the
22 staff as well. Does that make sense?

1 REP. HOLTZMAN: How do you hope to
2 get to the unspoken issue here, which is any
3 conclusions by the subcommittee? When are
4 we--

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

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

22 Shall we take it through your

1 proposed findings and then go to the next step
2 with respect to where you leave us, paragraph
3 by paragraph?

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

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

16 CHAIR JONES: Yes. I don't know.
17 I can hear -- I'm having trouble hearing as
18 well.

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

22 So shall I just take objections to

1 these or -- I'm not sure they're in the right
2 order or that they are --

3 CHAIR JONES: Right, right.

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

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

18 CHAIR JONES: Hello?

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

21 CHAIR JONES: I am.

22 PROF. CORN: Hey, this is

1 Professor Corn. I'd just like to chime in.
2 First off, thank you for doing this, you know,
3 starting off the discussion. I really wonder
4 if it might -- I mean, I didn't get this -- I
5 think we got this today. And if these are
6 proposed or initial findings -- candidly, I
7 was just caught a little off guard by it,
8 because I didn't realize we were necessarily
9 at that point.

10 I wonder if it might be more
11 efficient to -- I don't know, to maybe give us
12 a little bit of time to look at these and
13 maybe comment on them or -- I just worry that
14 trying to go through it paragraph by paragraph
15 or line by line beyond maybe the first
16 paragraph -- for example, just as an
17 illustration, I totally agree with paragraph
18 2, but I think -- I think that it would be
19 more logical to emphasize the primary
20 responsibility of a commander, which is to
21 prepare his unit for its warfighting mission.

22 And then, you know, an aspect of

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

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

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

22 I see that as an issue that we

1 have to, you know, either say we can't make a
2 finding, or make a finding, we're not sure, we
3 are sure, and then where would that leave us.
4 It will increase it, it won't increase it, we
5 can't tell whether it would increase it.
6 There are any number of conclusions we might
7 reach based on what we have heard so far.

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

15 Kyle?

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

18 CHAIR JONES: Okay.

19 PROF. HILLMAN: Judge Jones, this
20 is Beth.

21 CHAIR JONES: Yes.

22 PROF. HILLMAN: I would go with C

1 on your litany. Do we know what --

2 CHAIR JONES: I'm sorry. I can't
3 hear you, Beth. Sorry?

4 PROF. HILLMAN: I think that C of
5 your choices -- can you hear me now -- would
6 be my choice, which is that I just don't think
7 that we know whether this change will increase
8 reporting. If that's the empirical question
9 on the table, I don't think anyone can answer
10 that for us.

11 CHAIR JONES: Right.

12 PROF. HILLMAN: And I think we've
13 heard opinions on all sides of it. I also
14 don't think that hearing more from more people
15 will give us more traction on that issue.

16 I actually don't think we can say
17 with any sort of definitive evidentiary basis
18 that -- either that this change will increase
19 reporting or will not increase reporting.
20 That's my opinion.

21 CHAIR JONES: I agree with you.
22 There are certainly plenty of statistics, and

1 to some extent there is -- there is some
2 thought that other programs might increase
3 reporting, but I don't -- I'm not prepared to
4 say that even those necessarily are enough to
5 convince me about other programs.

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

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

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

21 MG ALTENBURG: This is Altenburg.
22 I agree with that, but I'm wondering if we

1 should address it in other contexts because
2 that's one reason that has been proposed for
3 removing the commanders. Some people have
4 argued anyway, not persuasively, that taking
5 the commanders away will somehow increase
6 prosecutions or increase convictions, neither
7 of which I think has been demonstrated
8 empirically either, as Congresswoman Holtzman
9 alluded to with regard to reporting.

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

14 CHAIR JONES: I don't disagree
15 with that. And I think it is an argument that
16 -- I think everything down here that the staff
17 has already printed is an argument. I suppose
18 there has been -- I don't know whether or not
19 there is agreement that -- in the past by
20 people who are in favor of removing the
21 commander that there will be more convictions
22 or somehow better results.

1 If there has been that argument, I
2 would agree that I don't know there is any
3 basis to find that, and I -- so I'm just not
4 sure whether that's one of the arguments. I
5 think -- well, or at least it's not -- to me,
6 I think the argument is more -- it's almost
7 one of "We don't care what the results are,
8 but we want to have confidence in the system.
9 We want to make it fairer."

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

18 What do other people think about
19 that?

20 PROF. CORN: Well, this is
21 Professor Corn. I agree with everything that
22 has been said. I think it's pure speculation

1 that removing the commander from the convening
2 authority role will increase reporting or
3 prosecution rates. It might, it might not,
4 but I don't think we know.

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

7 CHAIR JONES: Right.

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

18 CHAIR JONES: Right. And which
19 leads us to the question of, if we're talking
20 about fairness in general, is that our
21 mandate? Or are we supposed to be responding
22 to sexual assault?

1 So its fairness in the context of
2 the arguments that are made for proponents of
3 removing a commander I think is only relevant
4 if they mean fairness to sexual assault
5 victims.

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

12 CHAIR JONES: That's right.

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

19 The first one is easy; the second
20 one is more difficult. And I -- there are
21 other reasons to remove the commander that go
22 to fairness to victims of sexual assault and

1 the fundamental fairness of the system that --
2 in which those assaults get or don't get
3 prosecuted and investigated, et cetera.

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

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

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

20 But I -- those findings are not
21 intended to justify a particular
22 recommendation, so -- because it doesn't feel

1 to me that I think the strong majority of the
2 subcommittee thinks commander should stay,
3 should retain that role of convening
4 authority.

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

9 CHAIR JONES: Hello? Hello?

10 LT COL GREEN: Yes, Judge Jones.
11 You're there.

12 VADM HOUCK: I am still here.

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

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

1 issue, right?

2 CHAIR JONES: Absolutely.

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

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

21 I don't think that, basically,
22 there will be more convictions, there will be

1 more trials is one of them. So if we start to
2 go to the next one, I think that makes a lot
3 of sense.

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

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

20 PROF. HILLMAN: There are sirens
21 outside now. I apologize if you hear them, as
22 well as me. But I -- to speak specifically to

1 that, I am reluctant to substitute the
2 judgment of others for what -- the victims who
3 have come forward through primarily the
4 victims advocacy organizations.

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

13 And they have told us this is what
14 they want and I don't -- the other reason that
15 this seems a salutary change to me is I don't
16 view it as undermining what I agree is
17 essential as the unity of command -- General
18 Ham called it the totality of command --
19 within -- any more than what many other things
20 have already done in terms of altering the
21 sort of absolute control of commanding
22 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

1 what I am concerned about are I think some
2 pretty unrealistic expectations on the part of
3 some victims. At the panel last week I -- one
4 of the persons who was testifying basically
5 said doing this would change military culture
6 overnight.

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

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

14 MS. FROST: Yes. I was just
15 saying that I have some concerns about very
16 unrealistic expectations, and I -- I do think
17 that reporting might increase. I think
18 convictions, successful prosecutions, will
19 actually decrease. That's intuitive and
20 that's not something that I would ever, you
21 know, put in the report. But just seeing over
22 and over the issues in the civilian sector,

1 and particularly on college campuses, that's
2 my primary concern.

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

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

13 But if the signal is about
14 something that is not necessarily going to
15 work, I don't know that I want to say that
16 this is going to work to anybody, nor do I
17 think sending signals is necessarily the right
18 -- I mean, maybe if it really sent a huge
19 signal to those would-be perpetrators and
20 victims, I could be persuaded. But I don't
21 know what kind of signal this will send,
22 because I don't know that most people in the

1 military even understand how -- what the
2 convening authority may do.

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

11 The second -- the major argument
12 they came up with was, aside from sending a
13 signal, was the conflict of interest, that
14 somehow because you are a commander with two
15 people from the same unit you cannot -- that's
16 a conflict of interest, but that is of course
17 not a conflict of interest. People have to
18 make decisions, employers have to make
19 decisions about two employees when they get
20 into a fight, parents have to make a decision
21 when two children get into a fight. Resolving
22 issues between two people is something that is

1 done normally. It's not -- just because there
2 are two people doesn't mean you have a
3 conflict. It's ridiculous in my view.

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

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

1 frankly.

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

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

17 There are so many ways -- I mean,
18 I am agreeing with your conclusion, just for
19 -- just to put a different orientation on it.
20 I think that there are so many ways today that
21 the allegation of a sexual assault can be
22 reported and is transparent, that to suggest

1 that a commander can fool the system by not
2 referring a case, and, therefore, sweep it
3 under the rug, and then make him- or herself
4 look good in the process, I think is deeply
5 flawed.

6 MG ALTENBURG: This is Altenburg.
7 I would look at another aspect of the
8 rationale supporting victims having more
9 confidence in the system. And that is to use
10 as a part of the logic construct that we ought
11 to do what victims want I think can be
12 dangerous.

13 And by no means do all victims
14 feel this way, but I think all of us would
15 agree that just because a segment of victims
16 believe that they really prefer a system where
17 they don't have to testify, or they don't have
18 to confront this beast again, why can't we
19 just, you know, kind of do away with Sixth
20 Amendment considerations because that would be
21 a lot easier for victims, and it truly would
22 be easier. But we don't let that drive us.

1 And, again, I'm not saying that
2 even most victims feel that way, but certainly
3 a segment of the victim society or victim
4 segment feels that way, and they would argue
5 they shouldn't have to testify. Writing a
6 sworn statement ought to be enough. And, you
7 know, we didn't even come close to considering
8 that seriously.

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

12 REP HOLTZMAN: And I just -- if
13 you'll excuse me for saying one more thing and
14 then I'll shut up, really. But I think that
15 no one is really focusing enough on the
16 alternative. I use an example, when I became
17 DA in Brooklyn, just the idea that having
18 "professional prosecutors" handle a matter
19 means that it's going to be treated the way
20 you think it should be treated is not true
21 because you don't -- who is setting the
22 priorities in that "professional bureaucracy"?

1 Is that the individual prosecutors? Do we
2 know what he or she thinks in terms of the
3 importance?

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

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

1 and what were their own concerns? How would
2 they feed into the process?

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

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

20 Everybody has an agenda. It is
21 impossible to take an opinion on something
22 without it. But certainly we would hope that

1 the senior level judge advocates that we have
2 heard of generally have a commitment to a just
3 disposition of an allegation.

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

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

22 And so I tend to -- honestly, I

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

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

18 Over.

19 CHAIR JONES: All right. Well, I
20 guess at the end of the day I haven't been
21 convinced that this particular sought-after
22 remedy is going to have the impact of being

1 more effective in terms of combatting sexual
2 assault in the military.

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

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

19 What I have become completely
20 persuaded of is that commanders should be --
21 can be much more important in creating a
22 climate that prevents sexual assault, and

1 there should be a lot of complaints that this
2 hasn't happened yet, because it has been an
3 issue since 1991.

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

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

22 And I'm very concerned that the

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

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

15 PROF. HILLMAN: Judge Jones, this
16 is Beth. I want to thank you for -- I don't
17 think -- you have all taken this seriously.
18 I don't think you should spend more time with,
19 you know, my angle on this. I think I differ
20 on -- I agree in many respects with lots of
21 what everybody said. I just disagree on --
22 where that leaves me with all of this.

1 And I don't think it is worth
2 spending more time sort of responding to me on
3 this. I think -- you know, I don't know that
4 we have any more time now, but I think you
5 should, you know -- I feel well taken care of
6 in this process. I appreciate your concern
7 with the arguments that I raised and that
8 they're not convincing.

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

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

17 PROF. HILLMAN: Understood. Thank
18 you.

19 CHAIR JONES: Great.

20 MG ALTENBURG: Beth, I'd like to
21 thank you for the perspective that you brought
22 to the analysis of this issue. I think you

1 made all of us -- you opened all of us up a
2 lot more and made us all drill down much more
3 deeply than we might have otherwise, given the
4 experience we brought to it and the
5 preconceptions that we had. And you have made
6 us all be much more thorough, and for that I
7 think we all thank you. I certainly do.

8 PROF. HILLMAN: Thanks, General
9 Altenburg.

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

20 CHAIR JONES: Absolutely. All
21 right. Then I think we should conclude
22 tonight. Thanks, everybody, for spending an

1 hour and a half with interruptions and trains
2 and planes and everything else in the way.

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

5 Kyle, is there anything --

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

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

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

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

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

17 CHAIR JONES: Hello?

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

20 CHAIR JONES: Yes, I can now.

21 LT COL GREEN: Okay. Ma'am, this
22 has obviously been helpful, and we can start

1 to craft some findings based on this
2 discussion. One thing I would just note is,
3 I mean, the staff will try to capture thoughts
4 and overall impressions, but anyone who wants
5 to write or feels particularly compelled to
6 start the analysis on any of this, you know,
7 we will certainly either work directly with
8 you or take any of that that anybody wants to
9 do.

10 I tried to reverse engineer this a
11 little bit. And with the meeting on the 30th,
12 I think we have to have the report done to the
13 -- and to the panel by the 28th, which means
14 we probably need to finalize the
15 subcommittee's report by the 24th, which is a
16 week from Friday. So the goal of the staff is
17 to finalize our draft of this report by the
18 20th and 21st, which will allow discussion and
19 deliberation for three to four days next week
20 prior to finalizing the report.

21 So all of you know -- and,
22 obviously, we're on a very tight timeline on

1 this, so whether we need to have another
2 meeting, Judge Jones, I mean, we can leave
3 that and sort of wait and see how it develops.
4 But our goal is to try to start to draft the
5 sections of this report and get those out to
6 you for vetting and consideration as quickly
7 as possible, but our goal is to have
8 everything in everybody's hands by next
9 Tuesday hopefully.

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

13 LT COL GREEN: Yes, ma'am. Just
14 one note. Obviously, I -- somebody talked
15 about maybe providing some written comments on
16 either the proposals or any other comments you
17 have on the outline. Just for FACA purposes,
18 if you could just send those to me and the
19 staff, and then I will consolidate all of
20 those and make sure that they get out to
21 everyone for everyone's consideration. But
22 just so that we keep the -- keeping our FACA

1 lines, please try to avoid just the
2 communications among yourselves. Just send
3 them back to us as we go through this.

4 CHAIR JONES: Okay, Kyle. Thanks.

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

8 CHAIR JONES: Any last comments?

9 (No response.)

10 Okay, Bill.

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

14 CHAIR JONES: Thanks a lot.

15 Thanks to everybody.

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

17 CHAIR JONES: 4:00 p.m.

18 (Whereupon, at 5:36 p.m., the
19 proceedings were concluded.)
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21
22

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This is to certify that the foregoing transcript

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

Before: US DOD

Date: 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.

Neal R Gross

Court Reporter

NEAL R. GROSS

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