

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL  
ASSAULT CRIMES PANEL

VICTIM SERVICES SUBCOMMITTEE

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CONFERENCE CALL

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THURSDAY  
MARCH 20, 2014

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The Subcommittee convened telephonically at 2:30 p.m. Eastern Daylight Time, Mai Fernandez, Chair, presiding.

PRESENT:

Mai Fernandez, Chair  
Dean Michelle J. Anderson  
William Cassara  
Meg Garvin  
Honorable Elizabeth Holtzman  
Honorable Christel Marquardt  
Brigadier General Colleen McGuire, Retired

STAFF:

Maria Fried, Designated Federal Official  
Colonel Patricia Ham, Staff Director  
Commander Sherry King

Terri Saunders

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

2:48 p.m.

MS. FRIED: Good afternoon,  
everyone. This Victim Services Subcommittee is  
now open.

MS. FERNANDEZ: Hi, this is Mai  
Fernandez. First of all, I want to thank  
everybody on the call, and for indulging my  
lateness for 15 minutes. I was on a plane  
getting off in Miami and everything got a  
little delayed.

REP. HOLTZMAN: Liz Holtzman.

MS. FERNANDEZ: Hey, Liz, how are  
you?

REP. HOLTZMAN: How are you? Who is  
this?

MS. FERNANDEZ: It's Mai.

REP. HOLTZMAN: Hi, Mai, how are  
you?

MS. FERNANDEZ: I am good. We are  
just starting the meeting.

REP. HOLTZMAN: Excellent.

1 MS. FERNANDEZ: I just wanted to  
2 thank everybody who's on the call today, and  
3 I wanted to thank the staff. I thought that  
4 this was an excellent draft, and given it was  
5 our first round at looking at something, I  
6 think it was the right place to start. It's  
7 well laid out; it's concise. I think it really  
8 gives us something that we can respond to.

9 As far as the content is  
10 concerned, I don't have any opening remarks.  
11 And I hate to do this to Meg, to put her on  
12 the spot, but given that she probably has the  
13 most background on this part of the report, I  
14 wanted to see if she could start by just  
15 giving us her first impressions of the draft.

16 MS. GARVIN: Um, okay. And I know  
17 - I realize that um just landed in the  
18 transcript. So, excellent. Yes, I, too,  
19 applaud the staff. This is really dense  
20 material and I thought it was covered really  
21 well in here.

22 I'm not sure whether we want to

1 talk substance or structure, and structure  
2 might be - my recommendation probably is that  
3 structure wait until we think about other  
4 chapters also, perhaps. So, substantively, I  
5 just had a handful of things that I had seen  
6 in the recommendations and in the language of  
7 the recommendations that I thought the  
8 Subcommittee might want to focus on just to  
9 make sure that the language choices are the  
10 ones that we actually want in there, so I'm  
11 happy to go through those.

12 But, overall, I thought it was  
13 excellent and captured our prior discussion.  
14 And I think from my perspective we're at some  
15 language-choice moments because I think  
16 language choice is going to matter in the  
17 recommendations.

18 JUDGE MARQUARDT: Could I make a  
19 suggestion? You know, I find it difficult  
20 structurally to have the recommendation first  
21 and then the finding. I thought the finding  
22 should precede the recommendation.

1 COURT REPORTER: Sorry, this is the  
2 court reporter. I was wondering if the current  
3 speaker could please identify themselves for the  
4 record.

5 JUDGE MARQUARDT: Christel  
6 Marquardt.

7 REP. HOLTZMAN: This is Liz  
8 Holtzman. I completely agree. I was going to  
9 make that suggestion, as well. It's very easy  
10 to get lost if you don't have the finding  
11 first, then the recommendation afterwards.

12 MS. FERNANDEZ: This is Mai. I also  
13 think that that is a good recommendation.

14 MS. GARVIN: Yes, and this is Meg  
15 Garvin. I concur. That was one of the  
16 structural things I thought, also.

17 CDR KING: And we switched them  
18 back and forth a couple of times, just to let  
19 you know. We weren't sure which way that we  
20 should start it out, so we can always switch  
21 those back. That's not a hard thing.

22 MS. GARVIN: But one thing I

1 thought structurally when - this is Meg  
2 Garvin. When it all is said and done and we  
3 read through all of it, the chapters, or  
4 whatever they end being called. And I think  
5 that structurally it might make sense to have  
6 all recommendations in one place, like a  
7 listing of recommendations that flow out of  
8 every chapter or whatever, subsection we end  
9 up considering. And then within those chapters  
10 it goes finding, recommendation, finding,  
11 recommendation. But that all recommendations  
12 it might be desirable to have in one place,  
13 and then supported within the chapters in that  
14 structure. But, again, I don't know whether  
15 that recommendation of mine makes sense until  
16 we see everything.

17 JUDGE MARQUARDT: I think we should  
18 wait. Christel.

19 REP. HOLTZMAN: I agree. And I also  
20 - this is Liz Holtzman. I agree with that.  
21 Why don't we wait and see what it looks like.  
22 But the other thing I wanted to say in terms

1 of structure is that I'm not sure the findings  
2 and recommendations should come before we have  
3 the DoD current victims policy, and  
4 differences between CVRA. I mean, I was  
5 wondering about the order of that. I'm not  
6 sure.

7 JUDGE MARQUARDT: I like that  
8 suggestion. This is Christel.

9 REP. HOLTZMAN: Because I think  
10 it's kind of strange to read the findings and  
11 the recommendations first, then have  
12 everything laid out, so this is how I see it.

13 MS. FERNANDEZ: This is Mai. I  
14 think you've get more of a sense of a  
15 narrative if we do it the way that Liz and  
16 Christel are talking about.

17 JUDGE MARQUARDT: But then again,  
18 we may want to see the other parts before we  
19 make all the structural recommendations.

20 MS. FERNANDEZ: Meg, why don't you  
21 go ahead and start talking the substance, and  
22 then maybe towards the end of this

1 conversation we can revisit some of the  
2 structural issues.

3 MS. GARVIN: Okay, I can flag mine.  
4 I imagine other folks have some, also, but  
5 maybe I'll just focus mine on recommendations.

6 So, my first - I have some stuff  
7 prior to this, but the first real substantive  
8 one is on page 2, Recommendation 2. And it's  
9 actually quasi-global because I think it would  
10 apply to Recommendation 1, also, I believe.  
11 So, it's a quasi-global comment, and that is  
12 I'm wondering if in our recommendations if the  
13 Subcommittee might want to consider saying the  
14 victim, him or herself, or through counsel can  
15 do these things. And the reason, I think  
16 making explicit that whether our  
17 recommendation is personal just to the victim  
18 or includes through counsel is to avoid future  
19 litigation about what counsel can do. And  
20 that, obviously, was the entire litigation, or  
21 one huge chunk of the litigation in Kastenberg  
22 was what can the victim do, but also what can



1 the victim's counsel do. And I know we are not  
2 making specific narrow recommendations on the  
3 SVC's duties, but I think in our  
4 recommendations, when we're saying the victim  
5 should have a right to do something, I would  
6 strongly encourage us saying that victim or  
7 the victim's counsel can do it.

8 REP. HOLTZMAN: Meg, this is Liz  
9 Holtzman. Would it make sense to refer - to  
10 have this completely as a separate finding and  
11 recommendation, find the problem in the --  
12 whatever the name of that case, Kastenberg,  
13 and say given that and to avoid these problems  
14 we recommend that it be clear that the  
15 reference to victim shall include reference to  
16 victim's counsel.

17 MS. GARVIN: That's a much cleaner  
18 way to do that. I really like that, yes. I  
19 would agree with that.

20 MS. FERNANDEZ: How do others feel  
21 about that?

22 JUDGE MARQUARDT: I think that's a

1 good way to handle it. This is Christel.

2 MR. CASSARA: This is Bill. That  
3 makes sense to me.

4 DEAN ANDERSON: Yes, this is  
5 Michelle. I agree.

6 MS. FERNANDEZ: This is Mai. I  
7 agree, so let's do that.

8 JUDGE MARQUARDT: This is Christel.  
9 I would like to go through Finding 1, and then  
10 Recommendation 1 in that sequence because I  
11 think they feed off of one another. And I have  
12 difficulty because in my profession as an  
13 appellate judge we do a lot of editing, and so  
14 I have edited a number of these.

15 MS. GARVIN: Me, too. This is Meg.  
16 I have, also. I didn't know what to do with  
17 edits.

18 CDR KING: This is Sherry. The idea  
19 is, I think, if you send me the edits I will  
20 incorporate all the substantive edits into  
21 like bubbles, and I can put them together, and  
22 then you can all - and send it out to

1 everybody with the report with those edits,  
2 comments in it. And then you can all see each  
3 other's.

4 MS. FERNANDEZ: I probably didn't  
5 make that very clear.

6 CDR KING: Just send them to me,  
7 not to each other.

8 JUDGE MARQUARDT: Yes. I have a  
9 question about in that first recommendation,  
10 implement mechanisms. And I know that you use  
11 that word mechanisms in a lot of places, but  
12 I think it's procedure or something like that.  
13 Mechanisms just seems strange to me in a legal  
14 sense.

15 CDR KING: Ma'am, I think - just  
16 to let you know where that came from, it came  
17 from the statute, the Victims Rights Act that  
18 lists all the rights.

19 JUDGE MARQUARDT: I saw that.

20 CDR KING: So, that's where we got  
21 that word from, just to let you know.

22 JUDGE MARQUARDT: Yes, I know, and

1 it just seems strange.

2 REP. HOLTZMAN: Implement isn't --  
3 this is Liz Holtzman. Implement isn't really  
4 a great word either, establish or create is  
5 better. But, you know, that's a very minor  
6 change.

7 DEAN ANDERSON: I guess I'm  
8 wondering just - I apologize if this is  
9 obvious to everyone else - this is Michelle.  
10 I'm wondering why it doesn't just say the DoD  
11 should grant the victim's right to confer with  
12 trial counsel, or should establish the  
13 victim's right to confer with trial counsel.

14 JUDGE MARQUARDT: I think it should  
15 say the government's trial counsel because it  
16 could be confusing if it's his trial counsel,  
17 or -

18 COL. HAM: Ma'am, this is Colonel  
19 Ham. Trial counsel is the prosecutor. That's  
20 the term of art in the military for the  
21 prosecutor.

22 JUDGE MARQUARDT: Well, for a non-

1 military person, it was confusing.

2 COL HAM: Understood, ma'am.

3 REP. HOLTZMAN: Maybe the first  
4 time you use it just put a footnote in,  
5 explain what it is, or at some point.

6 MR. CASSARA: Hi, this is Bill.  
7 Will there be a glossary of terms?

8 COL HAM: Yes, there'll be a  
9 glossary of terms in the report and we'll cite  
10 to, I think, the Manual for Courts-Martial  
11 defines trial counsel. We'll put a footnote in  
12 that describes that.

13 MS. FERNANDEZ: Just for the sake  
14 of organization, would people like to go  
15 through the findings and recommendations one  
16 by one rather than just talking about all of  
17 them?

18 MS. GARVIN: I think that makes  
19 sense. This is Meg.

20 MS. FERNANDEZ: Okay. Well, then  
21 let's start with Finding 1 and see other than  
22 - I want to focus on substantive edits right

1 now. And I think non-substantive edits, I  
2 think, we could just send to Sherry and she  
3 can, like I said, put them in the bubbles.

4 JUDGE MARQUARDT: Could somebody  
5 define for me service policy? I know service  
6 is capitalized; policy is not. Is that a word  
7 of art also in Finding 1?

8 CDR KING: Yes, ma'am. Service  
9 means all the four or five military services,  
10 the Coast Guard, Army, Navy, Marines and Air  
11 Force.

12 JUDGE MARQUARDT: Would it be  
13 better to say the Armed Forces Policy?

14 COL HAM: This is Colonel Ham.  
15 Services generally denotes all five of the  
16 different Services. I guess I don't know how  
17 else to say it.

18 JUDGE MARQUARDT: Well, it would  
19 have to be plural then, possessive, Services'  
20 policy.

21 REP. HOLTZMAN: Not necessarily.  
22 But I think the reason to do that is DoD is

1 separate as an entity from each one of the  
2 Services so, you know, I think I don't have  
3 any problem, frankly, with making clear that  
4 - I think what it's trying to do is just  
5 indicate that at every single level, the  
6 policy of the military is to grant victims  
7 whatever these rights are.

8 COL HAM: That's right,  
9 Representative Holtzman. This is Colonel Ham.  
10 The DoD sets the overarching policy and the  
11 Services then each have their own implementing  
12 policy.

13 REP. HOLTZMAN: That's why I think  
14 if you just said military - this is Liz  
15 Holtzman again. That's why I just think if you  
16 said military, it might be confusing because  
17 it might not be clear that that includes DoD,  
18 or all the Services, you know. I mean, these  
19 are technical words, I think.

20 JUDGE MARQUARDT: Well, I just  
21 needed an explanation.

22 REP. HOLTZMAN: I could be wrong

1 about that, but this is my sense.

2 MS. FERNANDEZ: What else do we  
3 have on Recommendation or Finding 1?

4 REP. HOLTZMAN: I wanted to add  
5 something on Finding 1. This is Liz Holtzman,  
6 if nobody else has anything to say. It's not  
7 really clear - I mean, I know what you're  
8 trying to do here, but it should be clear in  
9 the findings that the reason that the role of  
10 the commander is not comparable to the right  
11 to consult on the CVRA is because the trial  
12 counsel does not have the authority to refer  
13 matters for prosecution. I mean, I think it  
14 should be explicit as to why it's not  
15 comparable in the findings.

16 (Simultaneous speaking.)

17 REP. HOLTZMAN: However, due to the  
18 role of the commander, the CVA is not directly  
19 comparable. Well, you don't spell that out.

20 MS. GARVIN: This is Meg. I would  
21 agree adding to that would make sense in  
22 particular in light of the shifting



1 legislative plans. And if something does  
2 change explaining our rationale for this  
3 finding will help explain whether it stays  
4 relevant if legislation passes, or if the  
5 legislation has changed the recommendations.  
6 So, I think a little more detail there about  
7 why we don't think it's comparable will help  
8 ensure interpretation of our recommendation  
9 later.

10 REP. HOLTZMAN: This is Liz  
11 Holtzman again. I think I found that problem  
12 in a few places, so if I could just suggest to  
13 the staff that you just make sure that it's  
14 very - that the rationale is clear in all of  
15 the findings, that would be great. I mean, I  
16 don't know that I have another example where  
17 I made notes on it, but I think I was feeling  
18 that same problem elsewhere, so just make  
19 sure.

20 MS. FERNANDEZ: Okay. We'll move on  
21 to Recommendation 2.

22 REP. HOLTZMAN: I think the same

1 thing - I'm sorry. I think the same problem  
2 exists in Recommendation 6, so okay, anyway.  
3 I don't mean to get ahead of ourselves at this  
4 point, another example of that. So, there may  
5 be others.

6 JUDGE MARQUARDT: Are we going to  
7 look at the recommendation also for Number 1?

8 MS. FERNANDEZ: Go ahead, Christel.

9 JUDGE MARQUARDT: Well, in the  
10 Recommendation it says the victim's specific  
11 concerns discussions, I don't know what that  
12 means, or desires. I think it should be  
13 requests, not desires. I think desires is a  
14 bad word. And then in the second to last line,  
15 Authority may consider those issues prior.

16 DEAN ANDERSON: Yes, I agree with  
17 Christel. This is Michelle. I was sort of  
18 stopped by the question of - the lack of  
19 parallelism between concerns, discussions, and  
20 desires. And I agree that it could be the  
21 victim's specific concerns and preferences  
22 regarding case disposition would take into

1 account whatever discussions means, and have  
2 a better word, I think, than desires. And then  
3 that then makes more sense, I think, vis a vis  
4 the latter part of the sentence where the  
5 convening authority may consider those views.  
6 Those views being, you know, referring to  
7 concerns and preferences.

8 JUDGE MARQUARDT: But I still think  
9 issues is a better word.

10 DEAN ANDERSON: Where is issues?  
11 Where would you put issues?

12 JUDGE MARQUARDT: Well, instead of  
13 views.

14 DEAN ANDERSON: Oh, I see. Yes.

15 JUDGE MARQUARDT: And I know we're  
16 going to send these to Sherry, but I just  
17 thought it was unusual.

18 DEAN ANDERSON: It's a substantive  
19 question, you know, the concerns, discussions,  
20 and desires, I think would be substantive  
21 edits.

22 MS. GARVIN: I think another -

1       this is Meg. Another potential substantive  
2       edit there is whether we're comfortable with  
3       it being a may consider, or whether we want  
4       our recommendation to be shall consider.

5                 DEAN ANDERSON: Yes, I would like  
6       it to be shall, not a permissive may.

7                 MS. FERNANDEZ: This is Mai. This  
8       is shall, too.

9                 REP. HOLTZMAN: Where are you?  
10       Sorry.

11                MS. GARVIN: Recommendation 1,  
12       second to last line where it says, convening  
13       authority may consider, I'm recommending that  
14       our recommendation be shall consider.

15                DEAN ANDERSON: I agree. This is  
16       Michelle.

17                MS. FERNANDEZ: Members, Terri  
18       Saunders is here. She was on the committee  
19       that, what's the right word, redrafted all the  
20       Rules of Evidence based on all the changes to  
21       the Federal Rules of Evidence, and they  
22       changed shall to will. That appears to be the

1 -

2 COL HAM: Is everyone okay with  
3 will rather than shall?

4 MS. FERNANDEZ: Everyone okay with  
5 will instead of shall?

6 (Chorus of yeses.)

7 MR. CASSARA: That's fine with me.

8 CDR KING: Before you're done with  
9 this can we just go over it to make sure I'm  
10 clear?

11 REP. HOLTZMAN: You mean the  
12 recommendation?

13 CDR KING: There was - yes. I'm  
14 just not clear, one person discussed changing  
15 the word desires to I think preferences. And  
16 then change it to issues, so - or maybe  
17 issues is - oh, views to issues. Okay.

18 JUDGE MARQUARDT: Yes, we want the  
19 word discussions gone. Concerns is fine, it  
20 should say concerns and preferences. We get  
21 rid of discussions, we get rid of desires.  
22 Later instead of saying those views, it says

1 those issues.

2 CDR KING: Okay.

3 JUDGE MARQUARDT: And instead of  
4 saying may on the second to last line, it says  
5 will.

6 CDR KING: Okay. I just wanted to  
7 make sure I understood that as we were writing  
8 it.

9 REP. HOLTZMAN: Well, also, at the  
10 very beginning where it says DoD should create  
11 and implement -

12 MS. FERNANDEZ: Yes, I guess I'm  
13 still not clear on why we have a lot of --  
14 there's a lot of verbiage in that first part  
15 of the sentence.

16 JUDGE MARQUARDT: I don't know  
17 what should denotes.

18 REP. HOLTZMAN: This is a  
19 recommendation. Recommendation, what other  
20 word would you use?

21 COL HAM: The Panel doesn't have  
22 the authority to direct DoD or Congress to do

1 anything, only to recommend.

2 JUDGE MARQUARDT: Okay. But I  
3 think Liz said that create was a good word  
4 there.

5 REP. HOLTZMAN: Better than  
6 implement. Implement is -

7 JUDGE MARQUARDT: Well, that you  
8 can create and implement.

9 MS. GARVIN: Yes, I would not leave  
10 it at just create. This is Meg. I would  
11 recommend that if we're going to say create,  
12 it's create and implement, something that  
13 directs them to actually put it into practice.  
14 I mean, that our recommendation has got to be  
15 practiced and driven, that we create it and  
16 then put it into practice.

17 CDR KING: I think in some of our  
18 charts that we have, some of the Services  
19 already do it in practice in their  
20 instructions, or in their policy says Services  
21 do that in practice already, but it's not in  
22 any statutory language. And in practice I

1 think probably all the Services do it at least  
2 to a point.

3 MR. CASSARA: Bill Cassara. Sorry,  
4 folks, I hit the wrong button. I disconnected  
5 myself. I know you missed me. I'm back.

6 MS. FERNANDEZ: Yes, Bill, we did.  
7 Do we have anything else on Finding or  
8 Recommendation 1?

9 JUDGE MARQUARDT: Where it says in  
10 the fourth line of the finding, disposition of  
11 the matter, is there a better word? I'm not  
12 sure what word would be better used.

13 MS. FERNANDEZ: Christel, do you  
14 have a recommendation for a better word?

15 JUDGE MARQUARDT: Well, I wondered  
16 if charges or the allegations --

17 CDR KING: I think that word was  
18 meant to relate to the administrative -- if  
19 there was some other administrative procedure,  
20 or administrative action that was taken.

21 JUDGE MARQUARDT: Well, I think the  
22 beginning of that line should say pursue a



1 non-judicial or administrative, some other  
2 disposition I think is not good wording.

3 CDR KING: So, take out some other  
4 and just leave it pursue non-judicial or  
5 administrative disposition of the matter?

6 JUDGE MARQUARDT: Well, you could  
7 put an A in there, Pursue a non-judicial or  
8 administrative disposition of the whatever.

9 MS. FERNANDEZ: Can we move on to  
10 Recommendation 2 and Finding 2?

11 REP. HOLTZMAN: This is Liz  
12 Holtzman. On Recommendation 2 in line 4 it  
13 should be gender neutral so it's -

14 JUDGE MARQUARDT: Exactly.

15 REP. HOLTZMAN: And then in the  
16 parenthesis at the very end when it says,  
17 submission in writing or personal meeting, I  
18 could think of a circumstance where it might  
19 be via email, via video, so maybe submission  
20 in writing, personal meeting, or otherwise. I  
21 don't know, but something that's not - well,  
22 I guess you say e.g., so that's okay. I'm okay

1 with that, just make it gender neutral.

2 MS. GARVIN: I'm going to actually  
3 - this is Meg. I'm going to comment on that  
4 same thing in the parenthetical. The e.g.  
5 certainly clarifies, it's for example, but  
6 having it be or in the parenthetical means  
7 it's one or the other even though those are  
8 for examples, and I have a problem with a  
9 recommendation that makes it sound like it's  
10 a disjunctive. I'd rather just have a comma  
11 there so we're not saying it has to be one or  
12 the other, that the decision maker might say  
13 it's multiple ways.

14 REP. HOLTZMAN: Do you want an and?

15 MS. GARVIN: No, just a comma, so  
16 it's a for - I mean, we're recommending that  
17 they should implement the policy, and the  
18 convening authority retains the discretion. I  
19 just don't want to - so I want it to be a  
20 comma so the discretion includes that they  
21 could do it in multiple ways within the same  
22 case if they wanted to.

1                   JUDGE MARQUARDT: So, in other  
2 words, put a comma in and take the or out.

3                   MS. GARVIN: Correct.

4                   REP. HOLTZMAN: But that's not  
5 grammatical.

6                   CDR KING: Well, then we could add  
7 in or otherwise, or something like that if you  
8 wanted.

9                   MS. GARVIN: Well, yes, we could do  
10 or otherwise, but then again we have the or.  
11 I actually think it - Liz, I think it does  
12 work grammatically if we use kind of the legal  
13 version of the e.g. parentheticals where --  
14 but it will depend on the style guide we're  
15 following for writing this. If it was a legal  
16 parenthetical, the comma actually achieves it  
17 and you don't need to do anything else. If  
18 it's not, then we need to think about it. And  
19 then I'd recommend at the end and/or.

20                   COL HAM: This is Colonel Ham.  
21 Right now the right to be heard during a plea  
22 is not included in the statutory language

1 Congress just enacted. Is there any  
2 recommendation on whether that word should be  
3 added, or the - I mean, it might be more than  
4 a word.

5 JUDGE MARQUARDT: Well, I had a  
6 problem with the ending of that first sentence  
7 because it's the right to be heard regarding  
8 a plea. Is that the plea negotiation, the plea  
9 agreement after it's been made, whatever? I  
10 mean, if you're going to have any effective  
11 influence on the plea, it's got to be during  
12 the negotiation process and not after the  
13 agreement has been made.

14 COL HAM: I think that was the  
15 intent, certainly, ma'am, if it's not carried  
16 because it says, should include the right to  
17 be heard before the convening authority makes  
18 his or her decision to accept, reject or  
19 propose a counter-offer to a pretrial  
20 agreement. So, that's during the negotiations.

21 JUDGE MARQUARDT: Well, I think it  
22 should be made clear. It looks like a pretrial

1 agreement has already been made, so a pretrial  
2 proposal or something?

3 COL HAM: Again, that's a term of  
4 art, ma'am. It's a - the document is called  
5 a pretrial agreement, what you would think of  
6 as a plea bargain. The document is called a  
7 pretrial agreement.

8 JUDGE MARQUARDT: Okay, because  
9 agreement means it's already set.

10 COL HAM: Proposed, maybe?

11 JUDGE MARQUARDT: Proposed pretrial

12 -

13 MR. CASSARA: Colonel Ham, this is  
14 Bill. How about just any pretrial offer? I  
15 mean, in the Navy I think it's called a PTO,  
16 isn't it, Sherry? Or maybe that's the Air  
17 Force.

18 COL HAM: It's not the Air Force.

19 CDR KING: Yes, I think it's called  
20 a PTO.

21 JUDGE MARQUARDT: I think offer is  
22 good.

1 MR. CASSARA: I mean, we could say  
2 for offers of military pretrial agreements.

3 JUDGE MARQUARDT: Yes.

4 COL HAM: Offer pretrial  
5 agreements?

6 JUDGE MARQUARDT: Or just - I like  
7 the idea just to a pretrial offer and don't  
8 even - submitted by the accused. How do we  
9 know who's submitting it?

10 COL HAM: It has to be submitted by  
11 him.

12 JUDGE MARQUARDT: Well, what about  
13 a counter-offer. I guess you have a counter-  
14 offer. Okay. Well, but you see, it could be  
15 the pretrial offer, then you have a counter-  
16 offer, so what's the victim responding to?  
17 That's all I'm saying. So, that's why we leave  
18 it more general, but it's up - it's not a big  
19 deal.

20 REP. HOLTZMAN: I think the  
21 negotiation word should be in there, because  
22 that's what it is.

1 COL HAM: Under the federal statute  
2 there's no - well, I'm wondering, Ms. Garvin,  
3 my recollection is there's no right to  
4 participate in the negotiations -

5 (Simultaneous speech.)

6 MS. GARVIN: You're correct,  
7 Colonel Ham. The broad term that's used in the  
8 federal system is plea, the word plea is used,  
9 and the way it is navigated in practice is the  
10 right to confer with a prosecuting attorney is  
11 leveraged to be involvement in plea  
12 negotiations as they're happening and to be  
13 kept in the loop as they're happening. The  
14 right to be heard regarding plea is the right  
15 to be heard prior to a final decision being  
16 made about a plea agreement that has been  
17 reached as it's presented to the court, so  
18 it's the right to be heard by the court prior  
19 to acceptance. I'm not sure that's the best  
20 way to go, but that is the way it's currently  
21 laid out in the federal system, and it's used,  
22 the right to confer to ensure participation in

1 negotiation, and you have the right to be  
2 heard on plea, to be heard by the court prior  
3 to acceptance.

4 JUDGE MARQUARDT: Well, it seems to  
5 me the word "plea," even though that's what  
6 everybody thinks it says is subject to  
7 interpretation by the court at that point.

8 REP. HOLTZMAN: You know, this is  
9 only a recommend - this is not the statute.

10 JUDGE MARQUARDT: I know.

11 REP. HOLTZMAN: This is just a  
12 recommendation, so I don't know that the words  
13 must be - each word is going to have that  
14 kind of significance. And particularly since  
15 it's the mechanism includes the right to be  
16 heard before the Convening Authority makes its  
17 decision to accept, reject, or propose a  
18 counter offer. So, it sounds to me clearly -  
19 I mean, the word "negotiation" might be  
20 better, but it sounds like you're right in the  
21 process there, to me.

22 MS. GARVIN: This is Meg. I would



1       tend to agree with that. And I think if we're  
2       trying to make an explicit recommendation  
3       about involvement in negotiations rather than  
4       having interest and rights specifically heard  
5       by the decision maker before decision, that  
6       might be a separate recommendation which is -  
7       because it sounds like we might be making a  
8       recommendation of a tripartite negotiation,  
9       which is a little bit different than being  
10      heard about the plea.

11                   JUDGE MARQUARDT: I agree with you  
12      on that.

13                   DEAN ANDERSON: Meg, isn't that  
14      going further than what you get with civil  
15      court?

16                   MS. GARVIN: In civilian - yes,  
17      that is. I'm not, necessarily, endorsing that.  
18      I'm saying if we are - I think we need  
19      clarity on whether that's what we are  
20      recommending or not. The civilian system right  
21      now, you just get to be heard by the decision  
22      maker before it becomes final, and you hope

1 that the right to confer allows you some level  
2 of participation, but because you're not a  
3 decision maker that's it.

4 MS. FERNANDEZ: I see very - I  
5 don't know if the word is reluctance, but  
6 we've got to be careful to go - if we're  
7 going to be doing things that go farther than  
8 the civilian system.

9 (Off microphone comment.)

10 REP. HOLTZMAN: Especially since  
11 I'm not sure we had testimony on the subject.

12 MS. GARVIN: That we have not?

13 REP. HOLTZMAN: And I'm not sure  
14 whether we have.

15 MS. FERNANDEZ: No, I don't think  
16 we have. I mean, that kind of recommendation  
17 I think wouldn't be prudent.

18 REP. HOLTZMAN: I agree without  
19 support.

20 JUDGE MARQUARDT: I'll concede.

21 COL HAM: So, is it clear what the  
22 intent of this one is, Subcommittee members?

1 This is Colonel Ham. Our understanding of your  
2 intent was to make a military equivalent of  
3 what Ms. Garvin just described as the right to  
4 be heard during the plea, which you discussed  
5 and heard issues about why that is difficult  
6 to do in an equivalent manner to how Ms.  
7 Garvin described it in the civilian system.  
8 So, as the staff drafting this we were trying  
9 to implement your intent as we gleaned it from  
10 your deliberations, that this is to replace  
11 that, or to put something in place as  
12 equivalent as it can be in the Military  
13 Justice process as it exists now.

14 REP. HOLTZMAN: Colonel Ham, this  
15 is Liz Holtzman. I don't think we are  
16 suggesting, in fact now, any change aside from  
17 the content of the - changing the gender  
18 neutral issue, and changing the content of the  
19 parenthetical statement.

20 JUDGE MARQUARDT: Well, I thought  
21 we were going to change pretrial offer or  
22 proposal instead of agreement.

1                   REP. HOLTZMAN: Yes, right. Offer,  
2 right. You're right.

3                   MS. GARVIN: And with those - this  
4 is Meg Garvin. With those changes I think,  
5 Colonel Ham, it does capture the conversation  
6 and our discussion, and our recommendation and  
7 intent.

8                   MS. FERNANDEZ: Okay, then let's  
9 move on to Recommendation 3 and Finding 3.

10                  REP. HOLTZMAN: This is Liz  
11 Holtzman. On Finding 3 I think I have the same  
12 problem that I had mentioned earlier. It's  
13 kind of a generic issue. It doesn't - it's  
14 too general, and it should refer to the  
15 appellate rights point which is what we're  
16 talking about here. Isn't that correct?

17                  MS. GARVIN: This is Meg Garvin.  
18 I'm going to agree with that. I have two  
19 comments, one on Recommendation 3, and one on  
20 Finding 3. To echo Liz' on Finding 3, the  
21 finding seems to be mixing and matching trial  
22 level standing and appellate standing. And I

1 think our recommendation was about appellate  
2 standing, so I think Finding 3 should be about  
3 appellate. And that there's no clarity of  
4 appellate device right now rather than  
5 something broader that seems to be going on to  
6 trial and it's appellate. And in my notes, my  
7 edits I can send some suggested language on  
8 that. I have it, but that was the Finding 3.

9           And then on the Recommendation 3,  
10 I have concerns about the last clause or  
11 phrase. My grammar is bad today. The "is  
12 pending in appropriate circumstances." Mainly,  
13 it's just a phrase, "in appropriate  
14 circumstances," I would recommend removing  
15 that because I think that is getting into  
16 details that we shouldn't include.

17           JUDGE MARQUARDT: I agree that I  
18 would cross that out.

19           DEAN ANDERSON: Yes, I agree with  
20 that. I also am wondering about the first part  
21 of - this is Michelle. The first part of  
22 Recommendation 3. The first part says, "The

1 DoD should complete its study on the issue."  
2 And because we don't know what the findings  
3 are, that just sort of comes out of nowhere  
4 and it's not clear in reading what it's about,  
5 and why we should be making a recommendation  
6 on it, moreover. It could just say, "The DoD  
7 should develop mechanisms for an appropriate  
8 appellate device to insure" - or, actually,  
9 "The DoD should develop mechanisms to insure  
10 mandatory expedited interlocutory review of an  
11 alleged violation the rights listed in," blah,  
12 blah, blah.

13 I just think that there's more  
14 language here - the language is cumbersome  
15 and I'm not sure that we need the "for an  
16 appropriate appellate device," if there is a  
17 mechanism.

18 JUDGE MARQUARDT: Well, I like  
19 "process" instead of "device," for an  
20 "appropriate appellate process."

21 DEAN ANDERSON: That sounds good to  
22 me, too. But then I would take out the "for

1 the appropriate appellate device."

2 JUDGE MARQUARDT: Yes.

3 MS. GARVIN: I agree. I think if it  
4 just said "develop mechanisms to insure  
5 mandatory expedited interlocutory review,"  
6 that's good.

7 JUDGE MARQUARDT: Could you say  
8 "appellate review?"

9 REP. HOLTZMAN: That's a good  
10 point.

11 MS. GARVIN: Well, as long as we're  
12 sure that it can include pretrial appellate  
13 review, and it's not locked into a post  
14 moment, which is why I think we have  
15 interlocutory in there.

16 JUDGE MARQUARDT: Well, maybe you  
17 should say both.

18 MS. GARVIN: Good point, good  
19 point.

20 JUDGE MARQUARDT: Maybe "develop  
21 mechanism for appropriate review of pretrial  
22 and post-trial."

1 MS. GARVIN: I think that would be  
2 an excellent edit. This is Meg.

3 REP. HOLTZMAN: Well, what about  
4 during the trial? I mean, you've got pre and  
5 post, but what about during the trial?

6 JUDGE MARQUARDT: Well, you could  
7 pre, during -

8 REP. HOLTZMAN: Because it raises  
9 that question. That's all I'm - that's why  
10 I'm raising it.

11 PARTICIPANT: Maybe all -

12 MS. GARVIN: Or it could be - and  
13 this might be wordsmithing that we can do  
14 through edits, but we can do "to insure  
15 mandatory expedited interlocutory review,"  
16 which does include pretrial and trial, as well  
17 as post-trial review. I mean, we could do it  
18 that way, or in our wordsmithing and editing  
19 we could come up with a - to insure we  
20 capture all three moments.

21 JUDGE MARQUARDT: I think it should  
22 be explicitly stated because it's going to



1 leave it up to judicial review and it's going  
2 to take a long time to get down to exactly  
3 what we had intended. And it is hard to draft  
4 by committee, I agree.

5 MS. GARVIN: This is Meg. Is this  
6 something staff could attempt, if our intent  
7 is clear that it's all three moments, that you  
8 all could draft language?

9 COL HAM: Actually, the way it's  
10 drafted, it's even broader than that, Ms.  
11 Garvin, because we say "interlocutory review  
12 of alleged violation of the rights in Article  
13 6-B," which are - some are, what's the right  
14 word, in the absence of a trial.

15 MS. GARVIN: Does interlocutory in  
16 the military not - it means any time that  
17 something is pending, so it would capture --  
18 interlocutory isn't limiting. Is that  
19 correct, Colonel Ham?

20 COL HAM: I wish Dean Schenck was  
21 on today to check my - I mean, the  
22 extraordinary work process is not limited to

1 when there is a set of charges proceeding. For  
2 example, a Writ of Habeas Corpus, as you all  
3 know, can be filed when there are no charges  
4 pending. So, I guess we're asking what exactly  
5 is your intent. We thought your intent was to  
6 enforce all the rights in Article 6-B, but if  
7 you say pretrial, trial, and post-trial you  
8 may be limiting it more than it is right now.  
9 And if that's your intent, then -

10 MS. GARVIN: No, I think you all  
11 have the intent correctly. And I was hung up  
12 on the word "interlocutory," making sure that  
13 wasn't inappropriately limiting anything. That  
14 was my concern. I want it as broad as  
15 possible. And I think the Committee's  
16 discussions today echo that.

17 COL HAM: So, I guess the word  
18 "interlocutory" then would mean to a court  
19 system, as opposed to through the chain of  
20 command, which is what we understood your  
21 intent to be. You want it through the  
22 appellate court system.

1 MS. GARVIN: Correct.

2 COL HAM: I think - well, Mr.  
3 Cassara, and I'd love to hear from Dean  
4 Schenck on this one, too, if we have the right  
5 word there.

6 MR. CASSARA: Okay. Direct me as to  
7 - this is Mr. Cassara, I'm sorry. You  
8 probably realized that since I'm the only Mr.  
9 on the phone.

10 (Laughter.)

11 MR. CASSARA: Give me a paragraph  
12 that you are looking at. Is it Recommendation  
13 4?

14 COL HAM: It's Recommendation 3.

15 MR. CASSARA: I'm sorry, I'm way  
16 ahead of you. Okay. "The DoD" -

17 COL HAM: The question is  
18 "interlocutory," does that capture - our  
19 intent was that it captures the appellate  
20 process.

21 MR. CASSARA: Well, as I understand  
22 the Committee's intent it is that the victim

1 through his or her counsel be allowed to file  
2 an appeal at any relevant stage whether it be  
3 pretrial or during trial, or I guess  
4 theoretically post-trial. For example, if a  
5 defense counsel were to file a post-trial 513  
6 motion, so I - it would seem that if the  
7 Committee's intent is to allow the victim's  
8 counsel to file an appeal at any relevant  
9 state of the proceeding, then interlocutory is  
10 probably limiting that.

11 PARTICIPANT: How?

12 MR. CASSARA: Because when I think  
13 interlocutory appeal, I think of an appeal  
14 taking place during a trial.

15 JUDGE MARQUARDT: Correct.

16 MR. CASSARA: Not pretrial or post-  
17 trial.

18 JUDGE MARQUARDT: Correct.

19 COL HAM: So, should it be  
20 expedited appellate review, just appellate  
21 review?

22 MR. CASSARA: Why not just

1 expedited review?

2 PARTICIPANT: Well, who else -

3 COL HAM: Then it doesn't

4 necessarily have to be by a court.

5 MR. CASSARA: Okay, I see what

6 you're saying. Well, that's a valid point.

7 REP. HOLTZMAN: I would say an

8 appropriate device to insure mandatory

9 expedited appellate review.

10 MR. CASSARA: Yes, I think that

11 makes the most sense.

12 REP. HOLTZMAN: Take "appellate"

13 from where it is on line 2 in front of

14 "device" and put is in front of "review," and

15 strike out interlocutory.

16 MR. CASSARA: Where it would say,

17 "develop mechanisms for an appropriate device

18 to insure mandatory expedited appellate review

19 of an alleged violation."

20 PARTICIPANT: Can I just -

21 JUDGE MARQUARDT: I like the word

22 "process" rather than "device."

1                   PARTICIPANT: I thought we took  
2 that out, anyway.

3                   DEAN ANDERSON: Yes, the only thing  
4 that I would add - this is Michelle, on the  
5 question of appellate versus interlocutory, is  
6 that it - although it may be technically  
7 correct that appellate signifies at any  
8 particular stage of the game, the word  
9 "interlocutory" has a specific meaning that  
10 allows for someone to stop the process midway  
11 and get expedited review of something. So, I  
12 might actually add both words even though it's  
13 a little bit more cumbersome.

14                  MR. CASSARA: Let me ask this. What  
15 about if it just said mandatory - well, I  
16 want to talk about the word "mandatory," but  
17 what if it said to insure judicial review --  
18 expedited judicial review?

19                  DEAN ANDERSON: Yes, but I guess my  
20 concern is the implication that the word  
21 "appellate" or "judicial", that the possible  
22 implication that it awaits until the end of

1 the process. Even though I understand  
2 technically it doesn't have to imply that, it  
3 can imply that, as opposed to interlocutory  
4 which means intermediate, in the mid stage of  
5 the process. And I wouldn't want to lose that.

6 MS. GARVIN: And I would echo that,  
7 which is where that word in our  
8 deliberations/debate - that's where that word  
9 came from, was our deliberations previously to  
10 make sure it didn't wait until the end.

11 DEAN ANDERSON: Right.

12 MS. GARVIN: I'm just not sure how  
13 we wrap both those things in and capture the  
14 intent, and make sure people understand that.

15 MS. FERNANDEZ: Is there a problem  
16 with just saying before, during, and after  
17 trial? I mean, just sort of say what it is.

18 MS. GARVIN: Well, except as  
19 Colonel Ham was pointing out, some of these  
20 things might not go to trial. Am I  
21 understanding that right, Colonel Ham?

22 COL HAM: That was our

1 understanding of your intent, that you wanted  
2 it to reach all the rights, which don't  
3 necessarily involve any trial.

4 MS. GARVIN: Right. And that is the  
5 same in civilian, right, there doesn't have to  
6 be a pending case in order to initiate review  
7 of a denial.

8 MS. FERNANDEZ: Well, doesn't  
9 pretrial then cover everything that would  
10 happen if it didn't go to trial? You're saying  
11 pre, during, and after, we're kind of covering  
12 everything.

13 REP. HOLTZMAN: Didn't I hear  
14 suggestions that we let the staff try to  
15 figure this one out and come back to us with  
16 some language.

17 PARTICIPANT: Good idea.

18 JUDGE MARQUARDT: Well, they can  
19 consult with Colonel Schenck, too.

20 REP. HOLTZMAN: Yes, and go through  
21 an appellate review while they're at it.

22 (Laughter.)



1 COL HAM: Can I just ask one more  
2 wordsmith question. This is Colonel Ham.  
3 Somebody raised an issue with mandatory, does  
4 that engender -

5 MR. CASSARA: That was me.

6 COL HAM: What's your thought  
7 there, Mr. Cassara? Did you want to -

8 MR. CASSARA: Well, I may be wrong.  
9 I'm wrong a lot, just ask my wife. But my  
10 concern would be do we want to - I mean, are  
11 we telling a court that they have to do  
12 something? Is that our desire? You know,  
13 that's really my concern.

14 COL HAM: In other words, that they  
15 have to address the substance of something  
16 rather than deny or grant outright?

17 MR. CASSARA: Right.

18 COL HAM: Okay.

19 CDR KING: I think we meant the  
20 mandatory to go with the expedited.

21 MR. CASSARA: Aha, not with the  
22 review.

1 CDR KING: Right.

2 MS. GARVIN: This is Meg. I guess  
3 I'm not sure I had read it that way, or  
4 thought we - I thought we were directing the  
5 court to take review kind of akin to the  
6 civilian one of shall take up and decide  
7 forthwith language.

8 JUDGE MARQUARDT: It modifies the  
9 alleged violation of rights.

10 MR. CASSARA: I mean, if that's  
11 what our goal is, I'm - you know, the - I  
12 understand.

13 MS. GARVIN: And I will say, I  
14 mean, the shall take up and decide forthwith  
15 that is in the civilian has not mandated  
16 substantive review. Right? Because they have  
17 had to decide what the standard of review is,  
18 and the standard of review at times in the  
19 civilian world has dictated, in my opinion  
20 inappropriately so, but it has happened, non-  
21 review of substance, and instead said they  
22 didn't meet the threshold standing, so the

1 shall take up and decide language in the CVRA  
2 has resulted in courts, they have to look at  
3 the petition and decide what track it's on,  
4 basically.

5 MR. CASSARA: Okay. Then I'm good.  
6 See, I told you, I'm wrong a lot.

7 MS. FERNANDEZ: Let's move on to  
8 Recommendation and Finding 4.

9 JUDGE MARQUARDT: Should we have  
10 the word "should" in there? "The DoD  
11 implementation mechanism should include the  
12 provisions for the trial court."

13 REP. HOLTZMAN: I have another  
14 point to make on Recommendation 4, which is  
15 that, you know, it's not clear to me the right  
16 was waived by the victim, whether that's  
17 sufficient. Should it be a knowing waiver, or  
18 is that not necessary? Just throw it out to  
19 have a question. That's all. I don't have a  
20 recommendation.

21 PARTICIPANT: And this is very  
22 wordy. We can -

1 MR. CASSARA: Yes. I think a lot  
2 under the recommendation is missing words.

3 MS. FERNANDEZ: What was that,  
4 Bill?

5 MR. CASSARA: I think that the last  
6 sentence under Recommendation 4 is missing a  
7 word or two.

8 COL HAM: Yes, these are combined  
9 drafts, so we'll work on this one and cut it  
10 down.

11 MR. CASSARA: Okay. I just - yes.

12 COL HAM: There are some obvious  
13 grammatical things in there. We'll tighten it  
14 up.

15 MR. CASSARA: I don't mean to  
16 grammar police, but I wasn't sure what the  
17 intent was of the sentence. Okay.

18 CDR KING: It was too many versions  
19 being put together to get it out to you, I  
20 think.

21 MR. CASSARA: You know how many  
22 times I've done this with appellate argument.

1 I read my brief right before I went in and  
2 found numerous typos, so I -

3 (Laughter.)

4 MR. CASSARA: Embarrassing moment,  
5 believe me. I was shy about pointing those  
6 out, so -

7 CDR KING: Of course. So, with the  
8 waiver we were just trying to get something  
9 affirmative on the record, you know, make them  
10 do something affirmative on the record rather  
11 than just say the victim is not here so - you  
12 know, the judge say that, maybe make the trial  
13 counsel - somebody make an affirmative  
14 finding that there was a waiver, because  
15 that's what you had talked about, you know,  
16 making a finding about the rights, so we kind  
17 of included waiver in there based on, I think,  
18 your more general discussions.

19 REP. HOLTZMAN: I think we can wait  
20 to see what you can work out.

21 MS. FERNANDEZ: Let's work that one  
22 - let's take a hand at rewriting that one,

1 because I just had just sort of trouble  
2 understanding it all together. So, I think if  
3 it - if we tighten up, we may just need  
4 another quick look at that one. Are we okay  
5 with that? We can move to Recommendation 5?  
6 Anybody?

7 MR. CASSARA: I'm reading. I'm  
8 reading 5. I'm with you.

9 JUDGE MARQUARDT: I'm wondering if  
10 it's the finality of court-martial findings,  
11 maybe it's to insure the finality of charges  
12 or something, because what we're trying to do  
13 is to make sure that they can't bring charges  
14 10 years later.

15 PARTICIPANT: Right. So, maybe you  
16 mean proceedings instead of findings?

17 JUDGE MARQUARDT: I don't know, but  
18 it should be worded differently. That's all I  
19 think.

20 PARTICIPANT: I agree with that.

21 MS. GARVIN: This is Meg. I  
22 apologize, I'm a little - I was not following

1 exactly what our intent was with this. This  
2 was to ensure that there is a limitation time  
3 period on which a victim could bring charges.

4 MS. GARVIN: Charges, or was it the  
5 victim could bring complaint for violation of  
6 their rights? That was my confusion, so this  
7 is about charges?

8 CDR KING: No, our intent was to  
9 bring a complaint about a violation of their  
10 rights based on -

11 MS. GARVIN: So, setting up  
12 something parallel to the CVRA's time frame  
13 for bringing the complaint.

14 CDR KING: Correct.

15 JUDGE MARQUARDT: Maybe we should  
16 just re-look at the wording and parrot some of  
17 the language from the CVRA more closely.

18 MS. FERNANDEZ: I think that's a  
19 good idea.

20 MS. GARVIN: I think that's a good  
21 idea, especially because the CVRA - well,  
22 Colonel Ham, I would recommend that, although

1       some of it is clunky in the CVRA, too, the  
2       drafting there. We didn't do such a good job  
3       with some of it. There's several different  
4       time frames in there, so maybe you guys can  
5       actually make it cleaner than the CVRA's one.  
6       The CVRA has an explicit time period for when  
7       you're challenging certain -- bringing  
8       complaint for certain pieces, other pieces  
9       it's actually open, and there's no clarity of  
10      when you have to file a complaint. So,  
11      parroting the CVRA but maybe organizing it a  
12      little bit better would be good.

13                   MS. FERNANDEZ: Okay.

14                   COL HAM: We might come to you for  
15      help if that's okay, Ms. Garvin.

16                   MS. GARVIN: Of course, yes. And in  
17      my notes, I had a - some ideas on that in my  
18      edits, so I will be sending those to Sherry.

19                   CDR KING: Very good, thank you. We  
20      just weren't exactly sure if you wanted them  
21      to be exactly the same as the CVRA or  
22      something a little bit different based on your



1 discussions, so maybe your notes will help.

2 PARTICIPANT: It almost seems like  
3 Recommendations 6 and 5 should be flipped. Am  
4 I wrong about that?

5 PARTICIPANT: Should be what?

6 PARTICIPANT: Flipped, 6 should be  
7 5, and 5 should be 6.

8 CDR KING: I think Number 6 was  
9 meant to at least relate to like the ombudsman  
10 proceeding in the federal system where the  
11 U.S. Attorney's Office has an ombudsman to  
12 respond to complaints of victims that maybe  
13 the prosecutor or someone else in the system  
14 didn't give them their rights, and do an  
15 investigation. And a lot of times I think  
16 those are - we didn't get to hear from them,  
17 specifically, but those occur after the whole  
18 case is over.

19 JUDGE MARQUARDT: Well, I wondered  
20 if it was similar to the mandamus that you do  
21 when some official does not act the way that  
22 they are required to do.

1 COL HAM: We thought the intent  
2 here was the ombudsman similar to the - it's  
3 in the DOJ, I don't know if it's part of the  
4 Office of Victims of Crime, or separate. That  
5 was what was trying to be captured there, but  
6 if we are completely off -

7 REP. HOLTZMAN: Yes. See, I think  
8 that number 6 - this is Liz Holtzman. I think  
9 that 6 using both the recommendation and the  
10 finding, because it's not clear to me  
11 particularly in the recommendation what it is  
12 you're trying to address comparable to that  
13 set forth in CVRA. We don't know what you're  
14 really talking about here. And it's not clear,  
15 also, in the finding what is it that you're  
16 trying to do? These are not mechanisms to undo  
17 the harm. That's to be done in the judicial  
18 process, as I gather. What is - to kind of  
19 change it to the future? I mean, what is the  
20 point of this mechanism that receives  
21 complaints? Is it supposed to - what is it  
22 supposed to do, this mechanism, that's

1 referred to in Finding 6? What's the purpose  
2 of it?

3 COL HAM: This is Colonel Ham. I  
4 think the thought was, again similar to the  
5 ombudsman and the Department of Justice, if  
6 Department of Justice employees, the  
7 prosecutor, for example, is alleged to have  
8 violated the CVRA, this is where the victim  
9 would file a complaint. Is that correct, Ms.  
10 Garvin?

11 MS. GARVIN: Yes.

12 COL HAM: There is nothing similar  
13 in the military system -

14 MS. GARVIN: Well, there are -

15 REP. HOLTZMAN: Okay. Well, you  
16 should describe it because it is completely --  
17 to somebody who is not familiar with what  
18 you're trying to talk about, this is just not  
19 clear, what it is that you are envisioning.  
20 You might give an example, but it's just not  
21 clear. So, this allows - in other words, this  
22 doesn't give the victim a remedy for the

1 denial in the courthouse assuming that there  
2 was no remedy, aside from what she gets, or he  
3 gets through the trial process. What this does  
4 is allow other people who violated those  
5 rights to be penalized, or by bringing this to  
6 the attention of the authorities to possibly  
7 improve training or develop other programs. Is  
8 that correct?

9 COL HAM: Correct.

10 REP. HOLTZMAN: All right. Well,  
11 maybe spell out that that's the purpose in the  
12 findings, that the - you know, in the federal  
13 system this is what happens. There's no  
14 comparable system in the military, so the  
15 recommendation is that there should be a  
16 comparable system which does A, B, C, D, E.

17 CDR KING: Part of that was in  
18 recognition, and we probably, we didn't spell  
19 it out very good, of the NDAA that requires  
20 the Armed Forces to designate an authority to  
21 receive and investigate complaints relating to  
22 provision or violation of the rights and

1 disciplinary sanctions for members of the  
2 Armed Forces who violate - who willfully and  
3 wantonly fail to comply with the requirements.

4 REP. HOLTZMAN: All right. But you  
5 know something, that's also - I mean, you  
6 could spell out that that's what the NDAA  
7 requires. You could also spell out what the  
8 present system is in the federal system, but  
9 wantonly and what was the other word,  
10 willfully and wantonly is a pretty high  
11 standard. Well, what about just negligently,  
12 or what about just whatever? It should be  
13 covered by that, too, that there's some way of  
14 developing ways to redress violations of  
15 criminal - of victim's rights that are not  
16 done deliberately, I mean, wantonly and  
17 willfully, too, it seems to me. I don't know.

18 JUDGE MARQUARDT: Well, who are the  
19 DoD officials? I mean, who is this supposed to  
20 cover?

21 REP. HOLTZMAN: I guess it's  
22 supposed to cover - as I understand what

1 they're saying it covers prosecutors, it could  
2 cover the trial judge, it could cover the  
3 convening authority. It might cover the  
4 convening authority's SJA.

5 JUDGE MARQUARDT: Well, it wouldn't  
6 officials then, it would be DoD employees.

7 REP. HOLTZMAN: Well, they are  
8 officials, but they could be employees. I  
9 mean, sure. I don't know if they're employees.

10 JUDGE MARQUARDT: I don't think  
11 that's the correct word, but I'm saying that  
12 officials I think limits it.

13 REP. HOLTZMAN: I'm not looking to  
14 wordsmith this. I just found it confusing. I  
15 didn't know what you were trying to accomplish  
16 here, so now that you've explained that, I  
17 think you should - you need to explain it  
18 better and more clearly. And I think you also  
19 ought to deal with the situations in which  
20 it's not a wanton and willful violation  
21 because that seems quite narrow.

22 PARTICIPANT: Yes, you almost have

1 to prove intent, you know. It's like -

2 REP. HOLTZMAN: Have to? Yes, of  
3 course. Willful always requires intent, and  
4 wanton is like yes, that's - I don't even  
5 know what that would be -

6 (Laughter.)

7 REP. HOLTZMAN: - normally used.  
8 I don't know. It's pretty heavy duty.

9 PARTICIPANT: Can we get further  
10 explanation into this recommendation?

11 CDR KING: We can try to spell it  
12 out better. We were just trying to relate to  
13 the CVRA's - the investigation that DOJ does  
14 when there's a complaint that its employees  
15 didn't follow the CVRA, or some states also,  
16 like Alaska, have a similar office that can  
17 investigate complaints that officials,  
18 prosecutors, or whoever didn't follow the  
19 actual victim rights statutes. So, we were  
20 trying to do that, kind of comply with that,  
21 and we assumed the stuff with the NDAA was  
22 also requiring the DOJ to come up with. And

1 it's obvious we didn't explain it very well,  
2 and we'll try to maybe clarify it more so that  
3 not only you can understand it, but other  
4 people that we're making the recommendations  
5 to can understand it.

6 COL HAM: I think this was  
7 discussed on the meeting you had at GW. If  
8 it's something that you no longer wish to make  
9 a recommendation on, that's entirely your  
10 call.

11 MS. GARVIN: This is Meg. I think  
12 we should make a recommendation. I think,  
13 though, just explaining it more, because even  
14 we who've been in it and know - and I think  
15 concurred on it before, when we read the  
16 language, it didn't trigger enough of our  
17 recollection. So, I think it's just explaining  
18 in the finding, even more than the  
19 recommendation, in the finding kind of what's  
20 in the CVRA, what was it intended to, because  
21 that ombudsman thing, we could flesh it out  
22 just a little bit more.



1 COL HAM: Yes. And, typically, that  
2 - you'll notice the wording, and I'm  
3 wondering if you want to leave it in. Either  
4 within or outside DoD, typically, the office  
5 that would be set up to receive complaints  
6 about things is an IG-type office. I don't  
7 know if you want to get into any more detail  
8 or not.

9 REP. HOLTZMAN: Why would it be  
10 outside of DoD? Isn't an IG office inside of  
11 DoD?

12 COL HAM: Yes, ma'am. There's the  
13 DoD IG office.

14 REP. HOLTZMAN: Right. So, it's  
15 within DoD. I don't know why we would want  
16 something outside of DoD.

17 COL HAM: Okay. Right.

18 MS. FERNANDEZ: Let's move on to  
19 number 7. Do we need to explain what certain  
20 documents are? I mean, that just seems so  
21 vague to me that I'm not sure that it conveys  
22 anything.

1 COL HAM: This is also based on  
2 your discussion from the 29th of January. And  
3 if I can recollect it and give you a short  
4 memory, or a short reminder. There was  
5 discussion as to whether the SVC should be  
6 entitled to discovery. I think the case law on  
7 that as reflected in that Congressional  
8 Research Service study is that victims are not  
9 entitled to trial counsel's file, or law  
10 enforcement file. There was discussion on  
11 whether that should be different in the  
12 military, and the discussion went on for a  
13 while, and then Judge Jones and Judge  
14 Marquardt I think came to their conclusion  
15 that it would be best left to the discretion  
16 of the judge. There was a lot of discussion on  
17 it, and we really weren't sure what the  
18 consensus of the Subcommittee was on that.

19 DEAN ANDERSON: Colonel Ham, could  
20 you just - I apologize. This is Michelle. I  
21 just wanted to clarify which documents are we  
22 talking about now, which kinds of certain

1 documents are we talking about?

2 COL HAM: Well, that was the  
3 question - asking Ms. Garvin for some help  
4 here, too. I think that was the open question,  
5 that it wouldn't be certain, it would be  
6 within the discretion of the judge most of the  
7 time, that it was hard to determine what  
8 documents the counsel should be entitled to.  
9 That's why it's vague, there wasn't a lot of  
10 details.

11 MS. GARVIN: Yes. And I think,  
12 Colonel Ham, you actually captured the  
13 vagaries of our conversation very well there.

14 (Laughter.)

15 MS. GARVIN: Because we were vague  
16 when we were discussing it because, you know,  
17 my position as a victim's lawyer is I should  
18 get everything unless it's privileged or  
19 confidential. And I think others on the  
20 Subcommittee were like well, wait, do we know  
21 enough in light of case law? So, we ended up  
22 with this vague conversation about, well, what

1 documents? Is it the law enforcement  
2 documents, is it trial counsel's? And that  
3 resulted in this kind of vague language, which  
4 I think is an accurate representation if where  
5 we landed. And now having read it, I'm just  
6 wondering if our vagueness here should  
7 actually dictate that we don't make a  
8 recommendation on it, and instead when we're  
9 talking about the SVC section of our report we  
10 talk about that SVC should have sufficient  
11 authority and standing to do what's necessary  
12 to represent their client. And we leave it at  
13 that in that section, and we don't make a  
14 specific recommendation here.

15 JUDGE MARQUARDT: Well, I like the  
16 idea of a recommendation, but if you leave it  
17 up to the military judge, the military judge  
18 will have the discretion to know what kinds of  
19 things to give access to.

20 REP. HOLTZMAN: Well, isn't the  
21 word certain, this is all subsumed under a  
22 study, so all the recommendation here is

1 requiring a study of what documents should be  
2 provided. That seems to me to be  
3 unobjectionable in my -

4 JUDGE MARQUARDT: What study - may  
5 I ask what study this is referencing, because  
6 I guess I was - I'm not sure I under -

7 REP. HOLTZMAN: I don't know. It  
8 says that DoD should conduct further study in  
9 order to determine whether Special Victims  
10 Counsel should be granted access. I think the  
11 word certain should be taken out. Granted  
12 access to documents possessed by the trial  
13 counsel, and circumstances under which  
14 decisions regarding access may be in the  
15 discretion of the military - maybe that  
16 sentence needs to be taken - maybe that part  
17 of the sentence - so, I have no problem with  
18 saying that we think the issue should be  
19 studied further.

20 MS. GARVIN: I guess I do have a  
21 problem with that because I believe through  
22 litigation right now and certain victim's

1 rights right now, I already have access to  
2 these documents. So, for this - meaning SVC.  
3 If I'm an SVC, I think I would go into court  
4 tomorrow and argue that my right to, I don't  
5 know, to be heard about something gives me the  
6 right to see at least portions of those  
7 records. And I think defense counsel would  
8 probably object, or trial counsel might  
9 object, and then we'd litigate it. This  
10 recommendation to me that further studies  
11 should be conducted in order to determine  
12 whether the SVC counsel gets access, to me  
13 says this Subcommittee has made a  
14 determination that at this juncture they don't  
15 get it. And I have concerns about the  
16 Subcommittee saying right now in an undecided  
17 area of law that they don't get something.

18 REP. HOLTZMAN: Well, the other way  
19 to do it is to say in some - I mean, the  
20 other way is to just have the finding a little  
21 bit broader, which is to say that in some  
22 jurisdictions, Special Victims Counsel is

1 entitled to some documents, some parts of  
2 documents in the possession of defendant's  
3 counsel. I mean, of defense counsel. Is that  
4 correct, is that what we talked about, defense  
5 counsel or trial counsel? I'm trying to  
6 remember here.

7 MS. GARVIN: Trial counsel and  
8 investigative agencies.

9 REP. HOLTZMAN: Yes, by trial  
10 counsel. And say that those - and the  
11 question should be as to whether those rights  
12 should be expanded, should be examined. So,  
13 then you're not limiting, you're just saying  
14 expansion should be examined. But I don't feel  
15 strongly about it. If you think it's better  
16 just to have the whole thing litigated out in  
17 the future, I have no objection to that.

18 MS. GARVIN: I'm fine with that  
19 change. I mean, the actual edit I made to this  
20 one was there should be further study  
21 conducted in order to determine the scope of  
22 access to records.

1 REP. HOLTZMAN: Oh, okay.

2 MS. GARVIN: Which I think would be  
3 a better edit.

4 REP. HOLTZMAN: Okay, that's fine.

5 MS. GARVIN: It's really wherever  
6 the Subcommittee comes down. I'm just  
7 concerned about a recommendation that -

8 REP. HOLTZMAN: Okay, so that they  
9 don't have any rights now, when they do. Okay.

10 PARTICIPANT: Well, is it a sure  
11 thing that Special Victims Counsel can always  
12 go into court and ask for things?

13 REP. HOLTZMAN: Why not?

14 MS. GARVIN: They can go in now and  
15 ask for them, and I think the finding is an  
16 accurate statement of what's happening, which  
17 is current access to files appears to be ad  
18 hoc. That seems to be what's happening.

19 MS. FERNANDEZ: Hi, this is Mai. I  
20 guess my only thought is if we even limited  
21 the study to the scope, it just seems like we  
22 might end up limiting what Special Victims



1 Counsel can get by even studying it, rather  
2 than just litigating it on an ad hoc basis. I  
3 just think that a study might do more harm to  
4 the victim that really reveal anything.

5 MS. GARVIN: I tend to agree with  
6 you, Mai. If we're going to recommend the  
7 study, I want it broad like the scope that  
8 doesn't imply they don't get it, but I have  
9 concerns that -

10 MS. FERNANDEZ: - it will limit.

11 MS. GARVIN: I think it's better to  
12 litigate it on a case-by-case situation. I  
13 don't know. I think that maybe we should  
14 strike this one.

15 MS. FERNANDEZ: Liz, do you  
16 disagree?

17 REP. HOLTZMAN: I don't know. I  
18 feel - I don't have strong feelings about it.  
19 I'd be really guided by the rest of your  
20 views. I mean, to me if it's ad hoc, how do we  
21 know how it's going to come out? And maybe if  
22 we described it in a better way and say in

1 some cases courts have granted full discovery,  
2 in some cases they've limited discovery, maybe  
3 a study should be made of the limitations that  
4 have been put on it and whether they're  
5 appropriate. Maybe if you phrased it that way  
6 you're not limiting anything, but you may  
7 think we don't need a study, and this issue  
8 will all be resolved in the next, you know,  
9 before our report is made public.

10 MS. GARVIN: No, it will not be  
11 litigated that quickly. This is Meg.

12 DEAN ANDERSON: Let me jump in.  
13 This is Michelle.

14 MR. CASSARA: Okay.

15 DEAN ANDERSON: I'm sorry, Bill.  
16 You've got the floor?

17 MR. CASSARA: No, you go ahead,  
18 Michelle.

19 DEAN ANDERSON: So, I just want to  
20 put in a plug for not recommending further  
21 study. And the reason is that I think we heard  
22 repeatedly at different times that the demand

1 on different services and on the Department of  
2 Defense to study and continue to study, and  
3 continue to study are pretty -- that they're  
4 feeling overwhelmed by that. And unless we  
5 have a very - I'm not opposed to studying  
6 things. Good heavens, it's a good thing to do  
7 in general, but unless we have a really clear  
8 reason why we want them to study this and not  
9 something else, I'm not sure that just making  
10 a recommendation to study is a good idea. And  
11 I think because of the way this discussion has  
12 gone it persuades me that Finding 7 and  
13 Recommendation 7 we could probably not have.

14 MR. CASSARA: And to follow-up on  
15 that, I think in the post-Kastenberg world,  
16 this is all going to be resolved in  
17 litigation. I mean, I think, you know, right  
18 now cases that I'm involved with, SVC are  
19 given access to whatever documents the trial  
20 counsel has, and if they don't have them they  
21 file a discovery request, you know. And I  
22 think in Kastenberg there is almost equal

1 footing, and unless it's privileged they seem  
2 to be getting it. I just -

3 REP. HOLTZMAN: So, you don't even  
4 really think there's an issue.

5 MR. CASSARA: I really don't. I  
6 think it's something that will be worked out  
7 in litigation, if at all. I think it's pretty  
8 much not an issue, but if there is an issue,  
9 I just think that it's something that the  
10 courts will resolve on an individual basis.

11 MS. FERNANDEZ: So, it sounds like  
12 a consensus potentially to just delete it.  
13 Let's delete it.

14 MR. CASSARA: That would be my  
15 recommendation.

16 MS. FERNANDEZ: Let's delete it.  
17 Okay, folks, 8th and final.

18 MR. CASSARA: Okay. I'll pipe in  
19 here first. I think I dissent. And, obviously,  
20 if the Committee comes up with that as a joint  
21 proposal recommendation, I understand, but I  
22 just have real concerns with that. I mean, I

1 know that the civil courts - I mean the  
2 civilian courts are doing it. I don't know how  
3 universally, and under what percentage of  
4 civilian courts the defense is allowed to  
5 cross-examine the victim during sentencing.  
6 But I just - I have a real concern from a  
7 defense counsel standpoint with the victim  
8 being able to testify without being subject to  
9 cross-examination, and the defense not having  
10 an opportunity to really question the  
11 underlying facts as to what the victim is  
12 saying, you know. And I've seen too many cases  
13 recently where - in fact, I've got one right  
14 now where the victim said something completely  
15 inconsistent with what she said during the  
16 findings portion of the trial that led the  
17 military panel to want to revote on their  
18 finding of guilty. I just - I think that we  
19 are that point chopping too far into the  
20 accused rights.

21 DEAN ANDERSON: Can I just clarify  
22 - can I just ask you a question, Bill? This

1 is Michelle, just to understand Recommendation  
2 8.

3 MR. CASSARA: Absolutely.

4 DEAN ANDERSON: This is about only  
5 after a finding - am I correct in  
6 understanding -

7 MR. CASSARA: Right, this is during  
8 the sentencing -

9 DEAN ANDERSON: - after a finding  
10 of guilt.

11 MR. CASSARA: Absolutely.

12 DEAN ANDERSON: Just a question of  
13 whether or not the victim can submit a Victim  
14 Impact Statement that's not subject to cross-  
15 examination. Is that what we're -

16 MR. CASSARA: That is what we're  
17 talking about.

18 DEAN ANDERSON: Okay.

19 MR. CASSARA: Right now the victim  
20 once, you know, there's been a conviction and  
21 he or she testifies on sentencing, they are  
22 subject to cross-examination. I will tell you

1 that 90 - I'm sure Colonel Ham would agree  
2 with me that probably 90 to 95 percent of the  
3 time there is no cross-examination, but I'm  
4 very uncomfortable with taking that right away  
5 from the defense.

6 DEAN ANDERSON: Tell me what JSC  
7 is.

8 COL HAM: The Joint Service  
9 Committee, ma'am. The entity that proposes  
10 amendments to the Manual for Courts-Martial,  
11 the Executive Order portion, so they would go  
12 to the President as an Executive Order. The  
13 Rules of Criminal Procedure, for lack of a  
14 better word, the Military Rules of Criminal  
15 Procedure are Executive Order.

16 DEAN ANDERSON: Thank you.

17 REP. HOLTZMAN: And what's the  
18 practice now? Can a victim submit a statement?  
19 I'm not talking about testifying, but can they  
20 submit a written statement, and are they then  
21 subject to cross-examination on that  
22 statement?

1 COL HAM: They can submit a written  
2 statement if defense did not object, but the  
3 Rules of Evidence apply at sentencing unless  
4 they are waived by the defense.

5 (Simultaneous speech.)

6 DEAN ANDERSON: Do defendants in  
7 the military proceeding have a right of  
8 allocution at sentencing?

9 PARTICIPANT: Yes.

10 DEAN ANDERSON: And does the right  
11 of allocution - this is Michelle. Does the  
12 phrase "the right of allocution" mean that one  
13 can speak without being cross-examined?

14 MS. GARVIN: Generally, yes.

15 DEAN ANDERSON: And the defendant  
16 has that at sentencing?

17 CDR KING: At sentencing the  
18 defendant or accused as we call them in the  
19 military has a right to either to make a sworn  
20 or unsworn statement. The unsworn statement  
21 can be made in a variety of ways, it can be  
22 written, verbal, counsel if they want, however



1 they want. But that - no one can ask them  
2 questions about it if they choose to make an  
3 unsworn statement.

4 REP. HOLTZMAN: And let me just  
5 make clear about the victim. If the victim  
6 chooses to make an unsworn statement written,  
7 then what happens?

8 CDR KING: It can only be done that  
9 way if it's an agreement with the defense.  
10 And sometimes that happens with pretrial  
11 agreements that the defense will agree to it.

12 REP. HOLTZMAN: Okay. So, if it's  
13 not agreed to, then the only way the victim  
14 gets to give the version about what happened  
15 to her and the harm that's caused is through  
16 a sworn statement.

17 COL HAM: I don't want to get too  
18 far in the weeds, ma'am, but it's not a simple  
19 yes or no. A lot of the victim impact could be  
20 included in the agreed upon facts that the  
21 judge has for the guilty plea, which is a  
22 written document, so I don't - I think what

1       you're asking I can say generally that's  
2       correct, but there are - the prosecution and  
3       defense write a long document on the facts of  
4       the case, and a lot of it can be included in  
5       that.

6                       REP. HOLTZMAN: And what happens to  
7       family members and other people who want to  
8       testify about that? Are they also subject to  
9       cross-examination?

10                      COL HAM: Yes, the prosecutor calls  
11       -

12                      MR. CASSARA: I mean, if  
13       defendant's family - if the accused family  
14       testifies they are subject to cross-  
15       examination. If the victim's family comes to  
16       testify, they're subject to cross-examination.  
17       And Colonel Ham is right, I mean, I've done  
18       certainly a number of cases in which as part  
19       of a pretrial agreement the government has  
20       insisted on a narrative statement from the  
21       victim as to the impact that it had on him or  
22       her. And if I want the pretrial agreement then

1 I've got to include that.

2 Now, obviously, if it's a  
3 contested case then there's going to be no  
4 pretrial agreement and, you know - and that's  
5 where I get into if the victim is going to  
6 testify on sentencing, I'm not comfortable  
7 with removing the ability to cross-examine.

8 REP. HOLTZMAN: Well, do we even -  
9 is there a Constitutional issue here, is  
10 really kind of what I'm getting at.

11 PARTICIPANT: No, I don't believe-

12 MR. CASSARA: I think that, you  
13 know, I think Meg will tell you that in civil  
14 courts this happens, I don't know what  
15 percentage of civilian courts, but I know that  
16 it is not uncommon in civilian courts for the  
17 victim to testify without cross-examination.  
18 And look, you know, I understand. I may be the  
19 only one who disagrees with the recommendation  
20 and, you know, that's something that I can  
21 respond to.

22 REP. HOLTZMAN: Well, but maybe

1 because of the different system with regard to  
2 sentencing. Remember in the military the jury  
3 sentences.

4 MR. CASSARA: Not always.

5 REP. HOLTZMAN: Not always.

6 MR. CASSARA: Whoever does the  
7 findings, whether it be judge or jury, also  
8 does the sentencing.

9 REP. HOLTZMAN: Well, but if you  
10 have a "jury" jury trial, it's the jury that  
11 makes the sentence. Right?

12 MR. CASSARA: Absolutely.

13 REP. HOLTZMAN: But the sentence is  
14 not imposed by the jury in civilian trial, or  
15 even in a criminal trial.

16 MR. CASSARA: Very, very few. I  
17 think -

18 REP. HOLTZMAN: Unless you have a  
19 trial before a judge.

20 MR. CASSARA: Right. Right.

21 REP. HOLTZMAN: Jury would never be  
22 involved in the sentence. Well, maybe death

1 sentence or not -

2 MS. GARVIN: In civilian - this is  
3 Meg. In civilian when the victim is being used  
4 for aggravation or mitigation at the  
5 sentencing, meaning called, they are subject  
6 to cross-examination. Their right of  
7 allocution is their Victim Impact moment which  
8 is how did this crime impact me? That is not  
9 subject to cross-examination in the majority  
10 of civilian courts, state and federal.

11 I mean, I feel pretty strongly  
12 about this one that I think something at  
13 sentencing that allows actual victim voice  
14 without the trauma impact of cross-examination  
15 is important for us to consider as a Victim  
16 Services Subcommittee but, you know, I  
17 understand the challenges with having it.

18 MR. CASSARA: Well, and as I said,  
19 I'm not, you know, I'm not here to speak for  
20 the Committee. I may be the lone wolf on this  
21 one. I mean, I don't plan on - I don't want  
22 to hold up the rest of you all's thought

1 process because I'm being the naysayer.

2 MS. FERNANDEZ: No. I mean, there's  
3 a couple of ways I think we can deal with  
4 this. We could take a vote now on what we have  
5 in front of us, but my sense is good minds  
6 could come to a good agreement on this. Bill  
7 and Meg, would you be willing to have - can  
8 you guys talk off -

9 MS. FRIED: No

10 MR. CASSARA: I just heard our  
11 Federal Official jump out of her seat.

12 MS. GARVIN: I mean, I think it  
13 comes down to the Subcommittee thinking  
14 through, you know, is this part of the  
15 response that we want to recommend based on  
16 what we've heard, you know, that victims get  
17 this moment of unfettered speaking about their  
18 trauma in the court process. That's what it  
19 comes down to, or do we have concerns about  
20 it?

21 I don't have legal - I don't have  
22 the same concerns as Bill about defendant's

1 rights because I think it's a narrow moment,  
2 but if I was defense counsel, I would  
3 certainly want to argue that there are  
4 concerns. I don't think that they rise to a  
5 Constitutional level so I don't have very  
6 strong concerns about it.

7 JUDGE MARQUARDT: I think it is  
8 important, and it's really quite therapeutic,  
9 I think, for a victim to be able to present  
10 those issues at sentencing.

11 COL HAM: Ms. Garvin, would you  
12 want us to further explain what you've said,  
13 which is the right of allocution is not  
14 subject to cross-examination only applies to  
15 victim impact, not to aggravation. Although,  
16 in the military we don't - I mean, we really  
17 don't separate these, the victim impact -

18 MS. GARVIN: Yes, you guys have it  
19 slightly different.

20 MR. CASSARA: I think that's a  
21 distinction without a difference.

22 COL HAM: Yes, okay.

1 MS. GARVIN: I mean, I agree with  
2 Christel. I mean, part of where this comes  
3 from is like the neurobiology of trauma tells  
4 us this moment of being heard means half the  
5 victim recovery. So, I think there's  
6 literature out there to support the utility of  
7 it from a survivor's perspective. And I think  
8 judges, most of them, would agree with that  
9 statement, too, that Christel just made that  
10 it's useful. That may be where the concern  
11 comes about it from a defense perspective.

12 MS. FERNANDEZ: Meg, is there some  
13 way right now that you can figure out how to  
14 draft this more narrowly, the actual wording?

15 MS. GARVIN: I'm happy to send in  
16 my edits and suggested language that cabins  
17 it, but I'm - and then we can further discuss  
18 it.

19 COL HAM: And, Mr. Cassara, you can  
20 - we can assist you in drafting a separate  
21 statement if you never do -

22 MR. CASSARA: Yes. You know, I -



1 I'm not trying to hold up the entire  
2 Committee over this. I mean, I may be the lone  
3 wolf, and if I am, then I'll sit down with you  
4 all and maybe write a very small separate  
5 opinion on it. That's all.

6 COL HAM: Okay.

7 REP. HOLTZMAN: Well, I mean, yes,  
8 one of the possibilities is that it could be  
9 limited in cases where there's no jury, to  
10 cases where there's no jury, also.

11 MR. CASSARA: Well, I don't know  
12 that that accomplishes what Meg is trying to  
13 accomplish.

14 REP. HOLTZMAN: I understand that,  
15 but it makes it - it raises fewer issues if  
16 you are - because is this before the finding  
17 of - this is after the finding of guilt.  
18 Right?

19 MR. CASSARA: Yes, ma'am.

20 COL HAM: For the sentencing.

21 JUDGE MARQUARDT: Well, this  
22 Committee is supposed to deal with victim's

1 rights. And I think this is an important right  
2 for victims.

3 PARTICIPANT: I agree.

4 JUDGE MARQUARDT: We're not here to  
5 represent the accused.

6 REP. HOLTZMAN: Excuse me. I  
7 disagree with that. No one is here to  
8 represent anybody, but if there's a real issue  
9 of fairness, then it needs to be considered as  
10 part of the process, in my view. I mean, you  
11 don't have to agree, but that's my view.

12 MS. FERNANDEZ: No, I think we all  
13 recognize the need for Victim Impact  
14 Statements. I think it's one of -

15 REP. HOLTZMAN: Right, I agree.

16 MS. FERNANDEZ: That said, I'm just  
17 wondering given Bill's assertion that where he  
18 found a jury to then say oh, well, we want to  
19 really look at our findings again, I don't  
20 think anybody wants that either. There's got  
21 to be finality when there's finality. So, I  
22 guess my question is, is there any way of

1       crafting this in a way that says you can give  
2       a Victim Impact Statement but that can't turn  
3       around the findings that were just made?

4                   JUDGE MARQUARDT: I think you can  
5       put that in there, that it's post-conviction,  
6       and that it doesn't change the conviction and  
7       the findings.

8                   REP. HOLTZMAN: Well, I'm not sure  
9       that that's what Bill's concern was. I think  
10      his concern was that what it did was it  
11      suggested a level of dishonesty, am I not  
12      saying this correctly, Bill?

13                   MR. CASSARA: You're correct. I  
14      mean, the -

15                   REP. HOLTZMAN: Yes, level of  
16      dishonesty on the part of the victim to  
17      suggest that the testimony at trial was  
18      tainted. That, I think, is the issue. I don't  
19      know how you're going to prevent that if  
20      you're going to have a Victim Impact Statement  
21      that is made that is subject to cross-  
22      examination or not.

1                   MR. CASSARA: Well, only one - in  
2                   that particular case that information only  
3                   came out as a result of cross-examination.

4                   REP. HOLTZMAN: Oh, okay.

5                   MR. CASSARA: But, you know, I just  
6                   - and, again, I'm just - you know, I'll say  
7                   my peace one last time and then we'll go from  
8                   there. I just feel that when we limit the  
9                   ability of an accused to cross-examine, or at  
10                  that point a convict - you know, even a  
11                  person who's been convicted to cross-examine  
12                  the victim we limit his or her rights to  
13                  provide evidence to the members or to the  
14                  judge in mitigation. But, you know, again  
15                  that's my piece, and I'll leave it at that.  
16                  You all vote otherwise, that's - you know,  
17                  like I said, I'm not going to hold this up  
18                  just for me.

19                  MS. FERNANDEZ: But how about some  
20                  how we also put in there -

21                  MR. CASSARA: I'm sorry?

22                  MS. FERNANDEZ: Hold on for a

1 second. If we somehow in our language say that  
2 this Victim Impact Statement can't in any way  
3 change around the findings.

4 MR. CASSARA: Well, no, that's not  
5 the concern. I mean, if information comes out  
6 that causes the members to question the  
7 findings, then maybe it should. But I think  
8 the bottom line is, you know, Meg and I, you  
9 know, we disagree. If the Committee agrees  
10 with - in other words, I don't think that  
11 there's a way to split this baby.

12 MS. GARVIN: I don't either, yes.

13 MR. CASSARA: We're either going to  
14 allow an unfettered right of allocution to the  
15 victim, or we're not. And if the Committee  
16 votes to allow it, then I'll write something  
17 separately and we'll go from there.

18 MS. FERNANDEZ: Then I think we  
19 need to take a vote amongst the members  
20 because we've heard a well-rationalized  
21 dissent. If you weren't rational, Bill, I  
22 might take a vote anyway.

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(Laughter.)

MS. FERNANDEZ: But I think we do need to - because this is the first time that we've actually needed - that we haven't been able to figure out how to split a baby, so -

MS. GARVIN: Can I put one thing, because I do think - I think this is a dispute that I agree, you can't split the baby. I do want to comment that the note that is in there about - that I believe protects defendant's rights, and Bill disagrees, and I respect that, but I believe defendant's rights are sufficiently protected by the right of rebuttal rather than the right of cross-examination in this moment because I don't believe cross-examination catches that in the minute or in the report, but I think that's an important thing. Defendants can rebut statements that are done in allocution.

REP. HOLTZMAN: Before we take a vote because I feel a little uncomfortable

1 here. I mean, I haven't really given the  
2 amount of thought that this - this is a very  
3 serious issue in my judgment, because I do  
4 agree that this is an important right for  
5 victims. And we certainly stood up for Victim  
6 Impact Statements, and feel they're very, very  
7 strong, feel strongly about that. But I  
8 haven't really - I don't know, perhaps we had  
9 testimony and I just haven't focused on it  
10 about the consequences of this in the military  
11 system, particularly, and what - how it  
12 exactly works in the state system. So, I mean,  
13 could we postpone a vote on this so I could  
14 get some materials to look at? I just don't  
15 feel comfortable voting on this now. I don't  
16 feel I have enough information about how it  
17 works in all the states, about the existence  
18 of cross-examination, where it exists, does it  
19 exist anywhere aside from the military?

20 MS. FERNANDEZ: Well, can I ask the  
21 staff, can we get information on this? Would  
22 that be a possibility for you guys to get?

1 COL HAM: Yes, we can look for it.  
2 One item that might be - well, Mr. Cassara  
3 has already mentioned, I mean 90 to 95 percent  
4 of the time there is no cross-examination. I  
5 mean, there's - that's his sense as a  
6 practicing counsel. Would you - I don't know  
7 if there's any way to verify that, and I don't  
8 know if that would be important to know or  
9 not.

10 MR. CASSARA: Yes, I don't know  
11 that there is, Colonel Ham. I think you would  
12 literally have to go through the records of  
13 trial of every court-martial in order to come  
14 up with a number. Mine is a very unscientific  
15 study, but most counsel do not cross-examine  
16 the victim upon a conviction, just as most  
17 trial counsel don't, you know - when I put my  
18 client's mom on the stand, the prosecutors  
19 never cross-examine her, you know. But in the  
20 rare occasions that it does happen it can  
21 sometimes be useful. So, I have no problem  
22 you know, I don't know what the timing is,



1 but I have no problem with postponing a vote.  
2 And I have no problem if the vote is 9-1  
3 against me, you know.

4 CDR KING: 8-1.

5 MR. CASSARA: Whatever the numbers  
6 are.

7 COL HAM: May I ask, Ms. Garvin, in  
8 the - with the jurisdictions you're familiar  
9 with, ma'am, if the victim has a right of  
10 allocution, is there a requirement to provide  
11 the statement ahead of time to the defense, so  
12 if they can rebut any of the facts they know  
13 what they are ahead of time to line up their  
14 evidence?

15 MS. GARVIN: No, there is not. I  
16 shouldn't say that globally. There are a  
17 handful of jurisdictions that they require it  
18 to be in advance, but not very many. I am  
19 happy to submit to the Committee, to staff if  
20 this would be useful, a citation list with  
21 annotations of the 50 states on where they  
22 stand on cross-examination of VIS. It has all

1 the citations to the statutes and to case law  
2 if that would be useful for the staff to have.  
3 And then that might at least give the  
4 landscape. It doesn't answer the question of  
5 propriety of it from a rights perspective, but  
6 at least then you'd have the law.

7 REP. HOLTZMAN: Do we have some  
8 experience in the federal system of how this  
9 - I mean, about this issue, not just in the  
10 states?

11 CDR KING: We did have some  
12 testimony on it from Mr. Jeffress, I think, on  
13 some discussion of it in his testimony, or his  
14 discussion before the Subcommittee in January,  
15 I think it was.

16 MR. CASSARA: It was snowing, I  
17 remember that. Meg, are there any  
18 jurisdictions besides the military that you're  
19 aware of where sentencing commences  
20 immediately upon findings, or in all  
21 jurisdictions is there a -

22 MS. GARVIN: Several commence

1 immediately.

2 MR. CASSARA: Okay.

3 MS. GARVIN: Not always by  
4 directive, meaning the statutes don't mandate  
5 it, but courts do it.

6 MR. CASSARA: Okay. Okay.

7 REP. HOLTZMAN: Generally, there's  
8 some time for, you know, probation - I mean,  
9 reports about - I mean, there's a probation  
10 report, there are other reports that are made  
11 so it's not - I mean, in New York it's not.

12 MS. GARVIN: Yes. Generally, there  
13 are pre-sentence reports or probation reports  
14 done depending on the level of the crime, but  
15 some jurisdictions will move, in particular,  
16 in plea situations, they'll move immediately  
17 to sentencing.

18 REP. HOLTZMAN: Okay, but that's a  
19 different story.

20 COL HAM: And you all know the  
21 sentencing proceeding is a - it looks like a  
22 trial in the Military Justice to determine the

1 sentence, instead of determining guilt or  
2 innocence. I don't know how - what the  
3 parallel to that is, if there is any in the  
4 civilian system.

5 MS. GARVIN: The closest parallel  
6 is when it's actually a capital case because  
7 then it's a full-blown trial-type proceeding,  
8 generally speaking, though it is different. I  
9 believe - I know that he did not - or I  
10 don't believe he testified unless he testified  
11 when I was not in attendance, but Professor  
12 Cassell, Paul Cassell out of Utah has written  
13 on this subject. And, again, from a victim's  
14 perspective so it's not a defense perspective,  
15 but I believe there is a Law Review article  
16 that the staff might be able to pull and  
17 circulate, if that would be of use. I believe,  
18 I'm not positive. Again, that's a victim-  
19 centered one, not a defense-oriented rights  
20 one, so -

21 REP. HOLTZMAN: Well, any side  
22 would be helpful to me. I'm sorry, I just feel

1 very - I just feel I need more information.  
2 I'm sorry.

3 MS. FERNANDEZ: No, you shouldn't  
4 be sorry, Liz. I think it's - I think Bill  
5 brought up some good arguments, and all of us  
6 understand why Victim Impact Statements are  
7 important. But I think it's a good idea that  
8 before we make a decision that we have some  
9 more background information. So, let's wait on  
10 number 8.

11 REP. HOLTZMAN: And, Meg, when you  
12 give us this annotated list and so forth, is  
13 there any effort in the states that don't have  
14 this cross-examination right to create it, or  
15 is the movement the other way, or is this not  
16 an issue any more, I mean, people just  
17 accepting the way the system works, however it  
18 works in their own jurisdiction?

19 MS. GARVIN: I'm not sure that I  
20 could identify a clear trend. I know in Texas  
21 over the last several years there's been -  
22 Texas does a lot of cross-examination and

1 also does allow - doesn't allow the victim to  
2 speak, actually, until after sentence has been  
3 imposed.

4 REP. HOLTZMAN: Wow.

5 MS. GARVIN: There's been an  
6 attempt to change that. That has gone nowhere.  
7 Victims have tried to tilt at it, and it  
8 hasn't changed. Maryland allows cross-  
9 examination of - or requires sworn statements  
10 of victims. I don't believe there's an effort  
11 to change that. In other jurisdictions there  
12 is, and some case law has gone that way, but  
13 it - what I can send to staff is the 50 state  
14 chart with actual language, as well as case  
15 citations that explain how it's been  
16 interpreted. And then there's a memo that goes  
17 with it. It's one of our public policy pieces  
18 that's been published.

19 REP. HOLTZMAN: Oh, that's great.

20 MS. GARVIN: So people can take a  
21 look at it, and it does talk a little bit  
22 about trend in theory, but I don't believe

1       there's - I would not use the word "trend" in  
2       assessing what's happening.

3                 REP. HOLTZMAN: Well, I think that  
4       would be really helpful to me. I don't know if  
5       anybody else needs it, but I feel that would  
6       be really helpful to me.

7                 DEAN ANDERSON: Yes, I'd love to  
8       see it. This is Michelle.

9                 COL HAM: Ms. Garvin, is there - I  
10      think you discussed this in the meeting, but  
11      is there then a - again, realizing a lot of  
12      jurisdictions don't have jury sentencing, if  
13      there's a jury there's an instruction that  
14      says it's not evidence, but instead it's an  
15      authorized manner in which to present matters  
16      for the juror's consideration?

17                MS. GARVIN: That is my  
18      understanding. We've never done a 50-state  
19      analysis on that issue, Colonel Ham. The ones  
20      we've worked in, that is what happens, but  
21      it's not in the chart, and I don't have a 50-  
22      state analysis of that.

1 COL HAM: Thank you. That's the  
2 instruction given if the accused chooses an  
3 unsworn statement, just as reflected, that  
4 it's not evidence, but it's an authorized  
5 manner in which to bring matters for their  
6 consideration. And they can consider the fact  
7 that it's unsworn.

8 MS. FERNANDEZ: Okay. We've been  
9 going for an hour and 45 minutes, folks. I  
10 hate to be the timekeeper, but we said we  
11 would try to keep these to an hour and a half.  
12 I think other than Recommendation 8 we've  
13 given the staff what we need, and I think we  
14 can move forward on this one?

15 COL HAM: If there are other  
16 substantive comments, which I suspect there  
17 are, on the body can everybody send them to  
18 Sherry so she can consolidate them all?

19 DEAN ANDERSON: Sure. This is  
20 Michelle, and I want to just make a request  
21 for more than 24 hours to read a document that  
22 stands in the coming weeks. I understand that



1       there are limitations and stresses on all  
2       sides because this is a difficult thing to  
3       write, but it's extremely difficult to process  
4       in a limited amount of time. And I worry that  
5       we won't have enough time to really digest it  
6       without more than 24 hours.

7                    CDR KING: Our plan is definitely  
8       to give - it was this time to give you more  
9       time. It didn't work out, partly because of  
10      the short time since the last meeting, and  
11      then the federal storm that we had, but our  
12      plan - we're working on the next one and  
13      trying to get it to you earlier.

14                   PARTICIPANT: There's a rumor  
15      there's snow again for next week.

16                   CDR KING: Yes, it's in the  
17      forecast. I don't know that we're going to get  
18      snow again, so anything that can go wrong for  
19      -

20                   MR. CASSARA: That's going to  
21      reflect on your OER. You have done nothing to  
22      stop the snow -

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(Laughter.)

COL HAM: We had a white St. Patrick's Day, and yes, they're talking about more next Tuesday and Wednesday, although with a lot of caveats.

CDR KING: Our biggest snowstorm of the year was last Monday.

REP. HOLTZMAN: Have you had more snow than we've had in New York? I'm just curious.

CDR KING: Well, I don't know, but we close down the federal government any time we have any, or threaten any.

COL HAM: We got about a foot out at my house on Monday.

MR. CASSARA: It's 80 degrees here. I don't know what the problem is.

PARTICIPANT: We're coming down.

CDR KING: We're holding these meetings in the wrong place.

MR. CASSARA: There you go.

JUDGE MARQUARDT: Well, I have a

1 question about the May meeting. Have you made  
2 a decision on where that's going to be?

3 COL HAM: Yes, ma'am, we confirmed  
4 yesterday, I'm getting my days - yesterday,  
5 the 5th and 6th are going to be George  
6 Washington University School of Law in the  
7 Faculty Conference Center, which is where we  
8 were on the 29th of January. For the 29th and  
9 30th of May, we don't have a location yet, but  
10 it's tentatively in New York at Manhattan.

11 DEAN ANDERSON: So, let me just  
12 clarify, on the 5th and 6th of May it's going  
13 to be in D.C.

14 COL HAM: Yes, ma'am.

15 DEAN ANDERSON: And on the - I'm  
16 sorry, what are the dates?

17 COL HAM: The 29th and 30th.

18 DEAN ANDERSON: The 29th and 30th are  
19 going to be in New York. Okay.

20 JUDGE MARQUARDT: What are we doing  
21 in New York?

22 PARTICIPANT: Having fun.

1                   PARTICIPANT: No, that's a joke.

2                   COL HAM: Ma'am, the 5th and 6th of  
3 May is when all three of the Subcommittees  
4 will issue their report and their findings and  
5 recommendations to the full panel. However,  
6 Ms. Fernandez determines you should do that,  
7 and then the panel will deliberate on all the  
8 findings and recommendations of the  
9 Subcommittees. The 29th and 30th is their final  
10 review of the report, and again because on the  
11 Federal Advisory Committee, they go line by  
12 line or page by page, however the Judge  
13 determines to review the final report. And  
14 then it gets polished up and sent to Congress  
15 and Secretary Hagel.

16                   REP. HOLTZMAN: And you think it's  
17 appropriate for us to be at the 29th and 30th,  
18 as well. That's a question.

19                   COL HAM: That's up to you, ma'am.  
20 It's not - it's certainly not required. Our  
21 process has been that you're invited to attend  
22 all the panel's public meetings.

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JUDGE MARQUARDT: All right, thank  
you.

MR. CASSARA: All right, folks.  
Everybody have a good weekend. Stay warm,  
hahaha.

MS. FRIED: Thank you all. The  
meeting is closed. Bye all, thank you.

(Whereupon, the proceedings went  
off the record at 4:37 p.m.)

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C E R T I F I C A T E

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: 03-20-14

Place: conference call

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

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Court Reporter

**NEAL R. GROSS**

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