The Subcommittee met by teleconference at 2:30 p.m. Eastern Daylight Time, Mai Fernandez, Chair, presiding.

PRESENT
MAI FERNANDEZ, Chair
THE HONORABLE ELIZABETH HOLTZMAN
THE HONORABLE CHRISTEL MARQUARDT
BG COLLEEN MCGUIRE
DEAN MICHELLE J. ANDERSON
DEAN LISA SCHENCK

ALSO PRESENT
WILLIAM SPRANCE, Designated Federal Official
COL PATRICIA HAM, Staff Director
TERRI SAUNDERS, Deputy Staff Director
CDR SHERRY KING, Supervising Attorney
JULIE CARSON, Attorney
KRISTIN MCGORY, Attorney
RACHAEL LANDSEE, Attorney
P-R-O-C-E-D-I-N-G-S

2:35 p.m.

CHAIR FERNANDEZ: So I'm going to skip any huge preparatory stuff and hand this right over to Commander King to tell us what we should be looking at.

CDR KING: First thing is Bill Sprance could start the meeting.

CHAIR FERNANDEZ: Oh, that would be good.

MR. SPRANCE: Good afternoon. This is Bill Sprance, the Designated Federal Officer, and this meeting of the Subcommittee is now open.

CDR KING: Thank you. Okay. And just for the record, I believe we have Mai Fernandez, Dean Schenck, Dean Anderson, General McGuire, Representative Holtzman, and Judge Marquardt. Is there anybody else that I missed? Okay. And here in the office, we have Colonel Ham, Terri Saunders, and the rest of the victim services team, Commander King,
Julie Carson, Kristin McGrory, and Rachael Landsee, for the court reporter's information.

And so I'm not exactly sure where you want to start, but you might want to start with the crime victim's rights since they're still one of the findings and recommendations. If you're ready to discuss that, that hasn't been voted on or discussed in detail yet.

That was the last one. I think it's number eight. I don't know if you want to start there or start just looking at our edits or how you prefer to do it.

CHAIR FERNANDEZ: Why don't we start with that one because that's the most substantive thing that we need to do. And it's on the allocution stuff.

My recollection was that, Bill, you're against several on number four. I know Liz Holtzman wanted to look at more information. Have we heard anything about Liz on this?

BG MCGUIRE: Can somebody repeat
that? I couldn't understand what the issue was. I got the voting, but I didn't get the issue.

CDR KING: Okay. The issue, but I don't think, we don't have Mr. Cassara on the call yet, so it may be that --

REP. HOLTZMAN: Oh, okay. There was only one Bill on the phone. Okay, okay.

CDR KING: And Meg Garvin, she emailed me earlier and she said she's giving a training all day, so she'll try to join when she can.

JUDGE MARQUARDT: Now, was this recommendation eight?

CDR KING: Yes, this is. It's on page four, and I don't know if you want to set that aside for now since we only have a couple of the more vocal members on that, or if you want to go over that first anyway and start discussing it.

CHAIR FERNANDEZ: I think we should wait for Bill.
REP. HOLTZMAN: This is Liz Holtzman. That's my view because he, you know, he has a point of view, and we should make sure that we hear it before we make a final decision.

JUDGE MARQUARDT: I have a couple of other minor things that I would like to discuss with regard to the others if you wanted to go through them now.

CHAIR FERNANDEZ: Sure. Why don't we go through them? With regard to the recommendations, Christel?

JUDGE MARQUARDT: Yes.

CHAIR FERNANDEZ: Okay.

JUDGE MARQUARDT: On recommendation one where it says to account for -- you know, I noticed through all of this, sometimes you capitalize "convening authority" and sometimes you don't. So you ought to be consistent with that.

But, anyway, nevertheless, the authority's role in the military justice,
there should be a mechanism to allow a victim
to express his or her views.

CHAIR FERNANDEZ: Instead of a
victim's views?

JUDGE MARQUARDT: Yes.

CHAIR FERNANDEZ: Okay.

JUDGE MARQUARDT: And instead of
"these," it should be "the."

REP. HOLTZMAN: Well, then it's
not going to make sense, you know, to allow a
victim to express his or her views, and then
it's to be relayed. Are we taking out "to be
relayed?"

JUDGE MARQUARDT: No, because the
first part of the sentence says that we're
doing this because of the authority.

REP. HOLTZMAN: Well, as I read
it, it won't make sense. There should be a
mechanism to allow a victim's views -- but
then you have the "to be relayed." You can't
just have express and then to be relayed.

CHAIR FERNANDEZ: Right. It's
like saying express/expressed. I mean, if you changed that word "relayed" to "expressed," you're saying the same thing, Christel.

REP. HOLTZMAN: Right. So just take out the "to be relayed" and then it could be, because he's saying later on, I think, sometimes whether the convening authority can decide whether to receive this in writing or directly or however they want it.

JUDGE MARQUARDT: I agree with that.

CHAIR FERNANDEZ: Let's go down the edits that were made from last time. Anything else that folks think that needs to be changed?

JUDGE MARQUARDT: On recommendation two -- this is Christel -- at the very end you say "submission in writing," and then you say "personal meeting." I would say "or personally."

CHAIR FERNANDEZ: Right.

CDR KING: The only thing about
"or personally" was we had a discussion last time -- this is Sherry, for the record -- that Meg Garvin didn't or was uncomfortable with the word "or" because she felt that that expressed, like, an indication that the victim or someone could make a choice on that instead of giving the victim different options.

CHAIR FERNANDEZ: Well, then we could say in person.

REP. HOLTZMAN: I don't understand, I don't understand the point you're making, Sherry. Sorry.

CHAIR FERNANDEZ: I think what Meg was saying that, if you put an "or" there, it changes the meaning.

REP. HOLTZMAN: How does it change the meaning?

CHAIR FERNANDEZ: Writing "or personal meeting." The comma indicates that it's one or the -- I mean, the "or" indicates it's writing or personal meeting. My sense is that the comma is that you could have both.
JUDGE MARQUARDT: Well, and the "e.g." could mean for example, and then you could say "in writing," comma, "in person."

CHAIR FERNANDEZ: I think if that's the big issue here, we could say comma and say or both.

REP. HOLTZMAN: Or both.

CHAIR FERNANDEZ: Well, "e.g." is for example so it's not --

REP. HOLTZMAN: Oh, yes, okay.

Where exactly are you in this?

CHAIR FERNANDEZ: Recommendation two --

REP. HOLTZMAN: Oh, two. Sorry.

CHAIR FERNANDEZ: That's okay. I think that the comma was, you can't have an "e.g." and put an "or," because it's for example, so it's a list of things. It's not a one or the other.

DEAN ANDERSON: Who's saying that?

CHAIR FERNANDEZ: This is Mai.

DEAN SCHENCK: No, I agree with
Mai. This is Lisa. Okay. So "e.g." means for example. That means it's not exclusive. That doesn't mean it's only two of those things. It just means these are examples. So I don't see a need for changing that.

JUDGE MARQUARDT: Well, I like in person because I think personal meeting is not --

DEAN SCHENCK: Oh, yes, that I agree with. I agree with what terminology, but as far as putting the other stuff in there or an "or," I don't think we -- I guess we could put in there that the point of "e.g." is these are just examples.

CHAIR FERNANDEZ: Okay. Let's move on to finding three.

DEAN SCHENCK: Mai, can I go back? I'm sorry to --

CHAIR FERNANDEZ: No, no, go ahead.

DEAN SCHENCK: I had some comments on just a couple of things. On finding one
where we have, we have DoD policy, the CVRA, and FY14 NDAA, "all grant". We don't need all and just say grant. And then in the last line on that page, "However, due to the role of the commander," people really just don't know what we're talking about. What do you mean the role of the commander? I think we should put in parentheses maybe as convening authority or -- see what I mean? They don't understand what role, you know.

CHAIR FERNANDEZ: Yes, I think that's a good distinction.

DEAN SCHENCK: So we need to put it in parentheses or put it in there. And, again, these are just my suggested changes. I don't feel adamant about any of these.

Recommendation one on the next page, or at least it's --

REP. HOLTZMAN: Before you go further than that, can I just say something on finding one, too, or do you want to just finish? I mean, because I was going to -- all
right. Why don't you just finish? That's okay.

DEAN SCHENCK: No, no, that's fine. I think we should stick to one finding, you know what I mean? We do one and then go to the next one and then go to the next one.

REP. HOLTZMAN: I try not to do the wordsmithing stuff, but here I think the "however, due to the role of the commander in the criminal justice process, the right to confer with attorney for the government," isn't that trial counsel? We should be consistent in the use of that term because, actually, attorney for the government? I mean -

DEAN SCHENCK: Right, right, I agree. And I think --

REP. HOLTZMAN: I don't know. So that's one problem. And should we say the victim's right to confer with trial counsel, parens, the prosecutor if you want, is not directly comparable to the right to confer
with the attorney for the government under the CVRA? Because I think what we're trying to do is draw, it's saying that there's a difference because the convening authority makes a prosecution decision, unlike in the civilian side where the prosecutor makes the prosecution's decision. It's not sufficient just to talk to the prosecutor, you also have to talk to the convening authority.

I mean, maybe there's a way it would work. It might have to be longer, but you might just want to make it a little bit more explicit so that people know what you're talking about because --

JUDGE MARQUARDT: Well, I would like for somebody to define for me convening authority and trial counsel because I think they're used somewhat --

DEAN SCHENCK: Okay. Well, if you notice, the first time the document has the word "trial counsel," we have a footnote there. And at the bottom of the footnote, we
have RCM-502. The trial counsel is a military
term for prosecutor. Yet, I guess the judge
thinks we should have the footnote.

My personal opinion is the
footnotes add to the denseness of the reading.
My recommendation is what Congresswoman
Holtzman said, parentheses, i.e., the
prosecutor and just be consistent with the
word "trial counsel," just like Liz said.

JUDGE MARQUARDT: Well, who is the
convening authority then?

DEAN SCHENCK: Well, the convening
authority is a person in the military that, by
virtue of his position and rank, that is
designated to take actions over criminal
cases, administrative criminal cases, and
would forward cases to court-martial, to
convene courts-martial. And it's by virtue of
your position and your rank, generally,
they're designated as convening authorities.

That's why when we say "the role
of the commander," I think that's overly
broad. I think you have to say the role of the commander, you know, as convening authority.

REP. HOLTZMAN: Yes, right. Or the other way to say it is just to say because -- the other way to say it is, in the civilian -- "Under the CVRA, the victim is given the right to confer with the attorney for the government or the prosecutor because the attorney for the government or the prosecutor makes a prosecutorial decision. In the military justice system, the prosecutor, i.e. the trial counsel, does not make the prosecution decision. That is made by the convening authority. It's not a decision just to give the right to confer with trial counsel. To give an equivalent right, you have to be, as to whether or not to bring prosecution, you have to have" -- you may just have to lay it out just a little bit more than you are here to make it clear. Now, maybe I'm just being too wordy but -
DEAN SCHENCK: I agree with that. I think we just need to flesh it out and put it in layman's terms and remember who the folks that are going to read the report and --

REP. HOLTZMAN: Congress people might not understand this.

DEAN SCHENCK: That's exactly right. That's exactly right. And I think that's the best way to go.

REP. HOLTZMAN: I mean, it took me, like, what? Six months to figure out the difference of convening authority and trial counsel and all that stuff. It might take other people less time, but, still, they might need a little bit of time.

COL HAM: We're ready to swear you in now, ma'am.

REP. HOLTZMAN: To what?

(Laughter)

COL HAM: To defend and support the Constitution of the United States.

CHAIR FERNANDEZ: Okay. Are we
done with that, or can we move into finding number two?

    DEAN SCHENCK: Are we skipping recommendation one, or are we done with that?

    CHAIR FERNANDEZ: No. Okay. We go into finding number one and recommendation number one, or do we have other things? Can I please sort of, because, I mean, we only have an hour and a half on this and we've already gone through it, if things are purely grammatical or editorial and don't change the meaning or don't need clarification, let's just submit those and go to the substance because, otherwise, we're just not going to get through the amount of the material we have in front of us.

    JUDGE MARQUARDT: When are the grammatical things going to get changed? I mean, they keep coming up.

    COL HAM: Ma'am, this is Colonel Ham. If everyone could please remember to say who's speaking for the court reporter. Ma'am,
if you want to send us edits or non-substantive changes, please send them to Sherry and we can make them. And we're continuing to go through it. Obviously, these are still in draft form. They're not finalized, so we just need to go through and catch those kinds of things. But it's always great to have another set of eyes sending us comments like that.

CHAIR FERNANDEZ: Okay. Lisa, you were talking on number one?

DEAN SCHENCK: Yes. I'm good with the substance and the last, at the end where it says "with respect to the court-martial process." I believe we're talking about the entire disposition of the case, so I would say the convening authority may consider those issues prior to making his or her decision regarding case disposition. That means they can do whatever they want, the victim may convince the convening authority not to go forward, like the Sinclair case.
CHAIR FERNANDEZ: Is everybody okay with that?

REP. HOLTZMAN: Yes, as long as that's comprehensive, sure.

CHAIR FERNANDEZ: Would you say that again, please?

DEAN SCHENCK: So I was saying, at the very last line, the convening authority may consider those issues prior to making his or her decision regarding case disposition.

REP. HOLTZMAN: Okay. My only concern about that, are we talking about any part of the case? It sounds like it's the total case. Suppose it's a question about a plea, about --

DEAN SCHENCK: I think that goes into case disposition.

REP. HOLTZMAN: Okay. If you're satisfied that that would include disposition of part of the case or something about part of the case, then I'm fine with

DEAN SCHENCK: I definitely think
the plea agreement portion is within there. I also mean that, I had a victim who didn't want to go to court-martial. She wanted the accused to be administratively separated, and the convening authority took that into consideration and didn't send the case to a court-martial.

REP. HOLTZMAN: Administratively separated? You mean cut and --

DEAN SCHENCK: No, no, administratively discharged. Separated from service.

REP. HOLTZMAN: It's just a joke. Okay. If you feel comfortable with that, I'm fine.

CDR KING: This is Sherry. Can I just ask one clarification? In the last meeting, we had a discussion about the use of "will" or "may" in the next to the last sentence or last line there where it says the convening authority, right now it says "will consider." And then Dean Schenck suggested it
should say the convening authority may consider the issues prior to making his or her decision.

DEAN SCHENCK: Don't forget we had that case, and it was command influence, a decision by Judge Pohler when the convening authority said the only thing he considered.

I think that us forcing the term "will consider," I mean, I just don't think it's appropriate. I mean, we give him the opportunity to consider, but how can you say he will? Everybody is going to determine whether or not they're going to do it on their own.

JUDGE MARQUARDT: Well, I thought that we were pretty clear that we thought they should or that they will consider, not forcing them, but I thought that was the issue.

COL HAM: That was Judge Marquardt.

JUDGE MARQUARDT: That's right.

CHAIR FERNANDEZ: I mean, I think,
by saying will consider, I don't think you're saying it's the only factor that you're going to consider. I mean, you can consider anything. You will consider doesn't mean that it's going to be determinative of your decision, but there is a factor that you bring in. So by saying "will," I don't think we're tying anybody's hands.

REP. HOLTZMAN: Well, you're tying them that they will consider, you're not tying them to --

CHAIR FERNANDEZ: Yes, but I could consider that it's snowing outside today. I mean, considering something, again, is not determinative of how I'm going to make a decision.

REP. HOLTZMAN: Well, if nobody thinks there's a legal issue with requiring them to consider a fact, then I don't have any problem with it. But if there is a legal problem that's created, you better be careful. That's all. I mean, maybe -- so I don't know.
I'm not an expert on this, but we have very
good experts right on this phone call.

COURT REPORTER: This is the court
reporter. Could I ask that people please
identify themselves when they speak?

CHAIR FERNANDEZ: Yes, sorry.

This is Mai. Can the staff weigh in on
whether this is going to, this has any legal
ramifications?

COL HAM: This is Colonel Ham.

Understanding Dean Schenck's point, if there
are unlawful material or unlawful -- coercion
is not the right word. If there was unlawful
command influence in a submission, the
convening authority should not consider it.

JUDGE MARQUARDT: Well, they could
consider it and find that it's not valid.

REP. HOLTZMAN: Oh, but you're not
even allowed to consider it. That's the
problem. The other way to deal with that is
the convening authority either may consider or
is in a position to consider these issues.
CHAIR FERNANDEZ: I think may, at the end of the day, is our safest if we're really worried about this.

REP. HOLTZMAN: Well, I guess we did see the Sinclair case results.

CHAIR FERNANDEZ: Why don't we go with -- this is Mai, by the way. Why don't we go with safer, rather than not, and go with "may?" Anybody completely disagree with that? Going once, going twice, gone. It's "may."

Lisa, did you have anything else under finding or recommendation one? Okay. Going to finding two and recommendation two.

DEAN SCHENCK: Okay. This is Lisa, and I have just a couple of observations, by reading all these findings and recommendations. I was looking at it like someone just picking this up, and I don't think we're specific enough when we're talking about -- in the third sentence, it says --

CHAIR FERNANDEZ: The third sentence in the finding or the recommendation?
DEAN SCHENCK: In the finding, finding two. In finding two and some of the other places, we use terminology and we haven't really defined what we're talking about. So, for example, in this finding, it says "reasonably heard regarding a plea." What does that mean? Does that mean they cannot submit documents, recommend, recommend no plea, they can talk to the judge? What does that mean, reasonably heard?

And then -- so this is Lisa. One of the things, the other things, throughout we talk about Article 6(b) rights, Article 6(b) UCMJ rights. We talk about 18 USC rights. And so I think that when we're using the terminology "rights," we need to, the first time we are using the term, like Article 6(b) or reasonably heard that right, we need to define what we're talking about because that could mean so many things.

REP. HOLTZMAN: I completely agree or find a shorthand. Also, people aren't
going to know what you're talking about when you keep referring to these rights.

DEAN SCHENCK: Right, exactly. I mean, if I don't know what Article 6(b) UCMJ rights are specifically, I guarantee the Hill people don't know what that means.

And in this one, "reasonably be heard," I think, in our discussions -- and this is Lisa -- I think in our discussions we said that it wasn't clarified and that it was not described, which could be part of the problem.

JUDGE MARQUARDT: This is Christel. I like the use of the

COL HAM: We lost you, Judge Marquardt. Could you repeat that?

JUDGE MARQUARDT: Oh, I just like the use of the word

REP. HOLTZMAN: You like the use of the word what?

COL HAM: Dean Schenck, we understand your point. This is Colonel Ham.
I believe the Subcommittee's decision was the 
findings and recommendations are actually 
going to go after the full discussion. We 
just put them up front for the ease of your 
teleconference discussions.

DEAN SCHENCK: This is Lisa again.

My problem then is, if they're going to pull 
these findings and recommendations out and 
separate them with the general report, say the 
full panel wants to take specific findings and 
recommendations, still at some point these 
findings and recommendations maybe stand 
alone, at least that was the way the DTF-SAMS 
report was. They did appear right above the 
actual discussion, but, in the beginning, when 
we had the executive summary, we had 
bullitized recommendations. And if you can't 
read it and understand what the heck it means, 
I'm afraid that drawing from what we're 
providing may end up with a specific 
recommendation that is not defined.

COL HAM: Got it. I have the DTF-
SAMS report right in front of me.

CHAIR FERNANDEZ: So can we go ahead and clarify those rights in the narrative?

CDR KING: We can try. We can try. I think staff -- yes, we can try to revise it and send it out again, I guess, to try to include more specific language. But if anybody has any ideas to help us out, you could send them to us. I'm not exactly sure right now what they should be.

CHAIR FERNANDEZ: Lisa, can I ask you to help out with that? This is Mai.

DEAN SCHENCK: Yes, I can help out with that.

REP. HOLTZMAN: This is Liz. Can I make another point about finding two? The problem is is that it's a little unclear the way it's written. What you're trying to say here is that the provisions of DoD and service policy and the NDAA do not grant a victim the right to be heard as would exist under the
CVRA. And, you know, if you made that clearer, the whole thing would be clearer.

DEAN ANDERSON: Can you all --

this is Michelle. I need to jump off for about 15 minutes and I'll get right back on.

CHAIR FERNANDEZ: Thanks.

REP. HOLTZMAN: So he just said that you might not need anything, and the same thing then happens in recommendation two because you just get lost talking about it here. So recommendation two would be to assure that the victim in the military justice system has an equivalent right to be heard with respect to the plea, as in the civilian under the CVRA do X, Y, Z. So you set out exactly what you're trying to accomplish, and then people, then you're not losing your reader. It becomes clearer that way. That's all. And it's really worth mentioning here that it's creating some problems. So I don't know whether it's worthwhile to go into it or not. I could send my edits to the staff, if
they can read my handwriting.

    CDR KING: We read most of the
last one, and your assistant helped us where
we couldn't. So that was actually fine.

    REP. HOLTZMAN: Okay.

    CHAIR FERNANDEZ: Okay. Finding
number two in recommendations. Anything else
in there? Okay. Let's then move on to
finding three in recommendation three.

    REP. HOLTZMAN: This is Liz
Holtzman, just quickly. You can't have a
finding where a victim should, a victim can,
and the recommendation is the victim should.
So that just needs to be changed. You can
say, under the present system, victims can do
X, and then the recommendation is they should
be able to do X.

    Here again, the right granted by
Article 6(b), I mean, who knows what that is?
That's the same probably as I said before. I
don't mean to -- sorry.

    CHAIR FERNANDEZ: Okay. Anything
else on recommendation three or finding three?

JUDGE MARQUARDT: I have one sentence to

CHAIR FERNANDEZ: Let's go onto finding four and recommendation four.

JUDGE MARQUARDT: On recommendation four -- this is Christel -- the SECDEF should implement mechanisms.

CHAIR FERNANDEZ: Okay. Anything on four?

DEAN SCHENCK: Lisa Schenck. Sorry, I got cut off. But I heard everything up until Mai talking about finding three. This is Lisa.

CHAIR FERNANDEZ: Okay. Do you have anything on finding four, recommendation four?

DEAN SCHENCK: That was Mai Fernandez?

CHAIR FERNANDEZ: Yes.

REP. HOLTZMAN: I have the same problem with recommendation four. I don't
really understand what this recommendation is about. What is it that you're trying to get? What do we urge be done? Is it what is in the including? Is it that specific part that says "including a provision," blah, blah, blah, or is it just all the rights in Article 6(b)? I don't understand what the specific objective is of the fourth recommendation.

CHAIR FERNANDEZ: Sherry, why don't you explain it?

COL HAM: This is Colonel Ham. I think I can help, and Rachael is here, the primary drafter of this part. So, as I understand it, the CVRA kind of splits the responsibility for enforcing the trial rights between the prosecutor and the trial court, the district court judge. So the district court judge has an affirmative duty to ensure that a victim is afforded his or her rights. That does not, that is not reflected in the Military Victim Rights Act or Article 6(b) of the UCMJ. Rachael, is that a fair summation
of the

MS. LANDSEE: This is Rachael. I think the recommendation, if I remember correctly, also came from Subcommittee discussion regarding how a lot of the violation of victims' rights comes pretrial. And so I think this is an effort of the Subcommittee to have the judge, through a pretrial, get on the record that the victims were afforded all of their rights sort of before a trial starts to avoid any problems down the road, I believe, was what this recommendation was about.

REP. HOLTZMAN: I mean, I just, I still -- but recommendation four really goes way beyond that because it doesn't really, it talks about implementing mechanisms which ensure that victims are afforded the rights specified in Article 6. Who could be opposed to that?

But then what we're talking about, however, has to do with the trial judge and
not with other mechanisms. So we've got to
get very clear, in my opinion, humble opinion,
what we are finding, what is the problem, and
what are we trying to address, rather than
addressing the whole universe here. I mean,
the first sentence is, you know, it's
everything. Is that really what the
recommendation -- I mean, I'm for it if we're
for it, but I think we've said that before and
that's not really a specific problem, or is
it?

And the finding has to do with the
trial judge has to make findings, but then the
U.S. Code says something different and then
the NDAA doesn't say. I mean, I'm already
confused totally by this. What is it that we
want to come out of this? We should just say
it real simple and really clearly. That's my
only point. So I found this recommendation
four quite confusing, the finding and the
recommendation, because it wasn't clear to me
what we were trying to get, what was the
problem and what we're trying to correct.
That's all.

CDR KING: What about if we skip
the first sentence or included that in the
findings, which it kind of is -- this is
Sherry -- and just included the specific
recommendation in the second sentence that
said the Military Judges' Benchbook should be
amended to include language that inquires
whether the victim's rights have been or the
victim has been accorded rights pursuant to
whatever throughout the pretrial and trial
process?

DEAN SCHENCK: Okay. This is
Lisa. First of all, the Secretary of Defense,
the reason he's listed in this recommendation,
as I understand it, is because we want the
Department of Defense to make recommendations
regarding changes to the manual for courts-
martial, UCMJ, DoD directives, those kind of
actions.

I agree with everyone else. I do
I think it's too wordy. I don't think it's direct. I think it's hard to figure out what we're talking about. And let me just tell you, that last sentence, the Military Judges' Benchbook is an Army publication. It is not provided by the Department of Defense. So when we say the Military Judges' Benchbook should be amended, that's like saying, hey, Army, modify your Department of the Army pamphlet because that's what it is. It's a Department of the Army pamphlet.

So maybe what, I mean, I can help write this. I just need to understand, like in bold type format almost, what is it that we want to happen? Because I can help write it, I just need to know what is it we want to happen.

JUDGE MARQUARDT: Trying to see to it that the victims are given the rights that they are to be accorded, but I think that's very broad.

DEAN SCHENCK: So do we know what
rights are missing?

COL HAM: Again, this is Colonel Ham. Our understanding of the issue from the Subcommittee's discussion was, having the judge, trial judge, be involved in assuring the victim was accorded the rights under the Military Victim Rights Act. I don't know how else to say it, kind of an affirmative duty to ensure the victim is accorded those rights by asking questions on the record to the trial counsel and if there's a special victim counsel and the victim.

In other words, to ameliorate any need for appellate litigation of the issues. It's right on the record, it either happened or it didn't happen.

DEAN SCHENCK: Well, you could also do that with a form, like they do with the defendant, the accused. They submit that form to assure that the defense counsel discussed the rights with the accused. You have the right to appeal, and then the defense
counsel submits that form as an appellate exhibit. There's no requirement to go through those things on the record.

So you could do it by a form, but I understand you want to modify the Military Judges' Benchbook. But I think that that might lead to certain issues. The trial judge is going to ask the defense, the accused, and trial counsel whether or not the victim has been provided these rights? If it's a victim counsel, okay. But, again, I think that we're being really, we are telling the Department of Defense to tell the Army to modify their pamphlet, their script that they use at every court-martial. That's what we're doing. That's what we're doing here, and that's pretty direct. That's a pretty direct recommendation. And since the Department of Defense is probably going to implement these recommendations, as they have done in the past with these reports, I think we need to figure that out or either go broader with a little
bit of leeway or be really careful about what
we're telling them to do.

The Military Judges' Benchbook
should be amended? That is very direct.
That's one publication.

REP. HOLTZMAN: Well, don't all
the services have something comparable?

DEAN SCHENCK: Actually, all the
services use the Army judges bench book. I
think all the services, if they use a script,
they used the one designed by the Army. I
think they may even attend the military judges
course at the Army school for three weeks to
go over the script.

So it's not that it's a bad idea.
I don't think it's a bad idea. It's just that
I wonder do we need to do it in the script.
And I'm concerned that what if you have a
victim who doesn't, what if there's no special
victims' counsel present or -- I mean, there's
just a bunch of issues involved. I think we
maybe should take it back a notch and give
more, be more direct, you know, be more direct
to ensure that the rights are, the rights
specified in the NDAA, the affirmative rights
are accounted for at every record, in every
courts-martial record. That's what we're
saying, I think.

We're saying that, at every court-
martial, we want to make sure that the victims
rights have been fulfilled. I think that's
what we're recommending. We're saying
Department of Defense, you need to put in some
mechanisms to make sure this happens.

CHAIR FERNANDEZ: Lisa, why can't
we just put that onus on the trial judge and
call it a day?

DEAN SCHENCK: Right. Because I
don't believe that we -- well, I don't think
-- well, first of all, the Secretary of
Defense cannot put any onus on any trial
judge. It comes through the Manual for
Courts-Martial, and the Manual for Courts-
Martial changes come by recommendations from
the services to the Joint Service Committee, and then DoD goes forward to Congress with them.

We can recommend that DoD, I think we should look at the recommendations in detail, seeing as where we recommended that they look at manual changes, you know what I mean? So we recommend that --

CHAIR FERNANDEZ: I don't think we should be talking about manual changes. That's not really what our panel is set out to do.

DEAN SCHENCK: Well, if we say mechanisms, then we just should anticipate it, direct mechanisms. If our panel is not set out to recommend manual changes, then we should not be making recommendations on a DA pamphlet called the Judges' Benchbook. That's like the needle, that's like the eye of the needle, you know. That's just really specific. That's like five levels down from the manuals of courts-martial.
REP. HOLTZMAN: Well, one problem, another problem with that is that only deals with the Army, it doesn't deal with the other services.

DEAN SCHENCK: Right. Because the other services can choose not to --

REP. HOLTZMAN: But I guess what I'm trying to understand here, finding four, is this really the thrust of it, that under the Crime Victims Act, that's a U.S. Code 3771, is that what that is? I'm trying to figure that out.

DEAN SCHENCK: Yes.

REP. HOLTZMAN: Okay. So maybe we call it just the Crime Victims Act and stop calling it with the section because that already is totally confusing. But if the Crime Victims Act, what you're saying, that on the Crime Victims Act, the judge is specifically given the responsibility of ensuring that the victim's rights are enforced. The judge has that responsibility;
am I right? Is that correct?

CDR KING: Yes, but both the judge and the trial counsel, but the trial court is responsible for --

REP. HOLTZMAN: Right. But each has his or her own responsibilities. So the trial court has an equal responsibility, has a complete responsibility, regardless of what the trial counsel does, to ensure that the rights of the victim are enforced. Under the NDAA, there is no, there's no statutory requirement that a judge do the same thing.

The Secretary of Defense now has to make changes. The statute requires that the Secretary of Defense make the changes to the manuals for court-martial and prescribe appropriate regulations. Okay. So that's a finding that that's happened.

Well, what is our recommendation beyond that? I mean, we now have Congress has told, has told Secretary of Defense to recommend changes to ensure that the trial
judge protects the victim's rights. Okay.
Now that's a finding. Now, what is our
recommendation with regard to that? That
should be changed in this manual? That it
should be in statute? That it should be in
the manual? That it should be in other --
what is our recommendation?

This is a finding. Okay. The
finding is the Secretary of Defense have been
told, basically, to do, to bring up to the
Crime Victims Act standard, in essence, the
behavior of trial judges in the military. So
now what are we recommending vis a vis that?
What is our recommendation? That the UCMJ --
we're recommending -- or are we recommending
that the Secretary of Defense do what he's
required to do under the NDAA? What are we
saying to the Secretary of Defense that he
should do this different from what he's
already required to do under the NDAA.

DEAN SCHENCK: Yes, I agree with
Liz. If you look at the last, if you look at
that line in our finding that says the NDAA tells him to recommend changes to the Manual for Courts-Martial and regulation so that mechanisms are in place to ensure those rights have been accorded. And so I think that, I think that, I think our recommendation is, yes, do what they told you to do and, oh, by the way, we might want to implement this through changes in the Military Judges' Benchbook.

REP. HOLTZMAN: I don't necessarily object to the Benchbook. I'm just trying to understand what we're trying to do here. So are we trying to say that the NDAA mandates --

CHAIR FERNANDEZ: Civilian law is more expansive than the military law, and I think we should direct Congress to expand the military law because it didn't in the NDAA.

REP. HOLTZMAN: Okay. Well, that's separate from what we're recommending in four. I guess the point I'm trying to
make, if I can get it clear, is that maybe what -- the last sentence requires changes to the manual court-martial all in a passive voice. It does not, the NDAA apparently doesn't require the Secretary of Defense to give the trial judge the same responsibilities as the trial judge has under the Crime Victims Act. Am I right? I'm trying to understand this. I just don't really, it's just not --

CHAIR FERNANDEZ: This is Mai. I think you're right, and that's why I'm saying why don't we hand this back to Congress?

REP. HOLTZMAN: Well, because maybe the thing is that we don't need a statute. Maybe if the Secretary just said if the NDAA is not clear that the trial judge is to be given this responsibility. This is a passive voice, so I can't tell who's responsible for doing what. But if the trial judge is not given the responsibility as the trial judge is under the Crime Victims Act, then the Secretary of Defense should, in
carrying out the 14 NDAA, try to implement
regulations that will make the trial judge
responsible in the same way that the trial
judges are responsible under the Crime Victims
Act for protecting victims' rights. If that's
what our recommendation is. I don't know.
Since I don't know what the finding is, I'm
sorry, I can't make a recommendation. That's
my problem here with recommendation and
finding number four. So maybe, you know, if
the staff would go back and take a closer look
at what exactly they think the problem is
here, then we can discuss what the solution
is, in my opinion. But that's just my
opinion.

CDR KING: So the problem is --
I'm sorry. This is Sherry King. What we were
trying to do was trying to find a way to
incorporate your concerns from the earlier
meetings. And all the enforcement mechanisms,
basically, in the NDAA were left to the
Secretary of Defense. So we're trying to find
a way for you to make recommendations, you
know, or tell the Secretary of Defense how
those enforcement mechanisms or what
specifically you want in there, if there's
specific things you want to enforce it. And
we're not doing very good at that, but that
was our intention that, since the statute
basically requires the Secretary of Defense to
implement all the rights, you know, and set up
mechanisms, that we were trying to incorporate
that into what you said in your meetings that
you wanted to have happen. And we've been
having a little bit of trouble doing it very
clearly, obviously. We can take another stab
at it now, once we have this discussion from
you.

But that's our problem is that all
of the mechanisms are set forth, you know --
in the NDAA, it says the Secretary of Defense
shall develop. So then --

REP. HOLTZMAN: What is the
Secretary of Defense supposed to develop?
That's what I'm not understanding here. Is the Secretary of Defense supposed to develop -- excuse me. This is Liz Holtzman. I'm just trying to understand is the Secretary of Defense supposed to, under the NDAA, develop regulations that will require the trial judges to enforce victim rights? Is that what the NDAA requires?

CDR KING: No, it's not that clear.

REP. HOLTZMAN: What?

CDR KING: No, it's not that clear. The --

REP. HOLTZMAN: Well, then if it's not clear, that's the problem. So then the problem then is that you have, in the Crime Victims Act, you have the trial judge is responsible for enforcing it, and it's not clear under the whatever Congress did that the Secretary of Defense is supposed to achieve the same result. So even though Congress hasn't specified it, he should. And if he
doesn't want to, then Congress should change the law.

That's my recommendation because I guess what our view here is that this should be as comparable as possible, what happens in the military system in terms of crime victims should be as comparable as possible to what the rights are for crime victims at least in the federal system. But if we don't want it comparable, then that's another story.

CHAIR FERNANDEZ: I think everybody has been looking for compatibility and comparability between -- this is Mai -- between the NDAA and the Crime Victims Act. So

COL HAM: So this is Colonel Ham. We have the language of the military, I call it the Military Victim Rights Act, whatever you want to call it, Article 6(b), the amendment. Basically, what it did is it set forth the list of rights, and then it left to the Secretary of Defense a whole lot of other
things. So I may be repeating what Sherry said. So what the staff is trying to capture are your thoughts on what those things should be that the Secretary of Defense should do.

REP. HOLTZMAN: This is Liz Holtzman. I think, for starters, there could be a long list, but I would say, for starters, it's a real simple list, it's a real simple thing, is to make it at least equivalent to what we have under the Crime Victims Act. And if it's not, it should be, and that's very simple. Then if you want other things, too, and bells and whistles, that's another whole discussion.

But if that point isn't clear, if the Secretary of Defense hasn't been directed under the NDAA to make the trial judge's responsibility equivalent to those in a federal court under the federal law, then that should change. This is my view. It seems to be a very simple thing.

CHAIR FERNANDEZ: I agree with
Liz. This is Mai. If you read number three, it gives you, we're saying, okay, you need to be able to swiftly appeal any time that one of your rights is violated. So what we want to state in this one is we want to make sure that all your rights that you have, all the rights that you have under the Crime Victims Act in the NDAA. So they kind of work together.

REP. HOLTZMAN: No, it's not all the rights, that the trial judge has a responsibility for enforcing them under the, in the military justice system, just as the trial judge has the responsibility in the civilian system. That seems to me the point. That's the only point I'm making. Because in the civilian system, under the Crime Victims Act, the trial judge --

DEAN SCHENCK: Hello?

CHAIR FERNANDEZ: Yes.

DEAN SCHENCK: This is Lisa. I'm here.

CHAIR FERNANDEZ: Okay. I think
we need a suggestion from the staff on how to move forward on this.

COL HAM: We can -- this is Colonel Ham. You made -- recommendation three is also something that -- I'm looking. I've got to make sure because I don't have it all memorized. It's something, SECDEF was directed to develop, you know, enforcement mechanisms, and the appellate enforcement mechanism is another example of what we took to be you directing the Secretary of Defense to include in those things.

So we could, taking Representative Holtzman and Dean Schenck and everybody else's comments, but those two in particular for finding four, again, our understanding is your recommendation is the SECDEF should put some responsibility on the trial judge, just like the CVRA does to district court judge. So we can reword it so that it's like that.

But a number of the recommendations we thought, and maybe we
thought wrong, were directing the SECDEF to include stuff into what Congress has directed him to develop, if that makes sense. Include specific things in there.

REP. HOLTZMAN: Yes, you could do that, too. You can say and one thing he could do, for example, is direct them to change the manual to, you know, or to require, he could require, I think the Secretary of Defense could require new manuals, could require new training, could require, you know, videos. I mean, all of that stuff is also possible. But you have to have it focused on what the purpose is of the manual change. Because if you get a new manual, what's the manual going to say?

JUDGE MARQUARDT: Well, it seems to me we're talking about the responsibility of the trial judge to make sure that the victim is accorded his or her rights. Well, I don't know that the manual, I mean the manual may be one mechanism to do that.
CHAIR FERNANDEZ: Is that Judge Marquardt?

JUDGE MARQUARDT: Yes, it is.

Thank you.

DEAN ANDERSON: Yes, this is Michelle. I'm back on board. I'm sorry. I had to get off for another meeting briefly, but what documents are we working on?

CHAIR FERNANDEZ: The same one we were on when you left.

DEAN ANDERSON: Oh, my. Okay, great. Thanks.

CDR KING: You know, there's several, finding and recommendation -- this is Sherry -- number six is kind of the same thing. It's trying to make a right equivalent to what's under the CVRA. So maybe you put it like, I don't know if you want to do it in one finding and recommendation where you list specific things you want to make, you know, equivalent or similar to the CVRA. And then just list them in one instead of having
individual findings, or do you want them in individual findings still you think?

REP. HOLTZMAN: Why don't we try individual and -- this is Liz Holtzman -- and then you can combine them. So I think clearer right now is really what the objective should be.

CDR KING: And if anybody has any ideas and wants to share them, you know, send them to us ahead of time, that would be great, too. I mean, I think we're getting where you're going with that, and we'll make another stab at it.

REP. HOLTZMAN: But maybe there are some other things specifically that you had in mind here. I'm just trying to

CDR KING: Not under that one. Under number four, basically, I think you were recommending that someone should be, and I guess we were interpreting it as someone should be responsible, and under the CVRA it's the trial judge and also the trial counsel.
The trial counsel, the prosecutor is responsible for enforcing the rights, and the trial judge is responsible for ensuring them. They're kind of different things, but I think that's the way it's supposed to work.

And so we were trying to make an equivalent based on your discussion from earlier meetings. So that's all we were trying to do, and we obviously didn't do it very clearly. But we'll work on that again.

CHAIR FERNANDEZ: Can then we go down to, are we at recommendation six then?

REP. HOLTZMAN: No, we're at five, I guess.

CHAIR FERNANDEZ: No, I thought five was just like three and four. I thought Sherry just said.

CDR KING: I think it is because in the CVRA they give a time limit of 14 days that the victim can go back and claim that she or he didn't get his rights under the CVRA at the trial court level. Well, in the military,
the problem with giving a date like that is really the case isn't final until at least the convening authority acts, and there's not a number of days that that can happen. So the language, I don't think you could pick a particular number of days because the accused has a right to provide information to the convening authority after trial and, in most cases, the victim does also now in a sexual assault case. And even though there's a time limit set in the rules, that can be extended for good cause.

So I don't think you can make a recommendation that's exact where you say, you know, the victim has to appeal a violation within 20 days or whatever because there's not really an exact time under the Manual for Courts-Martial. So we were trying to do something like that for number five also, to make it an equivalent right but based on what happens after trial in the military.

So assuming you want to do that,
but I think we talked about it at the last
hearing you wanted to do it, just make it
clearer. And I was trying to do that, but I
don't think we probably did it real well.

CHAIR FERNANDEZ: I think that's
the way to go. Does anybody dispute that?

REP. HOLTZMAN: Yes, I think
that's fine.

CHAIR FERNANDEZ: Okay. So we're
at six, recommendation six. Okay. What do
folks have as comments on recommendation six
and finding six?

REP. HOLTZMAN: Well, I guess my
question about this is why isn't it sufficient
to have the various services receive the
complaint? What's the inadequacy there? I
mean, am I wrong that the various services --
I'm trying to, you know, remember what this is
about.

CHAIR FERNANDEZ: This is like the
ombudsman in the Department of Justice.

REP. HOLTZMAN: Oh, so this would
be outside and above the services?

CHAIR FERNANDEZ: That was your thought last time, I think, Representative Holtzman.

REP. HOLTZMAN: Okay.

DEAN SCHENCK: Okay. So this is a DoD -- this is Lisa. So we're saying, hey, SECDEF, create an entity within your organization to receive complaints about your officials.

COL HAM: This is Colonel Ham. That was discussed last time. I think the original wording was within or outside of DoD, and the Subcommittee decided inside DoD. But the DoD IG. The analogy would be the whistleblower complaint process in DoD IG, although my recollection is the Subcommittee didn't specify an entity, if that correctly reflects the conversation from that teleconference. But we certainly can change it if that's not --

DEAN SCHENCK: No, no, I was
thinking the DoD IG, as well. No, I think it's fine. Again, that was Lisa.

CHAIR FERNANDEZ: Okay. So are we clear there?

REP. HOLTZMAN: Can I just ask a question? When you say the failure of DoD officials, would that include various services or is this just for the DoD itself? Is that a separate entity? I mean, I'm just trying to understand.

COL HAM: We should probably include military services or DoD.

REP. HOLTZMAN: Well, but isn't it, but isn't it now that the military services has to set up a system to receive complaints, each of the services, or am I wrong about that? Because the NDAA, according to finding six, requires a designation of an authority within each armed force to receive an investigative complaint. So you're saying that we should do this in the DoD -- I don't exactly understand what the DoD is in
relationship to each armed force. Is that something that's a separate bureaucracy that we're talking about, just like the Pentagon, or is it --

COL HAM: Yes, I think it's a chance to kick it up one more time.

REP. HOLTZMAN: Oh, okay. I just wanted to make sure that I understood that. Okay. I'm not opposed to that. That's fine.

CHAIR FERNANDEZ: Okay. Let's move to seven.

REP. HOLTZMAN: I just had clarifying language for recommendation seven. That's all, but I'm not going to bother giving it to you now. I'll just send it to the staff.

CHAIR FERNANDEZ: Okay. I think we need to make a determination around eight. I know Bill still isn't in here, but I think it was pretty clear that Bill just didn't want this in there. But I also want to iterate that he wasn't going to, he also said he
wasn't going to be scandalous if we did keep it in. So I just want to keep that balance in mind.

COL HAM: That's Mai speaking?

CHAIR FERNANDEZ: Yes, that's Mai speaking. I'm so sorry.

DEAN ANDERSON: Yes, this is Michelle on finding eight and recommendation eight. I think they do capture the dialogue of what at least the majority opinion was on the Subcommittee for victim services about the right of allocution during pre-sentencing. So I think they accurately, defining the recommendation accurately reflect our dialogue. I also think they're according for the process of victim healing, which obviously is within the scope of what we're trying to analyze here.

DEAN SCHENCK: Okay. This is Lisa. On pre-sentencing, the government has the opportunity to present matters in aggravation. We're talking about pre-
sentencing in this recommendation, so merely 
what this recommendation is doing is allowing 
for the government the ability to do exactly 
what they can do under the Manual for Courts-
Martial anyway and the rules of courts-
martial. Matters in aggravation specifically 
includes victim impact, so I don't see -- I 
know Bill's not on the line, but I don't --

DEAN ANDERSON: Lisa, this is 
Michelle. I think it was a question of 
clarification of this matter.

COL HAM: Dean Schenck, this is 
Colonel Ham. I think the issue that the 
Subcommittee would change under current 
government aggravation rules is they would 
permit an unsworn statement by the victim or 
a written statement, not sworn, not subject to 
cross-examination, by the victim, which, as 
you know, is not the norm, unless it's part of 
a plea agreement or the defense doesn't 
object.

So for military justice wonks,
that would be the difference. That would be
the change. Does that make sense?

DEAN SCHENCK: This is Lisa. I
got cut off again. I'm sorry. And you were
just saying for clarification of the language
--

DEAN ANDERSON: Actually, Colonel
Ham has actually clarified something, and I
think she's right. I was incorrect in stating
that this is a clarification.

DEAN SCHENCK: Oh, okay.

DEAN ANDERSON: We're talking
about unsworn. I'm sorry. Go ahead, Colonel
Ham.

COL HAM: I'm sorry. I'll try and
do it shorthand the second time. Dean
Schenck, for the military justice wonks, like
you and me, the change to the government's
ability to present aggravation by this
Subcommittee recommendation, as the staff
understands it, is it would now permit the
government to, it actually would be the
victim's right, whether or not the government wanted to do it, to testify in an unsworn manner, present an unsworn statement or a written statement not subject to cross-examination. That would be the change that this recommendation, supported by its finding, would make. Does that make sense?

DEAN SCHENCK: Yes.

REP. HOLTZMAN: And that would be with respect to sentence; isn't that correct?

DEAN ANDERSON: Right. The second half of the court-martial. Again, I thank you for the clarification, but I still, you know, I think that our recommendation is fine. I go with the recommendation of the staff.

COL HAM: And Mr. Cassara disagrees with the recommendation and would provide a separate statement on it. Just to encapsulate his view, he believes the right to cross examine the victim in sentencing, although rarely exercised, is an important way for the accused to present matters in
extenuation and mitigation that would be lost.

DEAN SCHENCK: Yes, noted and disregarded. This is Lisa Schenck.

REP. HOLTZMAN: This is Liz Holtzman. I just have kind of a wording issue here, which is, number one, we should make it clear that we're talking about sentencing; and, number two, the language both in the finding and the recommendation should track each other. I mean, we use allocution in the recommendation, and we don't use it in the finding. So try to use comparable language because we're talking about the same thing.

CDR KING: I really didn't spend much time working on this because it wasn't, you guys hadn't really discussed it yet or voted on it. So that was kind of a placeholder for it until you discussed it. And just for my clarification, Dean Schenck, are you saying that you agree it should be a right to present an unsworn statement or not an unsworn statement?
DEAN SCHENCK: No, I agree. If the accused gets the unsworn statement, I believe the victim should get the unsworn statement.

CDR KING: And we'll certainly change the testimony to that. I just left it more general because you hadn't decided on anything as a group at all yet.

JUDGE MARQUARDT: This is Christel. Do we need to explicitly say that that right does not include the right of cross-examination?

CDR KING: If it's an unsworn statement, I think it's pretty well understood in the manual that that does not include the right to cross-examination. And we'll put that in the recommendation.

CHAIR FERNANDEZ: Okay. I think we're done with these, folks. Sherry, what do we move on to now?

DEAN SCHENCK: Sorry. This is Lisa. Did we cover the standing issue you
noted in your email?

    CDR KING: You know, we were just
a little bit concerned about one of the NDAA
requirements is that the Committee address
standing in some way, and so I don't know if
you, I just wanted to make sure that the panel
thought they had done that either in the Crime
Victim Rights or in the victim legal counsel
or special victims' counsel sections or if you
want to think about making it another more
specific finding on it or if you want to think
about it and address it at the next meeting.
Not everyone is here this time.

    DEAN ANDERSON: Commander King,
this is Michelle. Could you clarify for us?
I'm kind of looking through the materials and
there have been a number of emails, just to
focus on what the standing issue is?

    CDR KING: Yes.

    DEAN ANDERSON: Because I can't
seem to find the relevant materials on it, so
I apologize for that.
CDR KING: I think

COL HAM: Ma'am, this is Colonel Ham. I'm looking through your terms of reference. They're just specific direction to the full panel, which falls under this Subcommittee purview, to assess whether the roles and responsibilities and authorities of the special victims' counsel should be expanded to include legal standing to represent the victim during investigative and military justice proceedings.

So you've had long discussions, and I believe Meg Garvin's position was that there already is standing, so there is no need to make a recommendation. I guess our point as a staff is Congress has directed an assessment of that, so the question for the Subcommittee is, even if you believe it's already settled, should there be something in writing in your report about it?

DEAN ANDERSON: Yes, I think --

this is Michelle again, and I appreciate that,
Colonel Ham. I do think that Meg has indicated that there are a number of areas that are, from her perspective as an advocate for victims, hopefully settled but, from the perspective, from a wider perspective, could stand clarification in manuals, in the law, etcetera. This seems like one of those areas, and I think a recommendation on that would be appropriate.

REP. HOLTZMAN: Excuse me. Would that be more appropriate in the other section on legal counsel?

DEAN ANDERSON: This is Michelle. In response to Representative Holtzman, I think the recommendation would be that crime victim, I'm sorry, that victim's counsel would have standing to represent the victim during the investigation phase. I think that's what a number of these issues around what's discoverable and what the process is for that might emerge. Is that correct, Colonel Ham, from your understanding?
COL HAM: I'm looking towards Kristin McGrory, who's looked at this issue. Kristin, do you want --

CDR KING: I think -- this is Sherry. We did make one recommendation last time. In your victim rights recommendations, it says that -- let's see. I can't remember exactly what it said. It says every time you refer to the victim, you're also referring to the victim's counsel.

REP. HOLTZMAN: Yes, if you want to throw something into there, you could say that the victim has, wherever the victim has a right to appear or a right to be heard, you know, the victim may be heard by counsel, through counsel. I mean --

COL HAM: Represented by counsel, yes.

REP. HOLTZMAN: I think that point is already there, but, you know, if it needs to be strengthened, I think that's where it should go.
COL HAM: I'm sorry, ma'am.

That's in finding seven and recommendation seven, and the issue there, and we don't get too far into the weeds, is the case that Ms. Garvin discussed has only dealt with rape shield issues. So whatever withholding is, our concern, as far as your discussions and recommendations go, is that's what it is right now, it's a holding on a rape shield issue. And if you wanted to clarify that you believe it should be broader, that might be appropriate for an additional finding and recommendation. So I think that's what finding seven and recommendation are, if the Subcommittee agrees.

DEAN ANDERSON: Yes, the recommendation seven -- this is Michelle -- appears itself to be fairly broad language. The finding is in some ways incommensurate with the recommendation because of its reference to a case that's limited to rape shield issues.
However, the second sentence in the finding I think does the work that it needs to do. You know, future litigation on this issue may ensure, and, therefore, the recommendation is that, across the board, the victim's right to be heard includes the right to be represented by counsel.

REP. HOLTZMAN: Yes, right. This is Liz Holtzman. I created new language or suggested new language which has now been forwarded to the Committee but saying in recommendation seven that SECDEF should recommend an appropriate amendment to the Manual for Courts-Martial to clarify that all references to a victim's rights be heard includes the right to be heard through counsel because I thought the language wasn't very --

CHAIR FERNANDEZ: I think that's clear. This is Mai. I like Liz's wording.

REP. HOLTZMAN: So I'm sending it over.

COL HAM: Ma'am, Representative
Holtzman, and Subcommittee members, there's an issue of whether the right to be heard and standing are the same thing.

REP. HOLTZMAN: Well, so maybe what you say is amend that to clarify that all references to a victim's right to be heard or to a victim's standing also includes a right to be heard through counsel or that the counsel -- I haven't written it, but that's easy to change. That could be changed. Colonel Ham, thank you for raising that point.

COL HAM: And Kristin McGrory has thought and looked a lot at this, so I'm asking her if she had any other advice.

MS. MCGRORY: No, ma'am. This is Kristin. That was my only concern. The way Kastenberg is written, the right to be, it's a standing issue but the right at issue in that case was the right to be heard. So the right to be heard was violated in that case. So I think it just needs to be clear, when you're talking about standing, you are
standing whenever a violation of any right occurs, versus a right to be heard. That was my only concern.

REP. HOLTZMAN: Okay. So maybe just to redraft both of these so it makes it clear that you're referring to both of them -- this is Liz Holtzman -- would be appropriate. That's all.

I'm sorry. I have to get off because I have a 4:00 conference call, and I have to leave my office now. So sorry, everybody. Mai, thank you very much, and I'm sorry I have to leave a little early. But I appreciate all the work the staff has done, hard work, good work. Bye-bye.

CDR KING: Do you want to move, since people are going to have to get off, and discuss if we can have an extra meeting because we're going to run out of time and it's taking a lot more time for us to go through all these things than we expected it would. So can we, can I just send out an
email asking for availability and pick a date for another meeting?

DEAN SCHENCK: This is Lisa.

You're talking about an in-person meeting, Sherry?

CDR KING: No, I'm talking about phone meetings.

DEAN SCHENCK: Okay. Yes, that sounds good to me.

CDR KING: I'll do a poll and do it. If we could, in the last few minutes, instead of going through the special victims' counsel, if we could just get some discussion on the framing the issue topic so that Rachael, Rachael has been working on that and trying to put findings to put together in that, but we're kind of a little bit not sure where you want to go with it --

DEAN ANDERSON: This is Michelle. And I'm glad we're bringing up the framing issue in the last few minutes. I think that, for what it's worth, I have a little bit of a
concern about the use of the DoD surveys where the answers are offered. The survey instrument gives the choices for people to check off about why they did or did not make a report. I think, at best, those are constructed responses. I think they're interesting, but I don't think they should provide the bulk of the analysis here because the answers were constructed before boxes were checked.

And to that extent, I think I might frame this a little differently. I would start with the question of how many people who are sexually assaulted in the military report or what percentage of people who are sexually assaulted in the military choose to report and what percentage choose not to report or to make a confidential report. And then I might also say, in the civilian world, there would be a comparison and contrasting there.

Regardless of what the comparison
is between the military and civilian world, the next section, I think, needs to be an acknowledgment of a huge problem of under-reporting of sexual assault, adult sexual assault in the military. And then the question comes to why.

So, currently, the structure that is here is victims' accounts around sexual assault. And then immediately it moves into these DoD surveys where the answers are fabricated ahead of time. And what I would do, after I talk about the huge problem of under-reporting, I would say, well, it behooves us to ask the question why, why are sexual assaults under-reported?

And then I would talk primarily about the treatment that victims have experienced after sexual assault, and we've got a lot of testimony from live victims and also a lot in the secondary source material that we distributed and analyzed. And then I think we have to grapple with the structural
disincentives to reporting. So structural
disincentives to reporting, like collateral
misconduct, potential harm to one's career,
the harm to unit cohesion and one's place
within the unit, and then, finally, the fear
of retaliation by authorities or peers, both
of which we heard testimony on.

What that does is it frames the
issue as we have a problem of under-reporting,
what might be some of the structural issues
with under-reporting, and that sets us up to
make findings and recommendations on these
structural disincentives to reporting. That's
what I would suggest, and I have notes on this
if that would be helpful. And other people
may disagree about that structure, but that's
what I think are the key issues around framing
the issue.

CHAIR FERNANDEZ: Michelle, I like
that structure. The only other comment I
would make is that our charge is further than
reporting and under-reporting, and I think we
could do a frame of reporting is indicative of other problems. But I think that the frame has to be also have we been providing the best services that we -- is reporting the only problem here? But at the end of the day, we don't disagree with you.

DEAN ANDERSON: Yes, I completely agree with you. In the treatment victims have testified about include, in part, their experiences with services. And I think you're right. That's a crucial part of the picture and should be part of what we're talking about right now.

CHAIR FERNANDEZ: But I think, at the end of the day, what we need to make is a pitch here that what we want is our troops to be healthy and to be in a good position. And that doesn't matter if you report or not report, it will be that you get the correct services.

So I think we first need to say is that it's great if people report, but, at the
end of the day, if we have ready and healthy
troops, that is really our goal.

DEAN ANDERSON: Even if there are
sexual assault victims who do not report and,
therefore, sexual assault perpetrators who are
not brought to task?

CHAIR FERNANDEZ: Well, I think
that there's a lot -- this is Mai -- I think
there's a lot of people who, I think you were
the first one to say it, Michelle. There's a
lot of people who don't report, and they
strictly want services.

DEAN ANDERSON: Right, right,
right, right, right. That's what I think the
link is. That's what I think the link is.
And it is not our goal, I completely agree
with you, Mai, it is not our goal to have
everyone report. However, to the extent that
there are disincentives to reporting that are
not about I would like my privacy but are more
about I fear retaliation, that's a problem in
the military that we've heard about again and
again that we can make a recommendation on.

And I agree with you that the services one receives, whether one reports or not, are crucial. Many of the services one receives only happens if one makes a report. For instance, everything we've been talking about in terms of victims' rights, they don't particularly attach until there's a proceeding, and that doesn't happen until there's a report. So there are a lot of victims that choose not to report for reasons that are not valid reasons and they're more about structural disincentives within the military, rather than a desire to maintain one's privacy.

CHAIR FERNANDEZ: Right now, what I saw was a total emphasis on reporting and not reporting. And I think the frame has to be bigger. It's about how do you get these men and women into a better place, and I think that that needs to be an overarching frame. And then we can kind of start
narrowing the frame to, well, what do we do about reporting and why don't people report. But I think the very first thing we've got to say is it's a real personal choice to report or not report, and people do it for, I mean there's a lot of reasons that don't go with the structural disincentives. It's strictly I don't want to come forward, I just don't.

DEAN ANDERSON: I don't have any problem with a broader lense that begins the framing that it's about the health of the troops overall. I have no problem with that, Mai.

CHAIR FERNANDEZ: So I think that that needs to be the initial frame, and then we start going into -- so the initial frame is healthy troops and having services available in all the different ways we talk about for the troops if they report or if they don't report.

We know that if they report, there's going to be additional services that
they can get. So there should be incentives, and you're also holding perpetrators accountable. Then you can get into what are the disincentives not to report in those circumstances.

And then you can talk about, okay, these are the things we're recommending, we're making recommendations for, so we're recommending for services to be made available, more widely available for people who don't want to report at all. And then we're trying to provide, trying to take away those structural disincentives for people who do want to report.

DEAN ANDERSON: Yes, I agree with that. I think that's great.

CHAIR FERNANDEZ: That would be the frame that I would put on it, you know, not just tie it to the survey because there are so many problems with that survey that I actually think that we're doing ourselves a disservice by using it as our principal source
DEAN ANDERSON: I completely agree. This is Michelle. Yes. The summary reads right now, the summary is like sexual assault is not just a military problem. Well, given that there is no one claiming that, that's not something to prove and it should not show up in our report. Nobody is saying this is a problem exclusive to the military. No one is claiming that it's a problem only in the military. It's just a question asked repeatedly throughout the process. We've made comparisons between the military and civilian world.

But I really don't think that our summary should be like, newsflash, this is not just a military problem. Rather than just a summary, I think we should have findings and recommendations on the things that we've talked about that are structural disincentives to reporting, as well as the services for victims who do report and don't report.
CHAIR FERNANDEZ: The services for victims are going to be, we have a whole victim services section coming that includes all the SAPR programs, all the advocates who work in it, the SARCs, DAs, all the different advocates, all the victim advocates, all the family advocates, all the, you know, all the kind of requirements about collateral misconduct and various things.

So you're going to be seeing that and maybe that's kind of its own section right now, and maybe that, once you see that, that will help you figure out if you want parts of that to go up in the framing the issue also or how far to go in that section when we have a whole detailed section on it, also, as far as the military.

So it's just coming, but it's such a big, complicated section. If you read it, some of the SAPR directions you've read are really long and very complicated. And Julie has been working really, really hard to try to
simplify the whole process and all the changes
that have come over the years, and it's
getting reviewed and reviewed some more. So
it's coming, but that will help maybe you
figure out what you want in this section. But
we at least wanted to start getting some ideas
from you.

COL HAM: This is Colonel Ham. I
understand all the discussion, and we can
incorporate all this into the framing the
issue. Throughout the terms of reference and
direction of Congress, the adequacy of systems
to support and protect victims in all phases
of an investigation, prosecution, and
adjudication, which seem to presuppose a
report. Do you want to, it sounds like you
want us to address that that's not where
you're looking exclusively.

CHAIR FERNANDEZ: I don't know. I
honestly think that if you just look at that,
you're going to miss the majority of victims
every single time.

COL HAM: Was that Mai?

CHAIR FERNANDEZ: Yes, that was Mai.

COL HAM: Okay. I'm not commenting one way or another. I'm just reading the words that Congress directed the --

JUDGE MARQUARDT: Well, you know -- this is Christel. I have looked at that framing the issues, and I agree. I mean, all the percentages are so misleading that I don't think that the way that it was handled should even be included. But I agree with Michelle that part of the issue that brought all this to light was that people were not reporting, and now that they are because they have some protections I think is a major part of what we're doing.

COL HAM: Again, all we have is that SAPRO study. I understand there are a lot of issues with it. It shows increases in
reporting from the mid 2000s until now. So one thing we have to be careful of is the accuracy of the statements we make. Unless you want us to comment on the survey, which this subcommittee hasn't examined --

JUDGE MARQUARDT: No, I'm not suggesting that we do that. But like I say, I think that our particular direction is that we have to look at why people were not reporting.

DEAN SCHENCK: This is Lisa. It seems that the failure to report is a general issue throughout everywhere: campuses, society in general. I mean, there are numerous scientific studies indicating that it's under-reported. Even the National Academies of Sciences report we just received I think indicates that it's the number one most under-reported crime. Do we really have to go there with specifics? I mean, that's just, seems to me, a general fact.

JUDGE MARQUARDT: But the military
is very different from the civilian side of it.

DEAN SCHENCK: This is Lisa. But did we study that in our Subcommittee, you know --

CHAIR FERNANDEZ: Study what, Lisa? Study what, Lisa?

DEAN SCHENCK: Should we study the reasons why in the military we are under-reported and why our reasons are victims are under-reporting, those reasons, and how they're different from the civilian sector?

DEAN ANDERSON: No, I mean, I think -- this is Michelle -- when you were off the phone, we talked about pretty much exactly what you're saying, which is a comparison with the civilian world, at least what I think you're saying, which is that no one is claiming that this is an issue that's exclusive to the military and there are a lot of limitations with the studies that center right now what the document says, the draft,
including giving the answers to victims to check off.

And so we thought it would be better for us to talk about the actual victim testimony we received about the treatment victims experienced when they were assaulted and reported or didn't or involuntarily reported, as it were, because someone told somebody. So the responses by both the command structure and the peers, which I think is a crucial piece that we haven't really addressed anywhere else in the document.

I mean, I think that this is a hard piece to write, and I give the staff credit for trying to take a stab at it. I think the hardest part is collecting the victim testimony, but it looks like from the draft that there's already an intention to do that. So I don't think we're suggesting anything that the staff isn't already in the process of plowing through, and it will be interesting to see the next iteration.
CHAIR FERNANDEZ: I think we've given you some food for thought. Why don't you take this and go and see where you can go. I think there's some consensus that we stay away from the survey as much as possible, but the claim that this is under-reported all over is a given and we don't want to focus on that. And I think it's the -- overall, we want to give services to folks who don't report, and then we want to create incentives for people to report. We want to identify why they're not reporting and then give them incentives to report.

CDR KING: That helps us, I think, in at least getting kind of a focus on it.

CHAIR FERNANDEZ: Okay.

CDR KING: This is a hard one because we really hadn't spent a lot of time on it and it really didn't have any focus. We were just trying to kind of combine some of the topics you had addressed before that didn't really go in or that didn't really fit
in any other section that we had so far, and we weren't quite sure how to even get going on it.

CHAIR FERNANDEZ: No, I think it's a hard thing to do. Okay, folks. We've been on the phone for an hour and 45 minutes.

DEAN ANDERSON: Thanks, everyone. That was Michelle.

CHAIR FERNANDEZ: I think, Bill, do you need to close?

MR. SPRANCE: I do, Ms. Fernandez, I do. This meeting is now closed.

(Whereupon, the foregoing matter was concluded at 4:16 p.m.)
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