ROLE OF THE COMMANDER SUBCOMMITTEE

DELIBERATION SESSION

FRIDAY
JANUARY 24, 2014

The Subcommittee convened telephonically, the Honorable Barbara Jones, Chair, presiding.

PRESENT
THE HONORABLE BARBARA JONES, Chair
MAJOR GENERAL (Ret.) JOHN ALTENBERG
PROFESSOR GEOFFREY CORN
GENERAL (Ret.) CARTER HAM
PROFESSOR ELIZABETH HILLMAN
THE HONORABLE ELIZABETH HOLTZMAN
VICE ADMIRAL (Ret.) JAMES HOUCK
BRIGADIER GENERAL (Select) LISA TURNER

ALSO PRESENT

MARIA FRIED, Designated Federal Official
LT COL KYLE GREEN, RSP Senior Attorney
COL PATRICIA HAM, RSP Staff Director
TERRI SAUNDERS, RSP Deputy Staff Director
2:37 p.m.

MS. FRIED: Okay. Good afternoon.

This is Maria Fried, the DFO. And thank you all for your time once again. And with that, I'd like to go ahead and open the meeting.

CHAIR JONES: I'm sorry. Is Beth Hillman on?

LT COL GREEN: No, ma'am, she's not. We can call her, but I'm not sure she's at the office today. So she may -- I think she may be dialing in from elsewhere. But we'll send her an email and ask her if she's dialing in. I don't know if the change in numbers is affecting her or what, but we'll send her an email real quick to see if she's dialing in.

CHAIR JONES: All right.

MS. SAUNDERS: This is Terri on the line. We have a court reporter who has just joined the conference, but he's actually not physically here, but he's on conference
call with us. So if I could ask you all to please identify yourselves before you speak, if you can try to remember. Otherwise, we'll try to go back and clean it up at the end.

CHAIR JONES: Okay, good suggestion, Terri. Yes, this is Barbara Jones. I'm a little reluctant to go ahead without Beth, but I guess we can start and hope that she joins us and then we can recap.

So I, like the rest of you, have tried to read everything that's come in. And many of you have been able to get comments, which the staff has been able to add to our draft.

I guess there's one question that I had which we could discuss, and that is for the scope of what we want to report to the full Panel. And I was thinking that we certainly want to give the full Panel our findings, as we did with our initial finding on this issue earlier. But I see there's a recommendation section here, and I don't know
whether we want to do that or not -- well, at least today, because I noticed that Ms. Frost has a recommendation and others of us might have some ideas that are additional recommendations. But I would open that up. And recommendations is something we might want to discuss with the full Panel. I'd just open that up for comment. So did we intend to --

MEMBER HILLMAN: Beth Hillman.

CHAIR JONES: Hi, Beth.

MEMBER HILLMAN: Sorry I'm so late. I got hung up.

CHAIR JONES: No, no, you're not. I was here two seconds before you. This is Barbara Jones, for the court reporter. The first question I just asked, and I'd like to hear your thoughts on it, was whether, obviously we're going to issue a report with findings in it. I don't know whether we should actually have a recommendation section in this or not or leave that up to the full Panel.
MEMBER HAM: This is Carter Ham.

At this point, I think we should save
recommendations until the Subcommittee's final
report to the Panel. I think this initial
report -- personally, I'm happy with the
report as it is written and then wait until
our final report to make the Subcommittee's
recommendations.

CHAIR JONES: Anybody else on that
topic?

MEMBER HOUCK: Jim Houck. I agree
with that.

CHAIR JONES: Okay. Then that
would -- that's basically what I think that we
should do. This is Barbara Jones again. Make
our findings and then have deliberations on
those with the full Panel. And we certainly
will have an opportunity to discuss various
recommendations, but I don't think we can put
them in this report out that we're doing now
to the full Panel.

All right. I have started to read
through the various comments. I thought maybe
what we could do first of all, before we went
comment by comment that we have received, is
just to ask if there are any general comments
from anyone who may not yet have had an
opportunity to respond to the Subcommittee
report. And if there aren't any, then I think
we should just begin comment by comment.

Does everybody have a copy of the
draft with the various comments that did come
in on time to be put into it?

MEMBER HOLTZMAN: I just have a
general comment. I think it is a general
comment. I mean, there are a couple of times,
and maybe more than a couple, where we have
talked about how we have looked at the
question of whether, and it's really the
second sentence in the document, whether the
convening authority should have the right to
refer serious criminal offenses, including
sexual assault, to court-martial.

I don't think we've looked at the
question of serious criminal offenses. I think we've looked simply at the question of sexual assaults and the referral of that.

So I would recommend that we make it very clear all the way through -- I don't know how many times it appears; I know it appears at least more than once -- that the focus is on whether there should be a reference in sexual assault cases, even though the statute, and we could refer to that in a footnote or a parenthesis, the statutes or the other proposals may be much broader. But that's not our jurisdiction. I'm sorry. Liz Holtzman.

MEMBER CORN: This is Professor Corn. I agree that our -- that the mission was to focus on the issue of sexual violence offenses. I do think we have heard generally, though, particularly from commanders, about their views on the significance or importance of convening authority over offenses under the Code more generally. So I don't necessarily
agree that we have not heard anything on the relationship between the role of the commander and a broader scope of convening authority, but maybe that can be addressed in the footnote or the parenthetical that Representative Holtzman suggests.

MEMBER TURNER: Ma'am, Colonel Turner here. Maybe the staff can help us, but I think that the NDAA 14 may have specifically required RSP to, you know, evaluate the effects of removing chain of command from the UCMJ in terms of legislation. But I'd ask us to go back and look at that statute. I don't remember the details.

MEMBER HOLTZMAN: Yes, but I'm not sure that includes -- this is Liz Holtzman -- I'm not sure that it includes the impact on all the other crimes.

CHAIR JONES: This is Barbara Jones. Yeah, I think the specific NDAA 14 mandate relates to what impact, if any, removing the commander would have on the
reporting of sexual assaults. I agree with Liz Holtzman that we have -- and Professor Corn -- we have heard a little bit of -- well, we all know that the proposed legislation from Senator Gillibrand affects almost all serious felonies, not just sexual assaults. And we began to hear, and I think we heard a fair amount, about potential issues in terms of jurisdiction and other problems that might arise from having particular fact patterns that occur in every case having to be parsed out jurisdictionally between the new convening authorities and the commanders who would remain to, you know, carry out good order and discipline with less serious offenses and some serious offenses.

But we don't have anything specifically in this report about that, as I recall. So I think a footnote might be helpful, if only to say that it does affect all serious offenses and we have heard, you know, there may be some issues there. I mean,
part of our problem is we still have not
heard, I don't think, a final discussion of
exactly what the current version of Senator
Gillibrand's bill actually calls for.

MEMBER HOLTZMAN: This is Liz
Holtzman again. Maybe I'll make myself clear.
I'm happy to have footnotes saying that we
heard testimony about whatever. That's true.
But I'm just concerned with this sentence that
says the Subcommittee has focused particular
attention on the question of whether senior
commanders should retain the right to refer
serious criminal offenses, including sexual
assaults, to court-martial. That's in the
very first -- I don't think we did focus
particular attention on whether there should
be a referral of other serious offenses.
I understand this is a nitpick, so I apologize
for taking it --

CHAIR JONES: No. You know what,
I've got it now, and I think the simple fact
is we should say to refer sexual assault cases
and put in a footnote. This is Barbara Jones again, for the court reporter.

Are there any other --

MEMBER HOLTZMAN: The reason for saying that is I just don't want us to be attacked for chewing off more than we had a right to. I mean, we will be attacked for whatever we say or don't say, but, you know, if we're very narrowly focused on what actually our jurisdiction is and make it very clear that we're not going beyond that, I think we can be a little bit safer.

MEMBER ALTENBERG: I agree. This is John Altenberg. And I think the footnote is a way to cover the issue. I agree with Congresswoman Holtzman.

CHAIR JONES: Okay. Any other comments?

All right. Any other general comments that we haven't yet received or aren't on the draft?

All right. Then on page one, I
agree with Professor Hillman. I don't think we need to indicate the numbers here, but I'm happy to hear from any and everyone else on that subject.

MEMBER HAM: This is Carter Ham. I think, as with the recommendations, perhaps that degree of specificity is best left for a final report. Perhaps in this initial report we could simply say most, or a majority, or near majority or something like that.

CHAIR JONES: Any other comments on that? All right. Then we'll make a modification to that, and it will be noted in the next draft that goes out. But we'll certainly -- I agree. As I said earlier, I don't think we need eight of nine at this stage.

Okay. The next comment is from Professor Corn, and we're in the assessment summary.

MEMBER HOLTZMAN: Oh, before we get to assessments.
CHAIR JONES: Yes, Liz?

MEMBER HOLTZMAN: Sorry. This is Liz Holtzman. I don't understand the statement where it says, "Further, eight of nine Subcommittee members," and I understand we're going to correct that, "agree that the evidence does not support a conclusion that removing such authority will significantly enhance the confidence of sexual assault victims." That seems to me a very general statement. What kind of confidence of sexual assault victims? What are we talking about here? Confidence to do what? To report? The confidence to pursue the case? The confidence to, you know, in the justice system? I mean, what does it mean? I'm sorry. That just seems to me to be a very nebulous, actually, in my view, meaningless statement.

MEMBER CORN: This is Professor Corn. If I could maybe jump on that a little bit, as well. The reference is directly to the role of the convening authority. That
role has to do with the prosecutorial response to allegations of criminal misconduct involving sexual violence.

I mean, in terms of -- we do talk later in the report about the different mechanisms for reporting and responding to sexual violence and how that may or may not contribute to confidence in sexual assault victims in the credibility of the response. But I think, in that paragraph, what we're talking about is the prosecutorial response, whether or not an allegation of sexual violence that violates the UCMJ will or will not be referred to trial. That's the function of the convening authority.

LT COL GREEN: And, Ms. Holtzman, this is Lieutenant Colonel Green on the staff. There was a recommendation, and I mentioned in my email we've received a number of text correction recommendations. Rather than looking at each one of those and taking up all your time doing that, we were going to look at
the text recommendations. But Professor Corn's recommended language that says, "enhance the confidence in the integrity of the military justice system among victims of sexual violence."

MEMBER HOLTZMAN: Okay. That's a better, you know, that's a better formulation. I mean, what it says now just leaves me up in the air. That's all. Liz Holtzman, that's who's speaking. Yes, maybe fairness is better than integrity, but that's a perfectly acceptable comment, conclusion.

CHAIR JONES: I mean, we should certainly -- I would certainly support -- this is Barbara Jones -- saying fairness. I mean, we can also get more specific and actually allude to what we're going to be finding, I believe, which is that at least the majority or most of us believe that the evidence does not support the conclusion that removing the commander as convening authority will or will not increase reporting or will increase
prosecution or conviction rates. We can play
with this, but I think maybe the more specific
we are the better.

MEMBER HOLTZMAN: This is Liz
Holtzman. Are you saying that there's a
problem -- you have a problem with the prior
sentence, which is, you know, the one about
all Subcommittee members? How would you --

CHAIR JONES: No, no.

MEMBER HOLTZMAN: You're not
proposing to change that?

CHAIR JONES: No.

MEMBER HOLTZMAN: Okay. I didn't
understand then what you were proposing, so
forgive me. This is Liz Holtzman.

CHAIR JONES: I'm sorry. I
thought we were talking about the line with
"will significantly enhance the confidence of
sexual assault victims."

MEMBER HOLTZMAN: Right.

MEMBER CORN: Yes, this is
Professor Corn. I think that my understanding
is that Kyle has some suggested modification
of the language to make it more precisely
aligned with why we're considering this and
why we're making the recommendations. I mean,
the word choice I think we can banter around
later, but I think most of us agree with
Representative Holtzman that this is not --
the objective here is not just confidence of
sexual assault victims. You have to make that
more precise. Confidence in what? And it's
the function of the system, I think, that
we're talking about.

CHAIR JONES: All right. That's
fine. I'm not going to -- I'd like to see the
-- we'll see the new word change there and
take it from there.

LT COL GREEN: Yes, ma'am. And as
we go through this, if I have alternate words
that have been proposed, I'll let everybody
know. But the comments that we provided out
really were more substantive in terms of the
additions or the fundamental nature of what
was being said. And perhaps if we get to that point and the next round we can really look at words and specifics on sentences, in terms of making sure that what they say, it may be more helpful because we have received a number of comments from people that we'll try to incorporate.

CHAIR JONES: Okay. Thanks, Kyle.

All right. The next comment is in the section one, assessment summary, and it's from Professor Corn. And it reads, "And all agree on the importance of maximizing the contribution of the military justice system and the overall effort to mitigate the risk of sexual violence in the armed forces. How to achieve this objective has, however, generated a divergence of opinion."

MEMBER CORN: Judge, this is Professor Corn. My only point there was I think that -- I mean, my sense is that is a point of consensus among us, that the system should contribute to mitigating this risk.
So, you know, it just kind of qualified --
when I read that first sentence, it struck me
that we all recognize there's been a lot of
scrutiny, but we also recognize that the
system needs to respond to that scrutiny
somehow. How to do it is obviously going to
be the point of some departure. If other
people want to add that, it doesn't -- it was
just a thought at the moment when I read it.

CHAIR JONES: Okay. Any other
thoughts on that? And Professor Corn had
another comment in the second paragraph in
section one and recommended moving two
sentences to paragraph one. I'll tell you
what. Perhaps when the staff has time to take
a look at it, we can make a decision and send
out another draft. How does that sound with
respect to that comment, since we're --

MEMBER CORN: Concur. Professor
Corn.

CHAIR JONES: Okay. I'm on the
second page. Okay. And this is Colonel
Turner. You're recommending you add a new section about commanders and convening authority.

MEMBER TURNER: Ma'am, this, again, may be a staff issue. Colonel Turner here. Just an organizational introduction to the topic for civilian readership is all.

CHAIR JONES: Right. I see what you're saying here. And I'm sorry, I didn't get this draft with these comments in it. I didn't have enough time today myself to read it, so I'm doing it as we go along. I think that you're right. We can try some placement or move it around some. It may make more sense closer to the front, and we'll send out another draft.

All right. I'm on page four. All right. Professor Corn wants us to consider not using just the word "survivor." Professor Corn?

MEMBER CORN: Yes. I mean, overall, the two terms that we use repeatedly
that I have a little difficulty with are
"survivors" and "sexual assault," and I'll
explain both briefly. I think we've got
victims or alleged victims of crime that came
before us, and the term "survivor," for me,
diminishes a little bit. If you're the victim
of sexual violence, you're the victim, you're
a crime victim. I understand you've survived
the consequence of a crime. I just think, in
the context of a report addressing the
response to criminal misconduct, the term
victim or alleged victim or an individual who
alleges they've been a victim, whatever the
case may be, would be a better word choice.

And I have a little bit of
consternation with our use of sexual assault.
I think the common connection between all of
the sex offenses in the Code is they're acts
of sexual violence. I get sexual assault as
a generic term, but, in my view, I don't
consider rape or forcible sodomy as sexual
assault. I think they begin with a sexual
assault and they are consummated with an act
of sexual battery that's much more, much more
egregious.

So, I'm okay leaving those terms.
I just wanted to raise that concern as I read
through it.

CHAIR JONES: I guess we've been
using it in the context of, you know, the name
of our Response Panel, but I understand that
it's a specific -- sexual assault is a
specific crime. We'll have to give that some
thought, and maybe we should put it in a
footnote.

With respect to survivors, we can
think about that, too. I don't know whether
the -- did Protect Our Defenders specifically
refer to survivor statements? I can't recall.
In any event, we can certainly give that some
more thought, too. But before we leave it,
are there any comments from anyone else?
Okay.

MEMBER HOLTZMAN: Wait, wait,
wait. I have -- in the next to last paragraph on that page, to me it wasn't clear, just thinking about it -- this is Liz Holtzman -- from the point of view of a civilian, and I think Colonel Turner makes a good point that not everybody reading this is going to understand the military stuff. I think that we ought to maybe just describe that a little bit more clearly the role of the staff judge advocate, that if a staff judge advocate disagrees with the decision of the commander, that he or she may take it up the chain of command. I mean, it's not clear that that's exactly what they're doing here, so I think that that should be clarified to make it clearer.

CHAIR JONES: And I think there's also new legislation on that in NDAA 14. So we should probably at least footnote it.

MEMBER HOLTZMAN: And I wanted to add another point to the paragraph about foreign military systems, which is it's not
only that removing commanders had no effect on victims' willingness to report crime. I believe also that it had no effect on the ability to prosecute these crimes more effectively. If everybody agrees with that, we should put that there, as well.

CHAIR JONES: I think I'd agree that we don't have any evidence it contributed to being more effective in prosecuting them. I don't recall what we put in our initial -- specifically what we put in our initial report out. But whether we put that in or not, I think that's a fair statement.

Okay. Anything else? And generally speaking, I think we do have to move our description of the system up before we get into section three, which I think was Colonel Turner's and Ms. Holtzman's suggestion.

MEMBER HOLTZMAN: No, Colonel Turner gets full credit.

CHAIR JONES: All right. I'll give her full credit then. All right. We're
on page five.

(Telephonic interruption.)

MEMBER HOLTZMAN: Hello?

MEMBER ALTENBERG: Some of us are still here, I think. This is John Altenberg. I hear Ms. Holtzman; is that right?

MEMBER HOLTZMAN: You hear me, yes.

MEMBER ALTENBERG: Are there others with us?

MEMBER HOUCK: Houck's still here.

MEMBER TURNER: Colonel Turner.

MEMBER ALTENBERG: I think somebody popped off and we heard that beep.

MEMBER TURNER: I think we lost Judge Jones.

COL HAM: I'll go call her. This is Colonel Ham.

COURT REPORTER: This is the court reporter. We're off the record at 3:05.

(Whereupon, the foregoing matter went off the record at 3:05 p.m. and went back
on the record at 3:06 p.m.)

CHAIR JONES: I'm back. Sorry. I just disconnected myself. Great, thank you.

All right. On page five, Professor Hillman's comments are that section four, which relates to -- let's start with that one, the historical overview of the right of the commander. It seemed a little out of place and might be more useful in the eventual report.

I think it's certainly something that should go in the final report. And I think I'm inclined to agree that we may not need it in this report out from our Subcommittee. So I'm happy to hear comments about that. I don't think there's anything in this section that's not correct. I'm just saying I don't -- I think it's a bit of -- it sort of takes away from the rest. It's sort of, I don't know, extra and maybe it would be better put in the final. Yes, is that Professor Hillman?
MEMBER HILLMAN: Yes, this is Beth. I thought I just might explain what I meant. I have a hard time, honestly, understanding exactly what this is as an initial assessment, compared to what the sort of general report out would be. So part of this may simply be my confusion about what we're doing exactly. I mean, if I'm understanding correctly, we want to flag what the Panel ought to deliberate over with respect to the convening authority question in the military justice system. Maybe this all belongs in here, but we did hear from Fred Borch. But, you know, all of the case background and whatnot, I don't know what the -- the eventual report needs to have plenty of background in it and our staff is compiling all that and putting it there.

But I just don't know how focused you want to be in this or how expansive it should be, and we did not talk about service connection, for instance, in the Subcommittee.
And, actually, Borch addressed the Panel, rather than the Subcommittee, which doesn't mean it can't go here.

I just -- it feels off base to me. And if the Subcommittee can focus this somewhat, I think it would be maybe a good idea for the Panel's deliberation. That's it.

CHAIR JONES: Well, I just happen to agree with you because I think it detracts from getting a report out that's sort of more economical and flags issues. But I'm happy to hear from anybody else on this. And I guess -- yeah, go ahead. I'm sorry, who is this?

MEMBER HOLTZMAN: Liz Holtzman. Is there some reason that we couldn't put it in an appendix or something like that?

CHAIR JONES: I guess not. Any other comments about it?

MEMBER CORN: This is Professor Corn. The only piece of that section that I thought -- my sense was that it was more of a proposed finding that was related to the
ultimate question of whether or not the convening authority should play a role in the prosecutorial function was the paragraph on the importance of the role of the commander in meeting goals of discipline during periods of cultural change. And I do recall there was some discussion of that periodically. But that felt more like a finding to me, as opposed to just background. The rest of it just seemed like background. My view is we go in a footnote or an appendix.

But if that's a finding that's being proposed or that we should consider, then I think that paragraph should be recast in that section, as opposed to this.

CHAIR JONES: Anybody else?

MEMBER TURNER: Colonel Turner here.

CHAIR JONES: Yes, Colonel?

MEMBER TURNER: Just that context matters to some degree. Whatever is the right way, a footnote or otherwise, is fine. But to
understand the unique military justice system, the role of the commander in that context, some historical background and understanding is necessary. Not necessarily all that's laid out here, but some background is necessary.

CHAIR JONES: Any other comments?

LT COL GREEN: This is Lieutenant Colonel Green. Obviously, the issue in terms of social change is one that was discussed during your last deliberation session, so that's what we've added and incorporated in that section.

CHAIR JONES: Right.

LT COL GREEN: If we're going to call it an intro section that talks about commanders more generally, what commanders are, I mean, we might be able to incorporate some details from this section into that without necessarily going into the depth of an historical analysis.

The one thing I would say is there's current debate related to the
legislation on this that is focused on the service connection test and some of that. So I think that's why we focused that portion within the brief based on arguments that have been heard, again, as Professor Hillman points out, was heard by the RSP and not necessarily by the Subcommittee.

CHAIR JONES: All right. Well, why don't we -- I think it needs to be shorter. Can you be more specific about what the debate is on the statute?

COL HAM: Ma'am, this is Colonel Ham. There's a new justification for the statute that goes as follows: that commanders lost the ability to -- lost jurisdiction over these cases for 20 years and everything was okay. And so there's a little bit of the discussion of the Solorio/Relford which shows that, even during the 20 years of the service connection test, all sexual assaults against military members by military members were certainly service connected and the commander
indeed did have a jurisdiction over them.

MEMBER ALTENBERG: I think the whole business of service connection is going to be confusing to a lot of people, and we ought to make sure that everybody on the Committee understands it. It's become a problem in the last few weeks because the Senator and people that work for her have made the comment publically that between 1969 and 1987 convening authorities did not have this authority over service felony crimes and they were able to maintain a well-disciplined army.

Number one, it's not a true statement. It's extremely inaccurate. The O'Callahan decision restricted military convening authorities and military commanders who exercised convening authority to service-connected crimes, but they were still the convening authorities and they still sent rape and ag assault and robbery and murder cases to trial after their lawyer made the recommendation. So it was still convening
authority commanders making all those same
decisions. They weren't able to make as quite
as many as they could after 1987 because the
Solorio decision by the Supreme Court said
your system is sophisticated and adequate and
you can try all crimes wherever they occur,
whether they're downtown or on a ship or on
the base.

So the only difference had to do
with the extent of the jurisdiction. The
convening authority rule itself did not change
at all.

Now, she went on to say, you know,
they did a fine job, and then I saw something
from some other sector where they quoted the
Center for Military History saying that the
Army in the '70s was at its low point in terms
of discipline and morale. And that just kind
of reinforces the fact.

Unfortunately, I'll just say it
since it's the elephant in the room, that the
Senator is ill-advised by people who know not
enough about military justice or military
history to be taking the stance that they're
taking. It's just unfortunate for her, I
think, that she made that public comment.

That's my perspective on it.

CHAIR JONES: Okay. Anybody else?

I think that we should shorten this. That was
General Altenberg, for the court reporter. I
think that we should certainly shorten the
historical overview, and I think that there is
a way to say that the convening authority, you
know, has been the system throughout, in
response to your comments, General Altenberg.
And why don't we take a crack at playing
around with this a little bit?

I do want to go back, though, to
the paragraph on page six about us just
talking about the role of the commanders in
meeting the goals of discipline and fairness.
Are there any other -- and discussing Don't
Ask, Don't Tell, et cetera. Are there any
other comments about that?
MEMBER HILLMAN: Judge Jones, this is Beth Hillman. Actually, just a comment on the service connection piece. You all are referencing changes and comments that have been made by legislative staff that I actually haven't even heard and haven't been before us, that aren't in the materials that we have. So I just -- it's fine if we want to consider the service connection issues, and, for us, we have to, given our, as Colonel Turner pointed out, our mandate is to assess the current legislation.

But I'm not -- putting it in this, we just haven't really heard from anybody on that issue, except really in passing. So I would caution us not to step out on that. In a way, I understand General Altenberg's wishes to correct Senator Gillibrand. I don't think we're ready to correct that impression without getting some information on it, so I'm hesitant to do that.

CHAIR JONES: Yes. And I guess
what I was thinking was that if we simply
accurately described the convening authority
and the fact that it continued throughout the
period and just explained that the
jurisdiction was narrowed during that one
period because of the service connection
issue, we wouldn't necessarily even refer to
Senator Gillibrand -- we couldn't because I
haven't seen those comments either.

MEMBER ALTENBERG: I agree with
that. I have no desire to mention the Senator
in our report.

MEMBER HILLMAN: This is Beth
Hillman again. I'm sorry. But then we're
shaping our report in response to -- I mean,
if there's something on the -- I guess that we
need to put that then in the -- if we're
responding to something that's not in the
record that we've looked at, I think we should
add it to the record and then sort of discuss
it and consider it and then put that in. But
if there's some bare bones way that you'd like
to just state out the sort of -- the convening authority's existence through a period of
time, I can't see any reason not to do that.
But it is going to distract from the sort of coherence and the focus of this.

CHAIR JONES: Well, I think -- go ahead.

MEMBER CORN: Yeah, this is Professor Corn. My problem with the section is, and I think it's reflected in the comments, is it's not linked or nested within the broader -- the way it's characterized, it's not linked or nested within the broader kind of end state of this initial report, which is leading to findings, and eventually recommendations, but certainly, in this draft, leading to findings.

I don't totally agree with Professor Hillman that there's been -- that this has not been addressed at all. I think implicit, implicit in proposals to divest the convening authority, the commander of
convening authority, is an underlying, maybe
sometimes more overt than others, suggestion
that there are certain crimes that really
don't implicate the command function. And
that, I think, was at the core of the service
connection, or a part of the service
connection rationale.

So, in that regard, what General
Altenberg expressed resonates with me to an
extent, not because it's a critique of what a
legislative staffer said, because it's a
response to the suggestion that if you have a
felony it has nothing to do with the
commander's function, so why is he involved in
the decision to take it to trial?

So I think if it could be re-
characterized in a way that links it back to
the ultimate issue, it has merit in the text
of your report. If it's general background,
then I absolutely agree with Professor Hillman
that it's really beyond the scope, not so much
because we didn't hear it, because I just
think, as you say, Judge Jones, it tends to
distract from the momentum of the report.

CHAIR JONES: Why don't we do
this? I think, since the staff, I assume, can
send everyone a link to the remarks that were
made and the arguments that are currently
being made about this to each of us, we can
look at it and then we can decide, that will
help us to decide how to handle it.

I am very much in favor, though,
of either absorbing portions of this section
elsewhere, certainly cutting it down, and I
think we could probably make a pretty quick
decision if we had the comments that we might
want to clear up the record on, if you will,
the public record, if we had them. So unless
someone has another idea, I think we ought to
get them and they could be on the record, and
then we can decide how to handle them in this
report.

MEMBER HOLTZMAN: I just want to
go -- this is Liz Holtzman. I just want to go
back and echo Colonel Turner's point, although she didn't make it necessarily about this. We are still talking about a number of people who are not really familiar with how the criminal military justice system works. So I don't object to having something that deals with this.

Now, I agree with you that it interrupts the flow. And I can't say that I've read the section -- I skipped over it, frankly -- and that I've read everything in the report carefully, but so stick it in the back in an appendix and cut it down if you want. But I would just be concerned about assuming that everybody is going to understand what we're talking about, because they aren't. And so maybe something that just helps them get an understanding of it would be important.

So that's just my view about it. I agree with Beth Hillman. We shouldn't be taking anything on without having our facts. She's absolutely right about that.
CHAIR JONES: All right. Let us take another shot at this. I think an appendix may be a good way to handle this. It would be good to have the back-up there, I agree with you. And we can also discuss it.

MEMBER HOLTZMAN: Yes. This is Liz Holtzman. May I make one other point before you go way past me? I'm on page five, and I noticed the word "revolutionary" in the first sentence, and that seemed to me a little exaggerated.

(Simultaneous speaking.)

LT COL GREEN: This is Lieutenant Colonel Green. We have a recommendation to change that to systemic, rather than revolutionary.

MEMBER HOLTZMAN: Or fundamental, whatever, you know. Just a different word.

CHAIR JONES: That sounds like an easy one. Okay. Are we comfortable, whether it's in an appendix or somewhere in the report, with the paragraph, which is the first
full paragraph on page six, that relates to
Don't Ask, Don't Tell and other areas where
the commanders have had success, successful
outcomes in changing culture?

Is there anyone uncomfortable with
it? Let me just ask you that. We had some
discussion about this the last time, and I
confess I have not gone back and re-read it
again in detail. But I just want to make sure
there aren't any other comments about this.

MEMBER HOLTZMAN: Well, this is
Liz Holtzman. I do have a factual comment.
I don't think we have full inclusion of women
in the military yet, so I can't agree with
this statement.

CHAIR JONES: Okay.

MEMBER HOLTZMAN: So, you know, I
don't know if we have to modify it, but I
don't agree with that.

MEMBER CORN: This is Professor
Corn. Again, I think it's a finding, and it's
a finding -- you don't have to make a finding
that commanders have achieved perfect success in every cultural change. The ultimate finding is at the end of the paragraph, which is that commanders are the decisive element in implementing cultural change, not JAG officers. And that is linked to the issue. Whether or not they fully accomplished it, personally I don't think that we could say, we could reach a conclusion, nor have we heard evidence whether or not the lingering effects of Don't Ask, Don't Tell have been totally eradicated from the Armed Forces. But what we do know is that the effort to do so is going to make the commander the focal point.

MEMBER ALTENBERG: You could say the same thing about racial integration, also. It's no nirvana. It's just the commander's role is important. Some would argue that we haven't done that as well as we need to, so on this we both agree with Congresswoman Holtzman. But then we've got to watch what we're saying. That's all.
CHAIR JONES: All right. I do think we have to watch what we're saying in this particular paragraph. We'll all have our draft, and when the next one comes out I think we have to -- we may have to narrow it a little bit. I'm not sure either how much we've actually heard about this as a Subcommittee, but, you know, I may just be misremembering. Perhaps the staff can find some of that for me. If no one else has a problem, that's fine. It may just be me.

MEMBER HILLMAN: Judge Jones, this is Beth Hillman. I'm not responding on all these issues because I'm not -- you're not writing, you know, for me so much. But I do want to say I agree that it's strong there. You could say the same thing somewhat less. It's a little -- it says -- I absolutely agree what Geoff Corn was saying, commanders are at the center of this process. But when you say commanders affected the necessary adjustments, it sounds too much like we are in the nirvana
that Liz Holtzman mentioned. And that's just
going to trigger a reaction that you don't
need with this, so I would tone it down.

CHAIR JONES: All right. Well, I
mean, I think you've just said better what I'm
thinking than I have. So I'm going to try to
narrow that, and then we can have -- when the
next draft goes out we'll see if it's
satisfactory to everybody.

Okay. Unless there's anything
else on that issue, then I'm going to move to
the comment on page six from General
Altenberg. And I confess I'm just reading
this now. General, do you want to speak to
this?

MEMBER ALTENBERG: It's just
another source, and I'm trying to contact
Judge Cox or Professor Saltzburg at GW, who
also worked on this, to see if I can find the
original document.

CHAIR JONES: Okay.

MEMBER HILLMAN: General
Altenberg, this is Beth Hillman. I mean, I was a co-reporter with Vic Hansen on that. I could send you a copy.

MEMBER ALTENBERG: Okay, good. I had talked to somebody earlier today who informed me that you and Vic were together as the workers on that. So, yes, that would be helpful, Beth. Thank you.

CHAIR JONES: All right. This is a section that we're going to be doing a lot with. So, General Altenberg, why don't we -- you'll have this, and if you have additional comments you'll send them in, okay?

MEMBER ALTENBERG: Yes, yes, that's fine. Thank you.

CHAIR JONES: Great. I'm moving through the report just to get through the comments that did get in here and get to the staff in time. And the next -- I'm not assuming there are no comments on the pages in between, but the next ones, at least as far as I can tell, are on page 15 under findings and
MEMBER HOLTZMAN: Oh, can I make a comment on page nine?

CHAIR JONES: Sure.

MEMBER HOLTZMAN: I mean, I'm not sure that we have said, and I think it definitely should be clear, that the options for reporting are widely posted and widely -- I mean, these aren't secret orders or secret methodologies. These are widely known and widely publicized and widely, I believe, understood. That's at least how --

CHAIR JONES: Yes. When I read this section, too, I wondered if, I thought we heard testimony, too, that everyone who comes in as a recruit and maybe many times thereafter, as far as the training as to how you report. I could be wrong about that, but that was my recollection. But in any event, I do think we need to make that point. I agree. Any other comments?

MEMBER HOLTZMAN: This is Liz
Holtzman again. On page nine, it's also, I want to be made clear, too, that the commander, I don't know whether it belongs on this page or where it belongs, but the commander cannot interfere with the reporting or with the investigation of the case under the system as it presently exists; is that correct?

MEMBER ALTENBERG: That is correct, and it's something that, something that changed just, I think, four to five years ago, and so it is important that that be there.

One of the problems, I think, with this issue, and Beth and I have talked about this I think, is that some of the people criticizing the system most are dealing with ten-year-old information. They're dealing with old cases, and some people aren't accounting for some of the changes that have been made. I'm not saying that there's been enough change, but a lot of the criticisms are
dated because there have been responses by the
DoD and the military departments to this
problem, this really serious problem. And our
report should account for as it is now.

CHAIR JONES: Right. And I think

that -- I'm sorry.

MEMBER HOLTZMAN: Well, I think
these two points go to -- this is Liz Holtzman
again. I think these two points go to a lot
of misapprehension that somehow this process
is manipulatable and that people don't know
what their options are. I think those things
really need to be clear that that's not the
case.

MEMBER CORN: This is Professor
Corn. I think the inclusion of the
prohibition of a junior commander or any
commander attempting to stifle or a report or
interfere with a report is very important.
And I think we should, I know that we heard
from some commanders who asked them directly,
if they learned that a subordinate commander
did that, what would the response be, and a
couple of, as I recall, they said they would
relieve that officer from command. So it's
evolving into an interference that would be
perceived as a significant dereliction of duty
and breach of command responsibility that
could justify disciplinary action in and of
itself. We heard that, and I think we should
emphasize that.

CHAIR JONES: Yes. We've heard it
at Fort Hood. But in addition, there is a
provision in the NDAA 14, also, which probably
only codifies what policy already previously
existed. Our commanders must report within 24
hours, and, as I said, I think that merely
codified what was said before. And we should
reference, we should reference the practice,
the policy, the directive, and also the NDAA
14 on that because it definitely a commander
not being able to sweep anything under the rug
and, if they fail to report and it's found
out, they're subject to discipline.
So I think we should add both the posting of the ways to report, any training that's been done, as well as the commander interference subjects we've been talking about. Any other suggestions before we go to page 15?

MEMBER TURNER: Ma'am, Colonel Turner here. The issue we're talking about right now, accountability, is something I brought up later in the draft and that we really don't talk about commander accountability or at least only briefly. Going back here, as we've been talking, I've been pulling out the 13 and the 14 NDAA's to go back in terms of RSP charter. And part of that is to talk about accountability and responsibilities of members of the armed forces with regard to sexual assault prevention and response. And so, at some point, I'd recommend we add a more robust discussion about accountability to include the pieces that we just mentioned.
CHAIR JONES: You know, how does the Subcommittee feel? Have we heard everything we need to hear on accountability? I think we had not focused on that for this report. Maybe we have.

MEMBER HOLTZMAN: This is Liz Holtzman. I don't know if we've heard everything on accountability. Do we have instances in which commanders have been punished or removed for improper interference or misuse of their authority with respect to the handling of the prosecution of these cases? Have we heard anything about that?

CHAIR JONES: My recollection is what we've heard about are command climate surveys, the fact that they're going to the next level of commander, the fact that there's more or at least in the future there may be in some services specific questions about sexual assault. But I'm not, I don't know, the staff can help me here: did we ever receive some of these climate surveys? I think they were
going to send them to us. I think we
requested it. But I think that's what we know
at this point, that there is an effort --

COL HAM: You have the actual --
the DEOMI people, the Defense Equal
Opportunity Management Institute people came
and spoke at a Subcommittee meeting, and you
have the actual surveys, the command climate
surveys, a couple of iterations of them that
show how over the last couple of years they've
changed some of the questions on sexual
assault and exactly what those questions are.
And you've also heard I think that same day on
the required commenting on support for sexual
assault prevention or response in annual
evaluations and the like, and there's some in
the NDAA about that, as well, I believe now.

MEMBER TURNER: Colonel Turner
here. I think also the RSP heard from Vic
Hansen, Professor Hansen about accountability.
And Colonel Ham mentioned the sit reps piece.
And so also part of the Lackland materials
that we provided talk about commander accountability, and it's just we did not develop it as much as perhaps we could, if that would be helpful to the full panel. But to say a commander has to do certain things but without addressing the ways that he can be held accountable or should be held accountable, I wonder if we're only addressing half the issue.

CHAIR JONES: I don't disagree.

And throughout our hearings, Panel and Subcommittee, accountability has been on our mind and we've been asking questions about it. We could certainly try to add that to this report. I mean, I think the proposition is pretty straightforward. They should be accountable, and there have to be ways that we can be sure that they'll be held accountable and we can have a description of what's been done so far and include citations in the NDAA 14. We just don't have that section in here, and I don't -- go ahead, Colonel.
COL HAM: Yes, ma'am, this is Colonel Ham. On behalf of the staff, I guess we envision that as a more comprehensive thing for the final report. And we can put --

CHAIR JONES: Well, Colonel Ham, I had not thought that we were going to be putting it in this report either, which is why, you know, I probably want to take another look back at what we've already heard and seen.

MEMBER TURNER: Colonel Turner here, ma'am. If it's final report, that's fine. This Subcommittee is supposed to help the RSP writ large, so if it's not the right place here that's perfectly fine with me.

MEMBER HOLTZMAN: My view -- this is Liz Holtzman -- is that I think that needs to be in any kind of report that we prepare about commander accountability. I think you're right, Colonel Turner. It's only half the story. So we don't have enough info. Maybe we need more.
CHAIR JONES: I'm all for having a section on commander accountability, but do you think we need to do it in this report now?

MEMBER HOLTZMAN: Well, that's my question. Yes, I don't know.

CHAIR JONES: Yes.

MEMBER HOLTZMAN: That I don't know.

CHAIR JONES: What do other people think?

MEMBER ALTENBERG: I think -- this is Altenberg. I think not at this time, but I feel strongly that we should address accountability and I feel strongly that there hasn't been sufficient accountability in the --

CHAIR JONES: Well, let me, let me --

MEMBER ALTENBERG: -- past. Just in the last, in my opinion, it's only been the last few years that there's been a real focus and attention paid to this issue. And I think
there's more and more accountability occurring, but there wasn't what there should have been before and there certainly wasn't a transparency. And while I may be cautiously optimistic that that's going to improve a lot, I think it's something we should definitely address.

CHAIR JONES: Unless anyone else has any suggestions, I think mine would be that we ask the staff to just send us the citations to where we can go back to our own materials and to the website and review what we have and suggest that they draft a short section because I don't disagree that it's important. And it can be a section that's not, you know, that can be based on what we know now and leave it a little bit open in terms of a much larger or lengthier section in the final report. Why don't we take a shot at that?

MEMBER HOLTZMAN: Barbara, on another subject -- this is Liz Holtzman again.
On page 11 -- you wanted us to get page 15.

I'm sorry.

CHAIR JONES: That's quite all right.

MEMBER HOLTZMAN: But I just thought that in the last paragraph about convening authorities and staff judge advocates that we put in this point, which I think is true, but I could be corrected, which is we don't know of any case in which the staff judge advocate suggested prosecution which a convening authority rejected. We know vice versa. We know that there are cases where the convening authority has gone forward, but I don't think we've had any other cases where the staff judge advocate said this does not warrant, you know, this should be prosecuted, in other words. This should be prosecuted, this case of sexual assault or violence or whatever word you want to use, and --

CHAIR JONES: I think you're
right. There is something about that on the
record. I remember it myself, but we have to
go back and find it if it's there. I'm trying
to -- I don't remember, as I sit here, what
testimony that came in through. But we can
find that, and I think, if we do find it, we
should cite it. I agree.

MEMBER CORN: This is Professor
Corn. Just one comment on that. If we do
cite that, I think it has to be very precise.
What I have in mind is I suspect that there is
going to be, we'll be able to cite evidence
that no officer who acted as a general court-
martial convening authority or a staff judge
advocate to a GCMCA was able to identify one
incident where the GCMCA overrode a referral
recommendation from the staff judge advocate.

Speaking of convening authorities
generally I think runs the risk -- we just
don't, I don't think we have or could even
begin to have enough information to be able to
make that comment with regard to special or
summary court convening authorities who may have received a recommendation in the transmittal packet, let a case go to trial, and said to their servicing JAG, you know, I don't agree, I'm going to recommend don't go to trial, and then it goes above their head and when it gets to the GCMCA it gets sent to trial.

So it's a little, I just think that we should be very, very precise about how we characterize that. I think it's a really critically important point that dispels some of the misconceptions about the JAG-GCMCA relationship, but I don't think it should be phrased in a way that's so over-broad that it encompasses all convening authorities.

MEMBER HOLTZMAN: I think you're right. That's Liz Holtzman.

CHAIR JONES: Agreed, agreed.

Anything else as we go along after page 11 now? All right. Then we're at page 15. Let me give everybody a minute. Okay. Page 15.
It's findings and recommendations of the Subcommittee, section seven in the current draft. I think we've already agreed that we will have findings, not recommendations. And so why don't we begin with the first one? And I see that there's a comment from Colonel Turner. Would you mind speaking to that, Colonel?

MEMBER TURNER: Yes, ma'am. I just wondered if perhaps to say the evidence does not support a conclusion that removing senior commanders as convening authority will affect victim confidence in the military justice system might be a little too conclusive. There are some victims, but none of them testified to us that they personally didn't report because of their convening authority. Some of them did testify that that could affect confidence in the system. Although, on the other hand, if they don't get the changes to the entire system, when a commander is removed, you know, that will
reduce their confidence in the overall system.
So I thought perhaps this might be a little
bit strongly worded for victims.

MEMBER HOLTZMAN: I agree with
that. This is Liz Holtzman.

CHAIR JONES: Yes, Liz. This is
Barbara Jones. I agree, too. And I think we
do have to be careful and be narrow in these
findings. Starting to talk about victim
confidence, you know, there is some evidence.
We've heard it from the victims that it might
affect their confidence. So I just, I don't
want to overstate anything. I think our
credibility will be much higher if we keep it
narrow.

MEMBER HOLTZMAN: This is Liz
Holtzman. Could I make a recommendation that
we split the two points about affecting the
incidence of sexual assault or reporting and
put the victim confidence in a separate point.
Then we can keep it --

CHAIR JONES: And we can pick it
up later, yes.

MEMBER HOLTZMAN: Well, I just put it -- no, just put in point number two, whatever you want to say about it. But it maybe just doesn't belong with point number one. And I would also suggest that we add something to the effect, on the prosecution side, that the removal of the commander will not affect, there's no evidence that the removal of the commander will affect the prosecution of sexual assaults, the conviction rate, or the conviction rate in sexual assault cases.

CHAIR JONES: I agree with you.

MEMBER HOLTZMAN: Whatever it is, the investigation --

CHAIR JONES: Right.

MEMBER HOLTZMAN: -- things should be there.

CHAIR JONES: Right, I agree. Any disagreement about that? Okay. Can we move to page 16? All right. Four says removing
convening authority from senior commanders is unlikely to have an effect on reprisal concerns of sexual assault victims. Any comments on -- Professor Corn wants to add "as there is no evidentiary basis to support a causal link between these concerns and existing convening authority."

Well, I think we did hear victim testimony that they were concerned about reprisal. Maybe I'm missing your point.

MEMBER CORN: Yes, Judge Jones. The point is that I believe it is a legitimate concern, but what I don't believe we've seen is an evidentiary basis to link the concern to the role of the GCMCA. That's my point. I don't want to diminish the concern. I want to emphasize that, while we acknowledge it's a concern, we're not persuaded that it's a concern derived from the existing function of the convening authority.

CHAIR JONES: Okay. Your phrasing, I understand, is narrower. Why
don't we consider what to do with that? I like the idea that there's no evidentiary basis to support a causal link. Any other comments on that one? I would like to play with that one a little bit. Is there anyone who disagrees with the finding?

MEMBER HOLTZMAN: I agree with the suggestion it should be revised. This is Liz Holtzman.

CHAIR JONES: Okay.

MEMBER HOLTZMAN: I think that -- CHAIR JONES: All right. We can look at it again.

MEMBER HOLTZMAN: Yes. First of all, I agree that there have been concerns. And the issue is that, the way that I would -- I mean, there are two issues, actually embedded in point four. One is the issue that the removing the convening authority will not have, there's no evidence -- the way I would phrase it, instead of unlikely, because I don't think we should be speculating. I think
we have, we can say what the evidence is, that
we have no evidence that removing the
convening authority from senior commanders
will have an effect on the reprisals against
sexual assault victims. That's one point
that's embedded in here.

         And the second point is that, you
know, there may be concerns and maybe you want
to phrase what the removal of the commander
will do with respect to the concern and pick
up Professor Corn's point, but there are
really two separate points embedded here, I
think. And I also don't, as I said, I don't
like the wording that it's unlikely. I would
rather phrase the findings in terms of what we
have evidence about and what we don't have
evidence about.

         CHAIR JONES: And I think they
should all conform to that way of being
stated, evidence or no evidence. Any other
comments on four?

         MEMBER CORN: This is Professor
Corn. I think that the key is I don't want to diminish the significance of anybody who believes that this change would have symbolic value, but our judgment is the symbolic value is not empirically justified. That's the point I'm trying to emphasize.

CHAIR JONES: All right. Let me take a hand at revising this and see if I can come up with something that works for everybody.

MEMBER CORN: And this is Professor Corn again, Judge. Since the next one is my comment, as well, it's a similar concern. The way it's phrased now, there is no inherent conflict of interest. I think the real point is whatever potential conflict of interest may exist as a result of this, there's insufficient evidence to support the conclusion that it's having a negative or improper impact. As strong a proponent I am for the system, I can appreciate why some people would say I think there is some
conflict of interest. I just believe that whatever risk there is is adequately mitigated by the totality of the process. And that's why I suggested -- what was it? The influence of any perceived conflict of interest on the exercise of convening authority by senior-level commanders is speculative, at best, and does not undermine the integrity of the prosecutorial decision-making process. I think we've heard evidence to support that. I don't think we've heard evidence that can support the conclusion that there is absolutely no risk or inherent or perception of conflict of interest.

CHAIR JONES: I think, with respect to conflict of interest, I want to give it some more thought. I don't view -- I know I remember, Admiral Houck, you talking about a potential conflict of interest. In a general way, I don't see conflict of interest in the structure of the military justice system any more than in other systems.
Conflict of interest, to me, means you know somebody, you have a relationship with them, and, therefore, you should recuse yourself. But I don't know whether -- does anyone else want to chime in on this? I'm happy to work on this finding as well, to see what we can come up with. There's a difference between saying no conflict of interest, which I might be leaning to, and what we have now, I guess.

MEMBER HOUCK: This is Jim Houck. I think the point I was making during the last call was only that, and I don't agree with the point, but the point was made by one of our panelists, and I can't remember exactly who, who suggested that the mere fact that, identified the conflict of interest as follows: that a commander who is charged with creating an environment in which sexual harassment and sexual assault does not exist is then conflicted when the commander has to prosecute or refer a case which suggests that such activity does exist.
Again, I don't agree with it. But I was just, in our last call, just trying to parse that there are two different types of potential conflicts of interest that critics have raised, and I was just trying to parse it and identify one of them.

CHAIR JONES: All right. I remember that now. Any other comments on this?

MEMBER ALTENBERG: This is Altenberg. I hesitate to say this, so please keep that in mind as I --

CHAIR JONES: All right, General. Go ahead.

MEMBER ALTENBERG: You know, the people, and I know the one fellow that mentioned this has some military background, but the people that talk about this don't seem to have in mind anyway the unique nature of the military's mission and the fact that leaders, commanders, especially at senior levels, are called upon on a daily basis to
make decisions that put people's life at risk, you know, and to choose who's going to go forward and to choose who's going to get on the helicopter that's going to go on the assault or to choose who's going to drive the truck, you know, for supply through a dangerous area. There's an inherent risk in all of that, and I think that the conflict that they identify for a convening authority to make these types of decisions pale in comparison to the other decisions that they make on a routine daily basis. You know, the disciplinary decisions don't come up that frequently, but the other operational decisions come up hourly, if not something even more intense.

And so I think there's a failure on some people's part to understand that's the context. That's why there is a different system.

So, again, I don't want to belabor too much the defense of the military culture
and all the rest of it because lots of aspects
of military culture are pretty negative and
pretty foul. But that's where I am on the
conflict of interest issue.

CHAIR JONES: Anybody else?

MEMBER HOUCK: Jim Houck. Not on
that particular issue, per se, but I have a
meeting at 4:00 that I cannot miss and I'm
signing off. I have concerns about some of
the recommendations in comment 21 I just want
to flag right now, but I must sign off now.
Thank you.

CHAIR JONES: All right. Thanks, Jim. And I guess, if Jim signed off, we won't
be discussing recommendations today. I see,
Colonel Turner, you also have a suggestion
about conflict of interest that -- hello? Is
everybody there?

MEMBER TURNER: Yes, Colonel

Turner here. Ma'am, as I look at this, I
think that the findings should be succinct and
to the point, where my comment is probably
better put in introductory remarks that talk
about the commander and chain of command, who
they are, what they do.

               CHAIR JONES: That may make it all
a lot easier if we figure out what we actually
want to say about this, and then our finding
can reflect it. All right.

               MEMBER HOLTZMAN: This is Liz
Holtzman. Maybe there's another way to
address this point instead of in a finding.
Maybe there's a way of discussing the
arguments against, the arguments for removing
the authority in a way that could address
these points about -- because there are two
main arguments that they make, that this sends
a signal to victims that the military cares
about them and the second one is that there's
an inherent conflict of interest in the
commander. And they never really spell that
out, but maybe it's what Jim said or maybe
it's something else. So maybe instead of a
finding, maybe it could be in a finding, but
maybe one needs to parse out and respond, you
know, a little bit more at length to the
concerns and just say we've found no evidence
to support these concerns. I don't know.
Maybe there's a better way to deal with it
than just coming out -- I don't know. I'm
just thinking out loud. I apologize.

MEMBER HILLMAN: This is Beth
Hillman. I'll just, I have to go, too. I
have a 1:00, actually, and I'm sorry to leave.
But I'll just say, although this is against my
interest here, I do mention in the separate
statement that I wrote two specific conflicts.
So you could take those off. I mean, that's
one reason I wanted to distribute this now so
--

CHAIR JONES: Thank you, Beth.

MEMBER HILLMAN: You bet. One is
about what Jim said, which is that a commander
who is trying to make change in culture who's
very forceful on the issue of sexual assault
and then later orders a court-martial to go
That seemed, to me, a potential conflict. You don't have to respond on that now, but that's one. The other one is a defense counsel being concerned. In other words, that first one, the problem seems that it creates problems with a successful prosecution because it could be unlawful command influence that would undermine a successful prosecution. Second is that same thing creates defense counsel concerns that legitimate cases, cases that are not legitimate would go forward.

That's all I'll say there. I appreciate the chance to weigh in, and good luck with the rest of your call. Thanks, Judge Jones and everybody.

CHAIR JONES: Thanks, Beth. All right. Well, I agree that we need to talk about this, the conflicts of interest in the section about arguments for removing the commander, and then when we redistribute it we'll take a look and see and also make a
suggested finding at that point but only at that point, after we've had a discussion.

MEMBER TURNER: Judge Jones, Colonel Turner here.

CHAIR JONES: Yes, sure. Go ahead, Colonel.

MEMBER TURNER: Professor Hillman was very, very generous letting us see her draft report early, and she just mentioned UCI, as well. And so maybe as we expand that section, we address the UCI issue there, as well.

CHAIR JONES: Right.

MEMBER HOLTZMAN: You see, also, it may be -- this is Liz Holtzman. I'm just thinking about the undue command influence, I mean the conflict of interest in terms of commander doesn't want to prosecute a case because that will show that there's a problem in his unit or her unit. But there's no way of squelching the incident. I mean, that number is going to be there. That will have
been reported, okay? I mean, it will have been investigated, so how do you, how do you eliminate that? It seems to me, maybe I'm wrong, but I'd like to think about that a little bit more. I mean, if the commander can't change the numbers, how many rapes took place in your command, then what is the conflict? Actually, there may be more of an incentive to prosecute them than to do nothing about that. But if you can't change the numbers, I don't know what the conflict about that is, but maybe I'm missing something.

CHAIR JONES: Let us try to write another, add a section on this, on conflict of interest and get it back to everybody. All right. Six is the Department of Defense has established sufficient channels outside the chain of command for victims to report incidents of sexual assault. I guess, Professor Corn, you had a recommendation here. We're on page 16.

MEMBER CORN: Yes. Judge, I mean,
I think my guess is not everybody has had a chance to read and respond to these. Again, my point in these comments is I think we have to emphasize the connection to where we're going. The point is that the efforts of DoD to establish multiple reporting channels and to impose measures to mitigate the risk of improper influence, in our view, have created an effective reporting mechanism to mitigate the risk that victims will be deterred by a fear of arbitrary interference. And, candidly, I'm not sure how much evidence we heard of this. I think this is a hugely significant evolution in the process because I don't think it was always that way. I think this is a relatively recent development. But, ultimately, what the issue is is are we confident that what's occurred to date has mitigated effectively the risk of hesitancy to report because of a fear of arbitrary interference?

CHAIR JONES: Yes. I think the
way you're phrasing it is a more appropriate
type of finding. And in reading all of six,
and I think it needs to be the type of finding
you're talking about. And the bullet points
are facts that we don't need there and should
be, if they're not already, but I think they
are, in the body or the text of the report
itself.

MEMBER HOLTZMAN: Yes, I would
also say with regard to point seven -- this is
Liz Holtzman. I don't know that I'm prepared
to say that there is sufficient laws in place
to ensure that everything is going to be
independently investigated. Do we feel that
confident? I mean, that certainly appears to
be the case, but do we have to make that
finding?

CHAIR JONES: That struck me as a
little sweeping, also. And, actually, I
confess I haven't read this as closely as I
should have, so maybe it's in the report. But
I think it is important to make sure, for
 informational purposes, that people understand that the military criminal investigative organizations do operate independently. And I think we've said it, but I think we haven't emphasized it. If we have, I apologize.

 MEMBER CORN: This is Professor Corn. I think seven could be easily modified to just a finding that DoD has made substantial progress in mitigating the risk of improper influence on independent investigations, as opposed to the conclusion that it could never happen.

 CHAIR JONES: That's a good -- I agree. All right. And Ms. Frost is not here, but she joins in saying, "I do not agree with this finding." All right. And, again, I would not have bullet points here, unless someone disagrees.

 Okay. Page 17. Let me look. Number eight. Well, this goes back to our previous report out on the Allied military justice systems. So, I mean, I haven't
actually compared what we say here to what we said before, but let me look at the comments. Well, maybe I better take a closer look at it. Has anyone else, does anyone else have any thoughts? Ms. Frost says, "I possibly do not agree with this finding."

MEMBER HOLTZMAN: Number eight? Is that what you're talking about?

CHAIR JONES: Yes, on eight.

MEMBER TURNER: Colonel Turner here. It might make the most sense to just go back and restate what we previously said.

CHAIR JONES: I think that might be the best thing to do. And it may not be so different from this, but I think I would be inclined to stick with what we reported out before. And then we'll see if Ms. Frost has some additional comments once it's been modified. All right. Any other comments on that one?

Okay. Number nine. Commanding officers, indeed leaders at every level of the
military hierarchy, must play a central role in responding to the challenges posed by military sexual assault. Professor Hillman recommends that we cut that and also that we cut ten, which reads, "Commanders are essential to creating and sustaining a command climate." And her rationale is that it's kind of out of tune with the rest of our findings, and she thinks they're a distraction.

Liz, were you agreeing with that or --

MEMBER HOLTZMAN: Yes, I was -- right. I mean, they seem just to be obvious statements, but maybe they belong somewhere else in the report. But I don't know what the finding -- what does it mean? What are the implications of these findings for the ultimate conclusion here? I don't know.

MEMBER CORN: Judge, this is Professor Corn. I think we could get rid of nine; or, actually, I think I flipped them. I put nine -- I flipped them around, so ten
became nine. And in the edit I recommended to Kyle, what I had was, "Commanding officers, indeed leaders at every level in the military hierarchy, must play a central role in responding to the challenges posed by military sexual assault at senior command levels. This includes retaining existing convening authority." I mean, I think that's what we're saying, we're just not saying it.

MEMBER TURNER: Judge Jones? I'm sorry.

CHAIR JONES: Yes, Colonel Turner?

MEMBER TURNER: It is Colonel Turner here, ma'am. I'm just going back to NDAA 13, which specifically requires the RSP to give, quote, "an assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding." So however is the right way to answer that task . . .

MEMBER CORN: This is Professor Corn. I think the point of both of these is
to support the ultimate conclusion that part
of that command function at senior command
levels is convening authority. That seemed to
be the influence to me.

MEMBER HOLTZMAN: I think we need,
I think we need more information about this.
It goes back to kinds of command climate and
the accountability point that was raised
earlier. Do we have enough information about
command climate, what's happening? I just
think these are generalizations that really
have no substance. I mean, to me, they just
hang out there, and I don't know that they're
supported. Of course they need to play a
role, but what does that mean? I don't know.
To me, I would take them out, but I would, I
do think that the issues that they raise need
to be addressed in terms of command climate.
Do we talk about that any place in this
report? Maybe this report isn't the place
where we should address that.

CHAIR JONES: You know, we have,
our work is not over with this particular report out to the Panel. I am not, at this point, certain, and maybe it's just because I haven't reviewed all of the information and evidence we have, but I'm not certain we have everything we need on accountability. I know I haven't focused on it, and I wouldn't be comfortable talking about it right now in this report. It's clearly on the table. We have to talk about that, and we have to talk about and assess how commanders are doing. And we haven't really, I think we've heard a lot about that. But to talk about how they're doing I think requires a more in-depth look at whatever results we have so far. And I know we have some information and testimony with metrics and the results of different programs that may have increased reporting and enhanced victim confidence, but I don't know that we're prepared to go there in this particular report. But by no means are we done, and accountability is one of the main things that
we have to move to next and actually assessing
how are we doing on command climate. Does
that make any sense?

MEMBER TURNER: Yes, ma'am.

Colonel Turner here.

CHAIR JONES: Well, you could say
no, too, Colonel, but I'm just worried that
it's not going to fit in this report at this
time. It's got to be done, and it's got to be
in the final report for sure. I think it may
be beyond us at the moment, and we may have
most, if not all, the information on it right
before us, but we haven't focused on it yet.
At least I haven't.

MEMBER TURNER: Copy that, ma'am.

It may be some of the scar tissue I'm wearing
from some previous jobs I've done dealing with
trying to hold commanders accountable so . . .

CHAIR JONES: Fair enough,
Colonel. Fair enough. All right. We're on
the last page, or, no, we're not. Yes, we
have a recommendation from Ms. Frost, and I
actually think it's worth our while for each
and every one of us to begin to think about
recommendations. She's stepped ahead and has
outlined one for us. We should certainly
consider that. There may be others that we
want to come up with, but we're not doing it
in this report. And perhaps when we read it
out to the full Panel, there will be some
discussion at that point by the Panel about
potential recommendations. Does that sound
right to everybody, or are there other
suggestions right now that anyone wants to
talk about in terms of a recommendation along
the lines of Ms. Frost?

MEMBER HOLTZMAN: Did you read
what she recommended?

CHAIR JONES: Oh, I'm sorry. She
recommended a permanent advisory council on
sexual assault in the military with direct
access to the Secretary of Defense, and it
goes on to talk about the council's
composition, which would include sexual
assault survivors with both positive and
negative experiences, former military
commanders with differing views on commanders
and convening authority, and, most
importantly, researchers. And she says, and
that's not all-inclusive, but those are the
members she highlights. And they would advise
the Secretary of Defense, the services, and
staff SAPRO on proposed courses of action.
And it goes on, but that's the essence of it.

MEMBER CORN: I think, to address
her recommendation, we need more information
on what's available already to the Secretary
of Defense.

CHAIR JONES: Yes, I agree with
that. I mean, and we probably need to hear
more about exactly what she's recommending,
etoo. So that's why I think, at this point,
it's premature to talk about it, but I think
we should all be thinking about
recommendations, if we are going to have any,
start thinking about them now. What else?
The last one -- yes?

MEMBER TURNER: Judge Jones,
Colonel Turner. In terms of recommendations,
we had a number of panelists provide
recommendations. I wonder if they've been,
you know, co-located or brought together in
some location and if that might be helpful to
look at.

CHAIR JONES: I think it would.
Kyle, do you have recommendations, other than
Ms. Frost's?

LT COL GREEN: No, ma'am. We
would have to go back and cull through
transcripts, written documents. We have not
consolidated any of the recommendations.
Obviously, in the course of this report, we
consolidated all the arguments for change, but
any tangential or included recommendations on
that, we have not culled through that.

CHAIR JONES: All right. I think
I may have some, and these would be from
presenters, which are not necessarily Panel members. But I'll send you what I have. And everyone else, if you have any recommendations along these lines or want to help cite to ones that you may have heard during testimony or otherwise, please send them in to Kyle.

MEMBER CORN: Yes, ma'am.

CHAIR JONES: Yes?

MEMBER CORN: I said, yes, ma'am.

CHAIR JONES: Oh, okay. I just heard the ma'am. All right. Let's see. Were there comments as to 11? Congress has enacted significant reforms, implemented new changes. Let me see. So what are we saying? There must be sufficient opportunity to assess the results of these changes and, if possible, the relative merit of all the changes and initiatives prior to deciding whether more substantial or drastic changes are necessary. I don't see a comment on that. Are there any that we should take into account right now? Okay.
MEMBER CORN: Judge, this is Professor Corn. The only other, the only other finding that I suggested in an email, I think, to Kyle yesterday, maybe I sent it, maybe I didn't, and Beth's original document that she sent around about ten days ago made me think of it, is I wonder if it's fair to say there's a lack of uniformity in the implementation of DoD policy among the services or if that's not relevant.

CHAIR JONES: You know, I think that you're right because that's what we've heard. Every one of the services appears to do things, you know, in somewhat different ways as they implement these policies.

MEMBER CORN: And I'm agnostic on whether that's a good or bad thing, but it might be an important finding if it leads to a recommendation. In other words, if we feel that there should be greater uniformity or synchronization in implementing these programs, then it would be based on a finding.
from what we've heard that there is disparity.

CHAIR JONES: Yes. You know what?

My personal reaction is I don't know enough about whether every service should be exactly the same. It sounds like it would be -- and I don't know what exactly the same means, honestly. It sounds to me that it would be very difficult because of how differently-configured each of the services are and the different kinds of missions they have. So I wouldn't be ready to go there. Anybody else have any comments on that?

MEMBER HOLTZMAN: Liz Holtzman. I agree with you, Judge Jones. I also would say, with regard to number 11, maybe we wait to the end to address this issue in the final report because it's not only Congress that has adopted significant reforms, it's also the Defense Department.

And so, you know, well, so I think, I mean, it has to be changed, in my view, at least from that point of view. But
I don't know that we need to be making a comment about this now because what we're doing is telling Congress don't do anything more. I mean, do we really feel comfortable, do we have enough evidence that we suggest that Congress shouldn't do anything anymore? And, anyway, they're not going to listen to us about that, so I don't know how . . .

CHAIR JONES: Well, I think that might be, that might also borderline, not a borderline, it's a recommendation, and I think we may be going too far there, at least in the context of the Subcommittee report-out.

All right. We're going to get another draft back to everyone. I realize that time is short. That seems to be the way this is going for us. And I think we need to have, try to get comments back in. I don't know how fast this will come back out. Hopefully, very quickly. And then we can have one, hopefully have another telephone conference.
Kyle, what's your projection on all of this? I'm putting you on the spot.

LT COL GREEN: We'll start working it right away, ma'am. Our goal is to get something this weekend, so I guess we should probably check availability for either Monday afternoon or, at the latest, Tuesday, just to give you an opportunity to review in time for Thursday.

CHAIR JONES: Yes. I think we're better off having the call later, like on Tuesday, where we would actually have a fair amount of time to take a look at the changes. So as far as Tuesday is concerned, I don't know how you want to determine availability. Do you want to send out emails? Do we want to try to do it right now over the phone? It's up to you.

LT COL GREEN: Why don't I send out an email to everybody asking about availability for Tuesday afternoon, ma'am, if that works? Or just any time of the day on
Tuesday, unless there are times when you all know that are not going to work for Tuesday.

CHAIR JONES: Okay. So why don't we, each of us, just agree and we'll send in times we're not available on Tuesday or maybe, better yet, times we are. Whatever. You'll send the email, we'll respond, and that way we'll also get Beth Hillman and Admiral Houck. Okay?

LT COL GREEN: Yes, ma'am. Again, what we'll provide, we've got a lot of text changes, as well, as well as the changes discussed today, and any observations that you want to send in advance of that, just like we did here, it helps us maybe to focus and narrow things for you.

CHAIR JONES: Yes. Anybody, really, who has some further thoughts or wants to really comment on anything, I think that would be very helpful to send them in to the staff.

MEMBER TURNER: Judge Jones,
Colonel Turner here. Again, I really appreciate Professor Hillman letting us see her remarks in advance. I understand they're still draft, and she's working to refine those. We already talked about some of the things, like ensuring that the revision addresses conflict of interest a little bit more and unlawful command influence.

One thing we didn't talk about that she does raise that I may have missed some of the evidence on is the assertion that there is a norm, quote, "that celebrates only aggressive male sexuality," unquote. So if we get more, if the staff has anything that would support that that maybe I missed, I would love to hear that. Otherwise, we may want to think about do we need to address that or not.

CHAIR JONES: I confess I missed that. I read her submission pretty quickly. But I --

MEMBER TURNER: It's certainly not been my personal experience as a woman in 23
years in the service so . . .

CHAIR JONES: All right.

MEMBER HOLTZMAN: This is Liz Holtzman. I have to get off. I'm sorry.

CHAIR JONES: Okay, okay. We'll take a look at this, particularly that. I don't recall any testimony about that specifically. Anything else? All right. Thanks, everybody. And I'll talk to everyone Tuesday, presumably.

(Whereupon, the foregoing matter was concluded at 4:26 p.m.)
CERTIFICATE

This is to certify that the foregoing transcript

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

Before: US DOD

Date: 01-28-14

Place: telephone conference

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