

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

ROLE OF THE COMMANDER SUBCOMMITTEE

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CONFERENCE CALL

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THURSDAY
APRIL 17, 2014

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The Subcommittee met by
teleconference at 2:30 p.m. Eastern Daylight
Time, The Honorable Elizabeth Holtzman, Acting
Chair, presiding.

PRESENT

HONORABLE ELIZABETH HOLTZMAN, Acting Chair
MAJOR GENERAL (RET.) JOHN ALTENBURG
PROFESSOR GEOFFREY CORN
JOYE FROST
GENERAL (RET.) CARTER HAM
PROFESSOR ELIZABETH HILLMAN
VICE ADMIRAL JAMES HOUCK
BRIGADIER GENERAL (SEL.) LISA TURNER

ALSO PRESENT

LIEUTENANT COLONEL CANDACE HUNSTIGER,
Designated Federal Officer
LIEUTENANT COLONEL KYLE GREEN, RSP
Supervising Attorney
COLONEL PATRICIA HAM, Staff Director

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

(3:34 p.m.)

LT COL HUNSTIGER: Sure, great.

Welcome, everyone and the meeting is now open for discussion and deliberation.

REP. HOLTZMAN: This is Liz

Holtzman. Kyle told me I am the new Barbara Jones. I don't think I can read as well as she but I will do my best.

Kyle, we are supposed to be going through four, five, and six drafts?

LT COL GREEN: If we can, that is right. And again, I sent, if everybody has them, I sent the commented versions of all of those with the comments that the staff has received on each of the sections. So, it might help to either go through those comments, see if anybody else has additional comments and just go from there.

REP. HOLTZMAN: Okay, so let's go to page 15 on number IV, Commander Responsibility in Military Justice Cases.

1 That is a draft of 9 April '14.

2 OPERATOR: Joining the meeting.

3 MG ALTENBURG: Altenburg. Sorry.

4 REP. HOLTZMAN: Hi, it's Liz
5 Holtzman. We have just gotten started. We
6 are on the findings on Draft Report IV, 9
7 April '14.

8 MG ALTENBURG: Okay, thank you.

9 REP. HOLTZMAN: Okay, I don't know
10 if I need to read them, each one of the
11 findings. Maybe just number them and go
12 through them and if anybody has any comments,
13 we could do it that way. Or would you prefer
14 that I read them? Anybody prefer that I read
15 them?

16 Okay, great. So, finding number
17 1, are there any comments about this? This is
18 the issue of confusion of the term commander
19 in this regard.

20 OPERATOR: Joining the meeting.

21 PROFESSOR CORN: Geoff Corn.

22 REP. HOLTZMAN: Hi, Geoff. This

1 is Liz Holtzman. We are getting started.
2 Barbara will not be with us today. We are on
3 finding number 1, page 15 on Report IV,
4 Commander Responsibilities in Military Justice
5 cases.

6 PROFESSOR CORN: Thank you very
7 much.

8 REP. HOLTZMAN: I am not reading
9 them today. They will not be read today with
10 unanimous concurrence of the Subcommittee.

11 So, are there any comments on
12 finding number 1? Any objections?

13 What is the procedure, Kyle? Do
14 we approve finding number 1?

15 LT COL GREEN: Yes, ma'am, I think
16 that is fine. And again, a lot of these
17 comments from these sections, and I can point
18 them out, are carryovers from your initial
19 assessment in January. This one in particular
20 is.

21 REP. HOLTZMAN: Okay. So, you
22 don't have a procedure I should use?

1 LT COL GREEN: No, I think that is
2 fine, ma'am. I think unless people have
3 issues and raise them, I guess we would
4 presume that everyone is comfortable with the
5 finding or the recommendation.

6 REP. HOLTZMAN: Okay, finding
7 number 2 on page 15.

8 PROFESSOR HILLMAN: Sorry. This
9 is Beth Hillman. I'm sorry, Representative
10 Holtzman. Kyle, may I just make a comment,
11 just a general comment?

12 LT COL GREEN: Sure, of course,
13 please, ma'am.

14 PROFESSOR HILLMAN: I just wanted
15 to say I haven't been able to write the parts
16 that I said I would write last time. I'm
17 sorry I missed the call yesterday. So, I
18 don't know what you got through yesterday
19 altogether, although Kyle attempted to update
20 me in very useful fashion and I appreciate
21 that. And I appreciate all the work that you
22 all did when I was off the phone.

1 I am finding it hard to sign on to
2 the report as a whole. So, I think that I
3 will write separately, rather than, again, as
4 I did before, slowing everybody down by trying
5 to alter the specific terms of the finding.

6 So, I just wanted to set that out
7 so that you knew where I stood as you go
8 forward. Thank you.

9 REP. HOLTZMAN: Well, Professor
10 Hillman, everybody has an equal right to have
11 a say in what these findings are. So, if you
12 have some thoughts about it, I mean you are
13 not holding anybody up. You may illuminate us
14 and educate us.

15 I personally don't see that there
16 is any objection. I mean unless you don't
17 want to, you have a perfect right to do it in
18 separate views. But if you have some specific
19 points that you want to raise about some of
20 these findings, you should feel free to do
21 that. And I think that is true for every
22 member of the Subcommittee.

1 MG ALTENBURG: Yes, I certainly
2 agree. Altenburg.

3 GEN HAM: This is Carter. I
4 certainly do as well.

5 MS. FROST: Yes, this is Joye,
6 absolutely.

7 PROFESSOR HILLMAN: I appreciate
8 that from everybody. My concern is that we
9 are so far along in the process at this point,
10 in terms of the crafting of the report that I
11 don't think it can be usefully changed in a
12 way that I would be comfortable with it. And
13 that is why I am reluctant.

14 And let me be specific. So, this
15 first finding begins with a statement that
16 says criticism of the system confuses these
17 terms. You know our charter is to assess the
18 role of the commander in this. And to me, why
19 are we focused on the critics of the system
20 rather than who the commander is and what he
21 or she does and what they do? And I know many
22 other reports set that out.

1 So, it is just that the framing of
2 it is not one that matches my own
3 understanding of the issues and that is why I
4 am not -- I will just write separately to say
5 that and that you are very close to having
6 resolution on this already. And that is why
7 I think it makes the most sense for you to
8 press ahead.

9 MG ALTENBURG: Beth, this is John
10 Altenburg. Would your concern about finding
11 number 1 be addressed if we simply changed
12 "criticism" to "some observers in the military
13 justice system" but that it is not toward one
14 side, just some observers?

15 PROFESSOR HILLMAN: It is not so
16 much that. It is that the first finding here
17 says there is a confusion of terms, as does
18 this whole section sort of reads from the very
19 first paragraph that this is the evolution of
20 military justice, the role of the commander
21 reflects a constant effort to ensure good
22 orderly discipline and readiness. In other

1 words, this is a manifesto about the
2 importance of command and how careful we are
3 in selecting commanders. And to me,
4 commanders are part of the problem, as well as
5 part of the solution. And this is focused
6 entirely on the latter part, that they are
7 part of the solution.

8 And to me, starting with the
9 criticism of the military justice mixes up the
10 terms. It is true. I mean, I think it is
11 true. I agree those terms are not synonymous
12 and that most commanders are not convening
13 authorities. And certainly, as the next
14 finding states, they are not general court-
15 martial convening authorities and it would be
16 great if everyone understood that. But the
17 framing of it is what the challenge is here.

18 REP. HOLTZMAN: Okay. Any other
19 comments? Does anybody want to make any other
20 comments on finding number 1?

21 General Altenburg, do you want to
22 forward -- make your criticism -- your change

1 in any case, or are you withdrawing the
2 change, or what do you want to do?

3 MG ALTENBURG: I don't know. Does
4 anybody else think that we ought to make it
5 "some observers" and just take the word
6 "criticism" out or do you want to leave it as
7 "criticism"?

8 PROFESSOR CORN: This is Professor
9 Corn. I think that I tend to agree with Beth
10 that starting off with that sentence is a
11 little bit -- appears objective oriented. I
12 don't know why we just don't say just the term
13 commander and the person authorized to convene
14 courts-martial for serious offenses is
15 frequently confused or not widely understood.

16 MG ALTENBURG: Yes.

17 REP. HOLTZMAN: Is there any
18 objection to that? Anybody object to that
19 change?

20 Well, I guess we have agreed to
21 the change. So, what is the procedure? Kyle,
22 you will redraft that?

1 LT COL GREEN: Yes, that's fine.
2 I got your words down, Professor Corn. I will
3 redraft that. And again, just for everyone,
4 our intent is to combine all the sections,
5 once you have had a chance to review them into
6 the report. So, you will see everything with
7 the new language and then, hopefully, that
8 will reflect that. So, we have got it. Yes,
9 ma'am.

10 REP. HOLTZMAN: If I may just add,
11 Professor Hillman, this is an indication of
12 the influence you have on this Subcommittee.
13 So, I would keep going with any thoughts that
14 you have and don't be shy.

15 PROFESSOR HILLMAN: Understood.
16 Thank you, ma'am.

17 REP. HOLTZMAN: Finding number 2.
18 This, again, amplifies finding number 1 about
19 the level of a commander who refers sexual
20 assault allegations.

21 Is there any objection to finding
22 number 2, or change, alteration?

1 PROFESSOR CORN: Kyle, this is
2 Professor Corn. Kyle, I am not sure. I am
3 just looking at the one that I made a comment
4 to. Is that the one everybody else has?

5 REP. HOLTZMAN: It is Draft 9
6 April '14.

7 LT COL GREEN: All right, and
8 Professor Corn, your comment was, "Replace the
9 first sentence of that with, 'Pursuant to FY14
10 NDAA amendments to the UCMJ, only a GCMCA is
11 authorized to order trial by court-martial for
12 any offense of rape, sexual assault, rape or
13 sexual assault of a child, forcible sodomy, or
14 attempts to commit these offenses.
15 Subordinate officers, even when in position to
16 the command may not do so.'"

17 PROFESSOR CORN: I think when I
18 wrote the comment I just thought it was a
19 little more precise. And I also questioned
20 "law and practice." If we are talking about
21 the NDAA, that is a legal constraint, not a
22 practice constraint. Is that wrong?

1 PROFESSOR HILLMAN: This is Beth
2 Hillman.

3 MG ALTENBURG: Altenburg. I think
4 that is correct. I think that your language
5 is more precise about the authority.

6 REP. HOLTZMAN: Professor Hillman?

7 PROFESSOR HILLMAN: Thank you. I
8 just think that "practice" indicates that is
9 actually what is happening. And since we
10 don't have any evidence that that is not
11 actually happening, I think "practice"
12 actually extends the breadth of that finding.
13 I understand the degree of precision it is
14 true under current law, maybe. But I think
15 actually the word practice adds some emphasis
16 and adds more to that in a way that is useful
17 and accurate.

18 REP. HOLTZMAN: Okay, where do we
19 stand on this? Anybody want any further
20 changes? Where do we stand?

21 Professor Corn, you want a further
22 change?

1 PROFESSOR CORN: When I went
2 through it, I just thought if we are going to
3 talk about the finding about what the law
4 requires, just say what the law requires. But
5 if everybody is comfortable with that, I am
6 okay.

7 LT COL GREEN: And I would just
8 note this finding is a carryover from the
9 initial assessment in January.

10 REP. HOLTZMAN: Do you think,
11 Professor Corn, do you think it is, would be
12 a good idea to reference what statute we are
13 talking about? Would that help or not?

14 MS. FROST: This is Joye. And I
15 will say, as a non-attorney, I find Professor
16 Corn's suggestion much more understandable.
17 Whether you add pursuant to the Fiscal Year
18 '14 NDAA and then to the UCMJ and practice or
19 whatever, but the rest of it that continues,
20 I think is a little bit clearer to your non-
21 legal reader.

22 And then also, Professor Corn, had

1 another comment. I don't know that he is
2 talking about adding it to the finding but
3 actually adding it to the discussion part of
4 the paper, which says, "I don't remember part
5 of the background discussion explaining that
6 the GCMCA or SPCMCA is normally in command of
7 thousands of personnel and is incapable of
8 developing personal knowledge or relationships
9 with all subordinates."

10 I mean, I am assuming, Professor
11 Corn, you wanted that added to the discussion.

12 PROFESSOR CORN: To the
13 discussion, right.

14 MS. FROST: But -- yes, I agree.
15 I think again, for people who are not familiar
16 with the military, I think that would be an
17 important thing to add.

18 REP. HOLTZMAN: Professor Corn,
19 would you mind reading your amended language,
20 please?

21 PROFESSOR CORN: So, it would read
22 instead of "under current law and practice,"

1 the finding would begin, "Pursuant to the FY14
2 NDAA amendments to the UCMJ, only a general
3 court-martial convening authority is
4 authorized to order trial by court-martial for
5 any offense of rape, sexual assault, rape or
6 sexual assault of a child, forcible sodomy, or
7 attempts to commit these offenses.

8 Subordinate officers, even when in positions
9 of command, may not do so."

10 And then from there, "If a
11 convening authority has an other than official
12 interest in a particular case, the convening
13 authority is required to recuse himself."

14 REP. HOLTZMAN: This is Liz
15 Holtzman again. My only concern about that,
16 I have no problem with that language but I
17 like what Beth Hillman said about the word
18 practice.

19 And also you have left out of that
20 statement the thought that is in the present
21 draft, which talks about it is reserved to a
22 level of commander who will normally be

1 removed from the personal knowledge of the
2 accused. I think that that is kind of vital.

3 PROFESSOR CORN: Now that I am
4 looking back at it, the comment is to replace
5 "under current law and practice."

6 REP. HOLTZMAN: I see.

7 PROFESSOR CORN: And then the next
8 sentence would be, "The authority to refer
9 sexual assault..." In other words, what I was
10 trying to emphasize was we would make it clear
11 or more clear that because the only convening
12 authority with authority to refer these
13 offenses is a general court-martial convening
14 authority, it is very unlikely that they will
15 have a personal knowledge of the parties to
16 the criminal incident.

17 REP. HOLTZMAN: Okay, so do you
18 want to read it as it would stand now? So,
19 your amendment would take out the first
20 bracket -- what is in brackets -- right?

21 PROFESSOR CORN: Right.

22 REP. HOLTZMAN: -- in finding

1 number 2, and add what?

2 Would you just read that?

3 PROFESSOR CORN: And add,
4 "Pursuant to the FY14 NDAA amendments to the
5 UCMJ, only a GCMCA is authorized to order
6 trial by court-martial for those offenses.
7 Subordinate officers, even when in positions
8 of command, may not do so."

9 REP. HOLTZMAN: Okay, period.
10 Then you would have, "The authority to refer
11 sexual assault allegations is reserved..." We
12 would pick up there. Is that correct?

13 PROFESSOR CORN: Exactly.

14 REP. HOLTZMAN: Okay, do you want
15 to do something about the word practice?

16 PROFESSOR CORN: I'm okay leaving
17 it in. I think that Beth is correct. If that
18 is what the law requires, then that is what is
19 being practiced.

20 REP. HOLTZMAN: Does anybody have
21 any objection to this change? Any comments?

22 Kyle, do you have it down?

1 LT COL GREEN: Yes, ma'am.

2 REP. HOLTZMAN: Oh, okay. So, I
3 take it we are approving finding number 2, as
4 amended by Professor Corn and Professor --
5 well, not amended, and taking into account
6 Professor Hillman's concerns. Okay.

7 Finding number 3. Any comment,
8 amendment, concern with this finding?

9 PROFESSOR CORN: Professor Corn.
10 The only comment I would make is you
11 recommended inserting the word senior judge
12 advocates. And under the Secretary of
13 Defense's disposition withhold policy, an
14 initial disposition authority is required to
15 receive consultation from a judge advocate but
16 there is no qualification to that.

17 So, I don't know if "senior judge
18 advocate" reflects the same language that is
19 in the defense policy.

20 MG ALTENBURG: It certainly seems
21 to me -- this is Altenburg -- that it reflects
22 the practice.

1 PROFESSOR CORN: Right. I was
2 going to say if we are going to leave
3 "practice" in there and we have already
4 indicated that we are talking about a GCMCA,
5 I will concede that I don't know the normal
6 advice relationship in the Air Force or the
7 Navy but I would be surprised if O-3 judge
8 advocates were giving referral recommendations
9 to GCMCAs in any Service.

10 So, I don't know if there is some
11 way to do that that is consistent but I do
12 think there is value in emphasizing that as a
13 matter of, I guess, practice, we should have
14 a high degree of confidence that the lawyers
15 advising these convening authorities are
16 experienced.

17 REP. HOLTZMAN: So, do you think
18 that we need to change the word senior to
19 something else or just drop it?

20 PROFESSOR CORN: It was just a
21 proposal. I'm okay with whatever the
22 consensus is. We might want maybe

1 "experience." I don't know.

2 REP. HOLTZMAN: Or "high level" --
3 no, too narrow.

4 Well, does anybody else have any
5 comment about this?

6 PROFESSOR HILLMAN: This is Beth
7 Hillman. Because the Service branches have
8 different relationships here, I am reluctant
9 to qualify that too much with language that is
10 not, you know, that suggests more than what we
11 can actually say with certainty across the
12 Services, despite Geoff's very good point that
13 it would certainly be someone senior in the
14 Army.

15 PROFESSOR CORN: This is Geoff. I
16 vote to delete my qualification.

17 REP. HOLTZMAN: Okay, is there any
18 objection to that? Is everyone okay with
19 that? Okay, I hear no objection.

20 I, myself, actually had a question
21 about the word resolve in the very first
22 sentence. Because that sounds like a very big

1 responsibility, "resolving." Is that really
2 what the convening authority does?

3 MG ALTENBURG: What it really is
4 is a disposition decision, a decision to go to
5 trial, what level of trial, whether to go to
6 trial in the first place and those types of
7 considerations. I agree with your "resolve."
8 I know what the drafter intended but it does
9 sound like much more than a judicial or quasi-
10 judicial determination by the convening
11 authority, which is what it is.

12 REP. HOLTZMAN: Right. And of
13 course, using the word disposed is not going
14 to work for us either but there must be
15 another verb that we can use. It is not
16 coming to my mind right away.

17 REP. HOLTZMAN: Kyle, can we just
18 throw this into your lap or onto your broad
19 shoulders, whichever?

20 LT COL GREEN: We will let
21 Microsoft Word do its thesaurus magic and we
22 will come up with an alternate term for that.

1 PROFESSOR HILLMAN: This is Beth
2 Hillman. How about "make disposition
3 decisions"?

4 MG ALTENBURG: Well, that is
5 certainly accurate.

6 PROFESSOR HILLMAN: I know it
7 sounds awkward but that is really what it is.
8 If we say "dispose of," it just sounds awful.
9 We can't say that, although that would be
10 technically accurate. But "to make
11 dispositions," make decisions regarding
12 dispositions of sexual assault allegations.
13 "Disposition" has a specific legal meaning
14 that I think is consistent with what we
15 actually intend there.

16 MG ALTENBURG: Both ways Beth
17 suggests are accurate. We will just throw
18 that to Kyle and he will make something out of
19 it.

20 LT COL GREEN: Okay, we can do
21 that. Thanks very much, Professor Hillman.

22 REP. HOLTZMAN: Any other

1 suggestions, concerns, objections to finding
2 number 3? Okay, hearing none, we are going to
3 -- is that number one -- recommendation number
4 1.

5 This basically looks at suggesting
6 to the Secretary of Defense that there be an
7 evaluation of the feasibility and consequences
8 of modifying authority for specific quasi-
9 judicial responsibilities such as discovery,
10 court-martial, panel member selection, et
11 cetera.

12 Any comments, reaction,
13 disagreement, suggestions?

14 PROFESSOR HILLMAN: Representative
15 Holtzman, this is Beth Hillman again. I just
16 will add that the Comparative Systems
17 Subcommittee will make a recommendation on
18 this very point and it will need to be
19 reconciled with whatever gets said here, you
20 know further down the road.

21 REP. HOLTZMAN: So, how do we
22 leave that, if that is the case? So are you

1 going to be making a specific recommendation
2 with regard to these issues?

3 PROFESSOR HILLMAN: I think so.
4 As our committee, as the Role of the Commander
5 Subcommittee is not yet done, neither is the
6 Comparative Systems Subcommittee yet done.
7 So, I can't say for certain that it would
8 survive our review but in our preliminary
9 discussions, yes, we did set out a
10 recommendation related to the pretrial
11 responsibilities of a military judge doing
12 things that the convening authority currently
13 does.

14 REP. HOLTZMAN: So, Kyle, do you
15 have any recommendations for how we should
16 handle this? I mean just assuming -- forget
17 the substance for a minute. How should we
18 handle this, given the fact that another
19 Subcommittee is maybe making a recommendation
20 in this regard? Should we just go forward and
21 decide whether we approve this or disapprove
22 this, or change this and then just let it --

1 when they make their recommendation, it will
2 be reconciled at some point?

3 COL HAM: Ma'am, this is Colonel
4 Ham. This is Colonel Ham. Each
5 Subcommittee's report stands on its own. So,
6 they could actually be diametrically opposed
7 and the full Panel will determine whether to
8 resolve them and, if so, how.

9 REP. HOLTZMAN: Okay.

10 MG ALTENBURG: This is Altenburg.
11 And in this instance, what we are signing up
12 for here, if we all agree, wouldn't be
13 diametrically opposed to another Subcommittee
14 recommending a change because ours is pretty
15 broad-gauged and allows for looking at it and
16 studying it. It doesn't say nothing should
17 change. So, I think we would be consistent
18 really with whatever the other Subcommittee
19 comes up with.

20 REP. HOLTZMAN: Okay, so given
21 that, we have authority to proceed with this.

22 Does anybody have, again, any

1 suggestions, comments, alterations,
2 objections, thoughts, et cetera?

3 LT COL GREEN: Ma'am, this is
4 Kyle. I would just, at the end of that
5 recommendation, include the list of the
6 specific provisions during your first
7 deliberation section in March, these were the
8 specific topics of convening authority
9 responsibilities that were discussed as
10 potential areas that you wanted to recommend.
11 And I know Professor Corn did make the
12 addition of expert consultants there.

13 REP. HOLTZMAN: So, I'm sorry, I'm
14 not sure I follow. You want to list the
15 statutory references?

16 LT COL GREEN: No, ma'am. They
17 are subject topics. So, discovery oversight,
18 court-martial panel member selection, search
19 authorizations, those are just a list of
20 subjects or responsibilities that, where the
21 convening authority -- possibility that the
22 Subcommittee believes are specifically ripe

1 for consideration as to who should be doing
2 those and how that authority should be
3 divided.

4 REP. HOLTZMAN: I'm not following
5 you. What recommendation for change, if any,
6 are you making with regard to that last
7 sentence?

8 LT COL GREEN: Ma'am, I am not
9 making any recommendations.

10 REP. HOLTZMAN: Oh, okay.

11 LT COL GREEN: I was just pointing
12 out -- I wanted to clarify with the
13 Subcommittee members that that list in fact
14 does represent what you all want to recommend.

15 REP. HOLTZMAN: Right. My only --
16 this is Liz Holtzman. My only thought is I
17 don't know why we have the first clause in
18 that recommendation. This really has nothing
19 to do with the convening authority's
20 responsibility for -- and actually, I am not
21 even sure that first clause makes any sense.

22 Why don't we just start with,

1 "Further study is appropriate to fully assess
2 what positive and negative impacts would
3 result from training some pre-trial -- I just
4 don't understand why we are starting with "we
5 recommend against modifying convening
6 authority responsibilities for sexual assault
7 offenses."

8 MG ALTENBURG: I agree with
9 deleting that clause. I think it is cleaner
10 and it is more clear and it doesn't really
11 alter the meaning. I like starting with
12 "further study is appropriate" because you
13 have got the convening authority at the end
14 there, if we take Professor Corn's addition.
15 At the end of the sentence is what I am
16 talking about.

17 REP. HOLTZMAN: All right. Does
18 anybody object to that suggested alteration?
19 Any other comments about that?

20 Okay, so we would accept that.
21 And with that alteration, any objection to
22 recommendation number 1?

1 Hearing none, I guess it is
2 approved.

3 Recommendation number 2 -- well,
4 we don't have a recommendation. Do we wish to
5 make a recommendation on the non-binding
6 nature of Article 32 investigating officer
7 recommendations, in light of the NDAA change
8 that requires IOs to be Judge Advocates?

9 PROFESSOR CORN: This is Professor
10 Corn. I did express my opinion that I think
11 we should, at least, propose that the issue of
12 whether and why a general court-martial
13 convening authority can ignore a determination
14 of no probable cause made by a Judge Advocate
15 should continue to be the standard.

16 I don't think we have heard enough
17 to make a recommendation one way or the other.
18 I do think the fact that we know that
19 investigations are going to be conducted by
20 legal officers and that the focus of the
21 investigation is to assess whether there is
22 sufficient evidence to move forward with a

1 criminal allegation, raise a legitimate
2 question as to why a convening authority
3 should be able to override that no-bill
4 decision.

5 So, I think it is something that
6 should be explored further but I know Ms.
7 Frost doesn't agree with me.

8 MS. FROST: You know, I will be
9 honest. I talked to Kyle about this or we had
10 an email exchange and I wanted to make sure
11 that I understood this. I just see this one
12 as kind of going to the heart of -- that
13 sometimes a convening authority may want to
14 move forward, even though there may not be
15 sufficient evidence.

16 I just think there is going to be
17 those cases that are borderline and my concern
18 would be that if the IO is taking a very
19 legalistic only kind of approach, that it may
20 narrow the number of cases that reasonably
21 could be expected to do forward.

22 I think the whole issue of consent

1 is kind of informing where I am going with
2 this.

3 But I certainly would be willing
4 to change that to what you suggested, that the
5 Military Justice Review Group review this.

6 I am wondering, Professor Hillman,
7 if the Comparative Systems Subcommittee also
8 looked at this.

9 PROFESSOR HILLMAN: This is Beth.
10 Yes, we did and we are writing on this, too.

11 MG ALTENBURG: This is Altenburg.
12 I don't object to the language that Professor
13 Corn suggested, it be looked at hard. But my
14 own belief is that the convening authority
15 should retain the ability to consider that a
16 recommendation and not be locked into it for
17 the reason that a legally trained officer of
18 varying experiences brings one type of
19 analysis to it and the convening authority has
20 other considerations than justice and is
21 responsible for discipline. And in a very
22 close case, as Joye suggests, he may determine

1 it is important to the combat readiness of his
2 organization that he prosecute the case on
3 behalf of the victim and on behalf of the
4 organization, even knowing that the evidence
5 is relatively weak. I think that is why they
6 have that because it is a combination system
7 of both discipline and justice. And for that
8 reason, I personally think the commander ought
9 to have that opportunity.

10 PROFESSOR CORN: This is Professor
11 Corn. My point is driven primarily because we
12 know that the amendments to the Article 32
13 process are deliberately designed to align it
14 more closely with a preliminary hearing. And
15 in a preliminary hearing, when a judicial
16 officer makes a determination that the
17 evidence is insufficient to establish probable
18 cause, the prosecutor is not permitted to move
19 forward with the charge. You can do another
20 preliminary hearing.

21 I mean, there is no double
22 jeopardy issue here. If the convening

1 authority thinks that the investigating
2 officer was that deficient in their analysis
3 of the case, they could -- this could be
4 another issue that could be looked at. Could
5 you order another 32?

6 But I think that one of the issues
7 that was raised in our receipt of evidence or
8 concerns from the defense bar was their sense
9 that the momentum was swinging very heavily
10 against an individual accused of an offense
11 and it cuts both ways. If we are going to
12 turn the 32 into more of a preliminary hearing
13 than the legal determination of insufficient
14 evidence to establish probable cause, I think
15 it is worth considering whether that should
16 have some protective effect for the accused as
17 well.

18 REP. HOLTZMAN: Anybody else?

19 COL TURNER: This is Colonel
20 Turner. Perhaps I can offer an Air Force
21 perspective that may be of some use, since we
22 have been using JAGs to do our 32 hearings for

1 quite some time.

2 I don't object to saying that DoD
3 can look at this or should consider looking at
4 it. But to write it in a manner that
5 indicates which way DoD should go, I would
6 urge caution.

7 And so maybe what I can suggest is
8 although we have been using JAGs as 32
9 officers for quite some time, there are any
10 number of instances where the JAG IO will
11 recommend that it not go forward and a
12 convening authority still allows it to go
13 forward. But that is why it is important to
14 go back to our ethical standards.

15 So, we have adopted the first
16 provision from the ABA Standards for
17 Professional Responsibility but not the rest
18 of them as it comes to prosecutorial
19 discretion.

20 So, if you don't mind, if I can
21 just read. Even though an IO in the Air Force
22 would recommend it not go to trial, there is

1 still an ethical responsibility as follows for
2 the subsequent trial counsel and certainly
3 SJA.

4 "Discretion in the charging
5 decision. It is unprofessional conduct for a
6 trial counsel to institute or cause to be
7 instituted or permit the continued pendency of
8 criminal charges when it is known that the
9 charges are not supported by probable cause.
10 Trial counsel should not institute or permit
11 the continued pendency of criminal charges in
12 the absence of admissible evidence to report
13 a conviction."

14 So, there is still that probable
15 cause basis, even though an IO doesn't
16 recommend that it go forward. And that is
17 where the area of the discretion of the
18 convening authority exists.

19 PROFESSOR CORN: Colonel Turner,
20 this is Geoff Corn.

21 So, what is the trial counsel's
22 ethical responsibility when the judge advocate

1 IO says no-bill, the convening authority
2 refers the case to trial? So, you have the IO
3 saying there is no probable cause and the
4 convening authority overriding that judgment
5 and you have an ethical rule that says the
6 trial counsel is not supposed to prosecute the
7 case?

8 COL TURNER: If a trial counsel or
9 SJA believes there is probable cause, they can
10 make that independent, personal analysis and
11 recommendation to the convening authority.

12 And an IO, sometimes, will
13 recommend a case doesn't go forward for
14 reasons other than a lack of probable cause.

15 PROFESSOR CORN: I get that,
16 totally. And I am not suggesting that that
17 shouldn't be discretionary. I understand
18 that. I just --

19 All I am suggesting is because we
20 are making the 32 more like a preliminary
21 hearing, it is worth exploring what the
22 consequence of that should be on the

1 discretion of the convening authority.

2 REP. HOLTZMAN: This is Liz
3 Holtzman. My only view about that, at the
4 moment, is that the analogy doesn't quite hold
5 up because the judge advocate, after all, is
6 not the trial judge. It is not the same
7 thing.

8 And so, you have elevated the
9 hearing officer for the Article 32 but it is
10 still not a trial judge with whatever
11 additional experience, responsibility,
12 objectivity, removal from the fray, if you
13 will, comes with that. So, I am not entirely
14 persuaded, Professor Corn, that we should do
15 anything about this.

16 I am not sure that there should
17 even be a study of it at the moment because,
18 I don't know, it doesn't strike me that the
19 change itself warrants that study. Because I
20 think for the points that were made both by
21 Colonel Turner and by Joye and my own concern
22 about the fact that there are prosecutors and

1 very wise and very experienced prosecutors who
2 will still have different views because of
3 their past experience. They may discount the
4 issue of consent. They may have certain views
5 about issues of consent.

6 And so it doesn't mean that there
7 is anything unethical going on. It is just
8 that people may view certain facts in a very
9 different light. And I think that is why, it
10 seems to me, that we still need the
11 commander's decision here.

12 But that is just my view and I
13 don't know how other people feel about it.

14 PROFESSOR CORN: This is Professor
15 Corn. It was just a suggestion to consider
16 it. If other people think it is not worth
17 suggesting, I will withdraw it, no problem.

18 REP. HOLTZMAN: Well, you only
19 have me. I don't know where everybody else.

20 Let's just put it this way. Let's
21 start with your suggestion and see what kind
22 of consensus there is. How many people want

1 to see the study that he suggested?

2 MS. FROST: This is Joye. I have
3 no problem with reviewing it further.

4 REP. HOLTZMAN: Is there consensus
5 on that? Do people agree with that?

6 GEN HAM: This is Carter. I agree
7 with that but I do agree with Colonel Turner.
8 I am certainly not at a point where I am ready
9 to recommend a specific course of action,
10 other than the Joint Service Committee or
11 others ought to review the matter.

12 MG ALTENBURG: That is my view as
13 well. Altenburg.

14 PROFESSOR HILLMAN: This is Beth.
15 I would just say that this is sort of
16 attention that results from the incomplete
17 judicialization of these processes. And that
18 is the sort of comparative perspective from
19 which the Comparative Systems Subcommittee
20 will address this.

21 But on the merits in terms of this
22 proposal, I think there is no harm in

1 recommending further study. So, I don't
2 object to recommending further study.

3 REP. HOLTZMAN: So, personally, I
4 do but I see it is overwhelming in favor of
5 the study. So, I guess we support the study.

6 But are we agreed, is there
7 general agreement on Colonel Turner's
8 suggestion that the recommendation for a study
9 not suggest any conclusion that we are tilting
10 one way or the other on that? Everyone in
11 agreement with that?

12 MG ALTENBURG: Definitely, as far
13 as I am concerned. As I have expressed, I
14 don't think it should change, I just don't
15 mind it being studied.

16 REP. HOLTZMAN: Okay. So, I don't
17 hear any objection to Colonel Turner's
18 amendment on that.

19 Okay, recommendation number 3. I
20 guess we have finished with recommendation 2.
21 Anybody else have any recommendations they
22 want to make on the Article 32 investigating

1 officer recommendations?

2 What about the next
3 recommendation? Does any member want to
4 comment on any other procedure or authority
5 changes enacted through the recent NDAA
6 provisions, Article 60 restrictions, convening
7 authority and so forth? Any other
8 suggestions?

9 PROFESSOR HILLMAN: Representative
10 Holtzman, this is Beth Hillman again. It
11 seems to me that we should -- maybe this a
12 finding instead of a recommendation but the
13 NDAA has restricted in significant ways the
14 convening authority's post-trial role. Is the
15 post-trial part in a different place here or
16 is this all in the -- I mean, this
17 specifically references Article 60, right?
18 So, this is our chance to talk about that in
19 particular. I mean we ought to at least
20 acknowledge that. Because part of what we are
21 facing is a one-way ratchet towards greater
22 scrutiny, higher prosecution rates, and less

1 post-trial sentence -- fewer post-trial
2 sentence reduction possibilities.

3 And I think it is worth noting in
4 a comprehensive look at the role of the
5 commander that Article 60 restrictions do
6 change that.

7 REP. HOLTZMAN: Are there -- Kyle,
8 do we have it someplace else in our report?

9 LT COL GREEN: No, ma'am, we do
10 not. There is no findings or recommendations
11 related to Article 60. Professor Hillman, you
12 are right. This is the section where it is
13 discussed. So, if there is a finding or any
14 conclusion, this would be where it should be
15 provided.

16 REP. HOLTZMAN: Does anybody
17 disagree with Professor Hillman's suggestion
18 about having a finding about the consequences
19 of the changes or the description of the
20 changes to Article 60 in our findings? It
21 would be finding number 4.

22 COL TURNER: Colonel Turner. I

1 don't have an objection. I would just like to
2 see the language, though.

3 REP. HOLTZMAN: Anybody else have
4 a comment about that?

5 Kyle, do you want to draw up some
6 language and we will review it?

7 LT COL GREEN: We can. We can do
8 that. And Professor Hillman, I might get your
9 assistance on that, if I could.

10 PROFESSOR HILLMAN: Of course.
11 You just have to catch me, Kyle. But I will
12 try my best to get with you on that.

13 REP. HOLTZMAN: Catch you if you
14 can, right -- if he can.

15 PROFESSOR HILLMAN: It is a time
16 issue, ma'am. I'm sorry.

17 REP. HOLTZMAN: I was just joking.

18 Okay, so we are finished with
19 number 4. Well, I guess not.

20 Do we have any comments -- I don't
21 know if we want to go through language by
22 language, but are there any other comments on

1 the text of this that people feel compelled to
2 raise at this point?

3 I have one that Beth Hillman
4 alluded to in her earlier remarks that I would
5 just like to say. On page one, where it talks
6 about the evolution of the military justice
7 system and the role of the commander, on the
8 very first sentence, it reflects a constant
9 effort to ensure good order, discipline, and
10 the readiness of U.S. forces. I think
11 "constant" may be a little bit over the top.
12 We might say "systematic" or "continuous"
13 would satisfy me. But I don't know if anybody
14 feels the same way.

15 MG ALTENBURG: I like the word
16 systematic better than the word constant.

17 REP. HOLTZMAN: Anybody else have
18 any feelings about that? Disagree?

19 Professor Hillman, does that make
20 you feel better?

21 PROFESSOR HILLMAN: Much. Thank
22 you.

1 REP. HOLTZMAN: Any other comments
2 that anybody else wants to make on the text?

3 LT COL GREEN: Ma'am, this is
4 Kyle. The comments that are included there,
5 the Staff will, if there aren't any additional
6 discussions on those, the staff will try to
7 incorporate or clarify based on your points
8 that we appreciate that and we will include
9 that in the second round in the revised.

10 REP. HOLTZMAN: Okay. I have a
11 bunch of comments but I am just going to send
12 it to the Staff. That was the only one that
13 I thought required review by everybody.

14 Anyone else have any thoughts or
15 do you want to go on now to number 5?

16 Okay, so we are going on to
17 Section 5: Legislation and Policy Affecting
18 Commander Roles and Responsibilities in Sexual
19 Assault Prevention and Response. That is
20 Draft 9 April '14.

21 Okay, we will turn to the findings
22 and recommendations first. And if everybody

1 could number the findings, I think, and
2 recommendations that probably would make it a
3 little easier.

4 Let's go to finding number 1. I
5 am not going to read it unless somebody
6 desperately wants that. Are there any
7 suggestions, changes, comments, et cetera?

8 COL TURNER: Ma'am, could I --
9 Colonel Turner. I just want to make sure I am
10 looking at the right copy.

11 REP. HOLTZMAN: Okay.

12 COL TURNER: This is the one dated
13 Draft 9 April?

14 REP. HOLTZMAN: Yes, '14.
15 Correct.

16 COL TURNER: Thank you.

17 REP. HOLTZMAN: Okay and so it is
18 on page 13, where we have Potential Part V
19 Subcommittee Findings and Recommendations.

20 Okay, so finding number 1. Does
21 anybody have any comments about this? Do you
22 want me to read it or are we okay with not

1 reading it? I'm not going to read it, then.

2 Anybody have any --

3 LT COL GREEN: This is --

4 REP. HOLTZMAN: Yes?

5 LT COL GREEN: Ms. Holtzman, this
6 is Kyle. Again, this is a carryover from the
7 initial assessment in January. We did update
8 some language, based on some just
9 clarification words from Professor Corn. And
10 I believe, I'm not sure, some were from
11 Professor Corn. Some may have been from
12 Colonel Turner. I can't -- I'm mixing.

13 MG ALTENBURG: We're in Section 5.
14 Is that right? Page 13.

15 REP. HOLTZMAN: Section 5, page 13
16 is a draft entitled 9 April or dated 9 April
17 '14.

18 MG ALTENBURG: My Section 5 like
19 that has findings on page 12.

20 PROFESSOR HILLMAN: Me, too.

21 LT COL GREEN: If you can look at
22 the copies that I sent out yesterday that

1 incorporate the member comments, I think those
2 are the ones that Ms. Holtzman is referring
3 to.

4 MG ALTENBURG: Okay, I am working
5 off of -- no, I am working off of yesterday's
6 email.

7 LT COL GREEN: With the comment
8 bubbles to the side, sir?

9 MG ALTENBURG: Yes. Yes.

10 LT COL GREEN: Okay, it may just
11 be paginating different on different ones.

12 MG ALTENBURG: All right.

13 REP. HOLTZMAN: Okay, so let me
14 read it so everybody at least has the same
15 text, we can be sure that we have the same
16 text.

17 Finding number 1. "Congress has
18 enacted significant amendments to the UCMJ to
19 enhance a response to sexual assault in the
20 military and the DoD implemented numerous
21 changes to policies and programs for the same
22 purpose. Some changes have only just been

1 implemented and other amendments to the UCMJ
2 have not yet been implemented. And DoD has
3 not yet evaluated what impact these reforms
4 and changes will have on sexual assault
5 reporting or prosecution." Does everyone have
6 the same finding?

7 MG ALTENBURG: I have it on page
8 12, yes. Kyle was right. It is just a
9 different pagination.

10 REP. HOLTZMAN: Okay. Any
11 comments on this finding? Objections,
12 thoughts, or anything else you would like to
13 say?

14 I would just like to add one thing
15 at the end, where it says that DoD has not yet
16 evaluated what impact these reforms and
17 changes will have on sexual assault reporting
18 and prosecution. There is also the question
19 not just on reporting or prosecution but on
20 the incidence of sexual assault in the
21 military. I don't know whether that is
22 something that would be evaluated but that is

1 kind of underlying.

2 MS. FROST: Yes, that is a really
3 good point.

4 MG ALTENBURG: And I think it will
5 be. That is what SAPRO is all about. So we
6 might stick the word incidence, comma,
7 reporting, comma, or prosecution.

8 MS. FROST: Yes.

9 PROFESSOR HILLMAN: This is Beth.
10 Should we just narrow that then and just take
11 out that last evaluation point? I feel like
12 that finding really says there has been
13 significant change in statutes and
14 regulations. Some have only just been
15 implemented. Others have yet to be
16 implemented.

17 And then that last part really,
18 DoD has, I mean there is some sense we are in
19 ongoing evaluation of for instance the special
20 victims counsel and what impact it is having.
21 So, there certainly is some evaluation that
22 does already exist. So, I am not sure it is

1 right to say they haven't yet evaluated any of
2 this.

3 So, if we just narrow that, that
4 would be easier for me. The incident rate is
5 a crucial part, too, obviously.

6 REP. HOLTZMAN: Do you want to say
7 "DoD has not yet fully evaluated"? Would that
8 solve the problem, Professor Hillman?

9 PROFESSOR HILLMAN: It might if we
10 add what you said, that we would have to add
11 on the incidence.

12 REP. HOLTZMAN: Yes, at the end of
13 -- my suggestion is to add where it says
14 "sexual assault reporting or prosecution" --
15 well, "sexual assault reporting," comma, "or
16 prosecution," comma, "or the incidence of
17 sexual assault in the military." I would add
18 that.

19 But I thought your comment was
20 that DoD has been evaluating some of these
21 things, maybe it has not fully evaluated. So,
22 I thought maybe if that were your concern,

1 that we would add the word fully in front of
2 "evaluated" but maybe I haven't understood
3 your concern properly.

4 PROFESSOR HILLMAN: You did. That
5 would be fine. I just think this single
6 finding says two things. It says first, there
7 has been a lot of change and then it says
8 second, we don't know what the impact of that
9 change has been. I think both are correct.
10 The second is a little more tenuous than the
11 first, that's all. If that is modified, I'm
12 fine with having it modified.

13 MG ALTENBURG: Perhaps we just
14 make that last part of the thing and "DoD is
15 evaluating."

16 REP. HOLTZMAN: Fine.

17 MG ALTENBURG: It is inconclusive
18 to say it is evaluating what impact these
19 formative changes will have, and then the
20 language that you suggested, Ms. Holtzman,
21 about incidence.

22 REP. HOLTZMAN: Yes. Okay, does

1 anybody have further comments, objections,
2 thoughts?

3 MS. FROST: I do because
4 prosecution is not synonymous with conviction.
5 And I also think that this is something that
6 DoD needs to be tracking as well, whether
7 there are, I don't know, I guess, I would say
8 successful prosecutions. I guess defense
9 counsel would say something a little
10 different.

11 But I actually could envision a
12 scenario where you have a lot more
13 prosecutions but the conviction rate could go
14 down.

15 REP. HOLTZMAN: This is Liz
16 Holtzman. My sense is that the word
17 prosecution encompasses the conviction rate.
18 But if you don't -- if people don't agree with
19 that.

20 GEN HAM: That's how I see it. I
21 agree with that.

22 MS. FROST: The prosecution, in

1 and of itself, you would read that as
2 convictions.

3 REP. HOLTZMAN: Well, you need to
4 include it.

5 MG ALTENBURG: I think when you
6 say prosecution, you imply.

7 MS. FROST: Okay.

8 MG ALTENBURG: I think.

9 MS. FROST: That's fine.

10 COL TURNER: I'm fine with that.

11 REP. HOLTZMAN: Okay, so now I
12 think we have in front of us a proposal,
13 General Altenburg has said it would read "and
14 DoD" --

15 OPERATOR: Joining the meeting.

16 COL HAM: Colonel Ham.

17 REP. HOLTZMAN: Hi, Colonel.

18 We would be making the following
19 change. It would read "and DoD" -- this is
20 the second to the last line of finding 1.
21 "DoD is evaluating what impact these reforms
22 and changes will have on sexual assault

1 reporting or prosecution" -- well, it should
2 be and -- "sexual assault and prosecution and
3 the incidence of sexual assault in the
4 military."

5 MG ALTENBURG: Might I suggest
6 that it read "will have on sexual assault
7 incidences," comma, "reporting," comma, "and
8 prosecution?"

9 REP. HOLTZMAN: Fine. That is
10 fine with me.

11 MG ALTENBURG: It would just -- it
12 has got the parallelism.

13 REP. HOLTZMAN: Yes, thank you for
14 the stylistic changes.

15 Okay, now that everyone is fully
16 confused -- just joking -- any comments about
17 that? Any objection, thoughts, refinement?

18 Okay, so we had no objection to
19 that. We can now approve finding number 1
20 with the amendment. Thank you.

21 Finding number 2. Implementing
22 the statutory convening authority, which deals

1 with the, implementing the statutory convening
2 authority mandate. Any thoughts on finding
3 number 2, comments?

4 PROFESSOR HILLMAN: This is Beth
5 Hillman. This is the only one where this is
6 based on the assessment of cost that we got
7 from DoD on that mandate. But we didn't get
8 assessments of costs on all these other ones.
9 I am uncomfortable with making a conclusion
10 about this without -- we don't have any
11 assessments on costs on all these other
12 measures that have gone forward. So, this
13 pulls out one part of that, of all the
14 legislation that is summarized but not
15 analyzed up above. And I think it is a thin
16 read that we are drawing that conclusion based
17 on.

18 That is a pretty strong finding
19 there. It is definitive as to cost.

20 REP. HOLTZMAN: So, what are you
21 proposing?

22 PROFESSOR HILLMAN: I would strike

1 that finding. I think that that is an issue
2 with everything we basically say. You know
3 all the different changes in the Article 32
4 investigating officer and changes with who
5 might -- many of the different issues that
6 come up have costs that are attached but this
7 is the only one where cost is actually in a
8 finding here that we are considering that.

9 I think resources are a critical
10 thing to consider, especially in the draw down
11 environment that we face now. But it is
12 uneven for us to write about it on this and
13 not on any of the other ones.

14 REP. HOLTZMAN: Any other
15 comments?

16 MG ALTENBURG: Well, another view
17 is that this is the one change that was
18 suggested that really does involve what
19 apparently are enormous costs. There may be
20 some costs attached to having 32 officers that
21 are lawyers and a few of the other changes but
22 this part is a more dramatic change and

1 obviously more dramatic expense will be
2 involved, I think. I think the people that
3 testified made that pretty clear.

4 PROFESSOR CORN: This is Professor
5 Corn. That is my recollection as well,
6 particularly when I am thinking specifically
7 of General Pede's testimony. He went through
8 some very extensive discussion and
9 presentation of the institutional burden and
10 the challenges that will confront. Of course,
11 always emphasizing that they will execute the
12 mission, whatever it is.

13 But I do think the personnel and
14 fiscal considerations related to this were
15 emphasized as a concern more so by some of the
16 witnesses than other changes that had been
17 addressed.

18 COL HAM: This is Colonel Ham.
19 I'm not sure the other statutory requirements
20 have a specific prohibition on additional
21 resources and this particular statutory
22 provision does have a specific prohibition on

1 additional personnel or resources, if that
2 makes a difference to anybody.

3 REP. HOLTZMAN: This is Liz
4 Holtzman. I think that part of the problem
5 with this finding is it is very vague because
6 the statutory convening authority mandate --
7 oh, it is in the MJIA, so it is only
8 Gillibrand's bill that we are talking about.
9 And maybe if we narrowed that and included
10 what Colonel Ham said, it would be clearer,
11 which is that the change proposed by the MJIA,
12 which will involve the -- well, I'm just
13 thinking of how we would word it. But to be
14 more specific and concrete in terms of what
15 the change would be, and then say, on the
16 other hand, however, the legislation prohibits
17 any additional funding, the consequence of
18 this.

19 And then, I guess it is the second
20 finding, maybe it should be after that finding
21 number 3, which is sort of related to it,
22 maybe the two of them could be combined in

1 some way so that we -- because I found this
2 very vague and confusing, actually.

3 I don't know if anyone else had
4 that problem.

5 Well, okay, so now what do we do
6 about this? Beth Hillman wants to strike this
7 section. Maybe we should just confront that
8 proposal. Do we have a consensus in favor of
9 striking this section -- this finding number
10 2?

11 PROFESSOR CORN: This is Professor
12 Corn. I think it should stay in.

13 MS. FROST: This is Joye. I, as
14 well. I think the reassignment of O-6 judge
15 advocates would be a real issue.

16 MG ALTENBURG: This is Altenburg.
17 I think it goes -- I agree with what both of
18 you said but I think it goes far beyond
19 finding the O-6 judge advocates. It is an
20 enormous change and I think this finding is
21 actually pretty accurate.

22 REP. HOLTZMAN: So, --

1 MG ALTENBURG: The title of this
2 section is legislative changes and policy
3 changes and their impact. I think it is
4 appropriate for us to be commenting on that
5 specific proposed change in Senator
6 Gillibrand's legislation.

7 PROFESSOR HILLMAN: Representative
8 Holtzman, may I make a recommendation if that
9 is the direction that we are going to go?

10 REP. HOLTZMAN: Yes.

11 PROFESSOR HILLMAN: This draft is
12 so light on analysis of the Act. I mean it
13 describes it here. I am just looking for
14 support in the draft for what the finding is
15 there. And there is just, there isn't an
16 analysis. There is not really support in the
17 draft for that.

18 I mean maybe this is just a
19 structural issue. When we make a finding,
20 will there be support that follows? I notice
21 there is a comment also that you made in the
22 text of this, which is on page eight, where

1 the Military Justice Improvement Act is
2 introduced and then reviewed. There is just
3 no analysis of it in here to support what our
4 findings are.

5 LT COL GREEN: Professor Hillman,
6 it is actually in the footnotes for these
7 proposed legislation. It is footnote 42 is
8 where this is documented and it comes from the
9 letter to the RSP from the Assistant Secretary
10 of Defense on January 28th, as well as
11 something from General Pede's discussion in
12 October.

13 PROFESSOR HILLMAN: Right. I see
14 that in the footnote. So that is that, then.
15 We just -- it is -- this is a huge -- this is
16 a big -- these are big Acts like the Victim
17 Protection Act has a short summary, too. And
18 I do see it now. I am looking at footnote 42.
19 That does have that information in there.

20 But this is a big bill with a lot
21 of different pieces. All of these differences
22 are large and it seems more analysis in here

1 would support whatever we decide to say. I
2 mean, that footnote is much more persuasive to
3 the rest of you than it is to me.

4 But that aside, I think that a
5 little more discussion of the -- anyway -- or
6 maybe just shifting some of that into the
7 text. Maybe that is all that I would like for
8 you to have to do right there. But that's
9 all. Thanks.

10 REP. HOLTZMAN: Well, this is Liz
11 Holtzman. I agree about shifting that into
12 the text because I have a note right next to
13 it that says, why is this information in a
14 footnote.

15 And I think that is a very good
16 point in general that she raises. If we are
17 making a finding, I don't know whether we want
18 to refer to the text that the finding relates
19 to when we make the finding but if it is
20 important enough to be a finding, then it
21 should be in the text.

22 COL TURNER: And are there

1 additional examples? For example, the Special
2 Victims Counsel Program, did any of the
3 Services -- I mean they almost had to redirect
4 resources, I am assuming, to support that
5 program.

6 COL HAM: They were actually,
7 there was \$25 million either in the NDAA or
8 the Appropriations Act for Special Victim
9 Counsel Program.

10 MS. FROST: Oh, in the '14 NDAA?

11 COL HAM: Yes, either in the NDAA
12 or the Appropriations Act. I can't remember
13 which one. They got \$25 million specifically
14 for that program.

15 COL TURNER: Well, then we
16 probably would not want to include that one,
17 then.

18 REP. HOLTZMAN: No, but it might
19 be an interesting contrast to point to that if
20 you want to put that in a footnote underneath.
21 If you put this in the text about the footnote
22 42, move that into the text, you might put a

1 footnote to that saying the Special Victims
2 Counsel Program, which also entails
3 substantial additional personnel, was
4 appropriated -- was given an appropriation of
5 \$25 million in whatever Act it was.

6 I mean, I think that, Professor
7 Hillman, I think there is an important
8 distinction in the sense that Senator
9 Gillibrand has said this program will not --
10 creating this defense-prosecution team will
11 have no additional resources, cannot get
12 additional resources. So, that is the
13 differences.

14 And I think maybe it is inartfully
15 worded but I think that that creates a serious
16 problem because it --

17 PROFESSOR HILLMAN: I think --
18 pardon me for interrupting you, Representative
19 Holtzman --

20 REP. HOLTZMAN: Oh, please, I'm
21 finished.

22 PROFESSOR HILLMAN: -- your point

1 advances that, actually, if you can put in
2 there the cost of some of these other measures
3 but we don't have any of that that is in here
4 right now.

5 I mean, what are all these others?
6 What is SAPRO's budget? I mean, these are
7 things that didn't exist before. If we could
8 just specify that there are resources that are
9 attached to some of these things, it would
10 help even out the separate. And I understand
11 the rationale for treating this differently.
12 I just disagree with the certainty with which
13 that conclusion is about how excessive the
14 cost would be.

15 But that aside, I think the larger
16 framework of cost would help.

17 REP. HOLTZMAN: Well, do we have
18 -- Kyle, do you have some information about
19 some of the other programs? Have they been
20 given additional appropriations, SAPRO and
21 other programs involved with sexual assault,
22 do we know?

1 COL HAM: Ma'am -- go ahead, Kyle,
2 I'm sorry.

3 LT COL GREEN: No, ma'am, if you
4 know because I don't. I'm not sure what
5 information we have from RFIs.

6 COL HAM: This is Colonel Ham.
7 Yes, we asked for a full listing of all the
8 different programs, if they could estimate the
9 cost or if they knew the cost to tell us. It
10 is 150 pages long what we got back. And I
11 know DoD SAPRO gets -- I don't know the exact
12 amount -- many millions a year but I'm not
13 sure if it is a special appropriation to them
14 or if DoD gives them the money. That level of
15 detail, I don't know. It is many millions of
16 dollars a year, I know that much, but I can't
17 tell you the exact number.

18 MS. FROST: This is Joye. I don't
19 think the finding is stating that the costs
20 are excepted. I think it is pointing out that
21 there are costs attached. And this is about
22 the role of the commander, which is why I

1 think there was more of a narrow focus there.
2 But I agree with what Professor Hillman says.
3 I'm afraid that the justification for the
4 finding or conclusion could be beefed up in
5 the body of this section.

6 REP. HOLTZMAN: Okay, so maybe we
7 should just -- anybody want to make any other
8 comments? I will try to parse out the
9 different pieces here.

10 First, do we want, basically, to
11 take the text of footnote 42 and put it into
12 the main body of the report? Does anybody
13 disagree with that or have any comment about
14 that?

15 LT COL GREEN: Ms. Holtzman, you
16 raised some issues as well, and Professor
17 Hillman, you pointed out the limited analysis
18 provided on the pending legislation. And the
19 Staff is sitting here and I think we owe it to
20 you to go back and look at each of the pending
21 legislation and see what additional analysis
22 or materials we have that we can strengthen

1 that section. So, we will do that for round
2 two of your review.

3 PROFESSOR HILLMAN: Thank you,
4 Kyle. That would be great.

5 REP. HOLTZMAN: So, at the very
6 minimum, we will take footnote 42 and put it
7 in the text.

8 Secondly, do we want to make any
9 other changes in finding number 2? I take it,
10 Professor Hillman, you are opposed to finding
11 number 2. But anybody else have any objection
12 to it?

13 So, we are approving finding
14 number 2. I just want to make sure I am
15 reading the silence correctly. Okay, so we
16 have approval of finding number 2.

17 Finding number 3. Oh, were we
18 going to put in or are we going to put in the
19 point that Colonel Ham made about the fact
20 that there is a restriction on any additional
21 funding for this program?

22 Does that belong in finding number

1 2 or finding number 3?

2 LT COL GREEN: Ms. Holtzman, I
3 think it belongs really to both but I think we
4 can add some language after the reference to
5 the MJIA that just refers to the statutory
6 restriction on any additional resources.

7 REP. HOLTZMAN: Okay, does anybody
8 have any objection to that in finding number
9 2, adding language that will make it clear
10 that there is a prohibition on additional
11 funding for the implementation of the Special
12 Defense Panel or whatever you call it program?

13 Okay, then so can we go now to
14 finding number 3? Any comments on this,
15 objections, thoughts, et cetera?

16 I don't hear any comments or any
17 objections. So, are we approving finding
18 number 3? Okay, nobody is objecting to
19 approving finding number 3. So, finding
20 number 3 is approved. I don't know, Beth,
21 whether you have a standing objection.

22 PROFESSOR HILLMAN: Indeed.

1 REP. HOLTZMAN: I want to include
2 you in that.

3 PROFESSOR HILLMAN: Right. It is
4 the same as the other one but I don't need to
5 restate it.

6 REP. HOLTZMAN: Okay.

7 PROFESSOR HILLMAN: But yes, thank
8 you.

9 REP. HOLTZMAN: Okay, so now we
10 are up to recommendation number 1. "Congress
11 should clarify the obligation established in
12 Section 2 of the Victims Protection Act of
13 2014."

14 Maybe I should read that. It
15 seems a little complex. "Congress should
16 clarify the obligation established in Section
17 2 of the Victims Protection Act. While the
18 Secretarial review may be warranted where the
19 Staff Judge Advocate disagrees with the
20 convening authority's decision not to refer
21 sex-related offenses, it is less clear whether
22 a differing opinion from the senior trial

1 counsel detailed to the case triggers
2 mandatory reporting to superior command and/or
3 Secretarial review."

4 So, this is basically a
5 recommendation about the ability of senior
6 trial counsel -- I'm trying to rephrase it --
7 differs from the -- thinks that the case
8 should not be prosecuted. Is that where we
9 are going? Kyle, maybe you can restate this.

10 LT COL GREEN: Right. This is a
11 provision that if the senior trial counsel has
12 a differing opinion from the convening
13 authority now, even if the staff judge
14 advocate agrees with the convening authority,
15 then that would elevate the review required
16 for Secretarial review.

17 MS. FROST: Well, this is Joye.
18 And I did put in a comment but I am not sure
19 I really understand. If the trial counsel
20 disagrees, I mean, they can't override the
21 convening authority. Right? I mean, that is
22 --

1 LT COL GREEN: And I think that is
2 what this gives them is that the senior trial
3 counsel assigned to the case would then have
4 the ability to have a disagreeing opinion.
5 And that would create a case that would then
6 have to go forward for senior review.

7 MS. FROST: Does this happen very
8 often?

9 PROFESSOR CORN: This is Professor
10 Corn. Kyle, I have some recollection that
11 this uncertainty also is relevant to the
12 situation where a trial counsel subordinate to
13 the staff judge advocate is the principal
14 legal advisor to a special court convening
15 authority and whether or not a disagreement
16 between the special court-martial convening
17 authority and the trial counsel would trigger
18 the same type of elevated review requirement
19 as would occur, should the staff judge
20 advocate disagree with a disposition decision
21 by the GCMCA.

22 I seem to have some recollection

1 that we discussed this. And then we got into
2 the whole question of the difference between
3 the Services of what level of JAG officer
4 advises special court-martial convening
5 authority. Is that related to this as well or
6 am I just not remembering that accurately?

7 COL HAM: This is Colonel Ham.
8 Maybe Kyle has the provision in front of him.
9 The statutory language is "senior trial
10 counsel," which can vary by Service. But a
11 lot of times it is a captain, an O-3.

12 REP. HOLTZMAN: This is Liz
13 Holtzman. This grows out of my complete
14 ignorance. But how would a trial counsel be
15 involved if you just had the -- if the
16 convening authority said, as the judge
17 advocate, there is a case -- an allegation.
18 And the special judge advocate has reviewed it
19 and said prosecution is not warranted. The
20 convening authority says prosecution is not
21 warranted. How is there a trial counsel that
22 is even --

1 MG ALTENBURG: The trial counsel
2 gets involved with the case from the very
3 beginning. And a trial counsel could have a
4 case that he thinks should be prosecuted. He
5 has confidence in the victim, even though
6 there may be some problems, the typical
7 things. The CNA had a case like this where
8 this type of offense and the trial counsel
9 tries to push it up through the legal side;
10 gets a 32; and the staff judge advocate
11 finally gets a look at it and says this case
12 is not going to trial. I recommend to the CG
13 that it not go to trial and they do that.

14 But here is this captain who has
15 been working with the victim for three or four
16 months, who believes honestly that this case
17 really ought to go to trial and he disagrees
18 with his superior lawyer and he disagrees with
19 the CG.

20 REP. HOLTZMAN: Right.

21 MG ALTENBURG: I think that is the
22 scenario that this --

1 REP. HOLTZMAN: Okay, that part I
2 understand. But I just didn't understand that
3 the trial counsel got involved in a case at
4 that early a stage. That was my only
5 question.

6 MG ALTENBURG: Yes, the trial
7 counsel are involved sometimes the day after
8 the offense occurs. At least within two or
9 three weeks, the trial counsel is working the
10 case, even before the 32, in most places.

11 MS. FROST: And this is Joye.
12 Again, because I am struggling with this one
13 as well, what if the trial counsel disagreed
14 with everybody and said the case should not be
15 prosecuted? Would they just, would the
16 convening authority then just say fine, then
17 we will find another --

18 MG ALTENBURG: If the trial
19 counsel said he didn't have enough confidence
20 in the case and he thought ethically, or for
21 some other reason, he or she couldn't try it,
22 just say that to the JAG and get another trial

1 counsel.

2 MS. FROST: Okay, thank you.

3 LT COL GREEN: And Ms. Frost, the
4 provision specifically in Section II if the
5 trial counsel believes the case should and the
6 convening authority decides not. So, it
7 restricts --

8 MS. FROST: We might want to make
9 that a little bit more clear. I think it is
10 assumed but again, some of the people who are
11 reading this might not.

12 But if it is really the trial
13 counsel is stating that they believe that it
14 should be prosecuted --

15 MG ALTENBURG: It is unfortunate
16 that we are stuck with this legislation and it
17 really kind of addresses a one-off type of
18 situation, I am sure that the prosecutors who
19 are on the phone, both civilian and military,
20 had lots of situations where there is
21 disagreement among various levels in the
22 district attorney's office. Sure, those are

1 usually resolved very professionally. But now
2 we have got this provision stuck in here where
3 this theoretical prosecutor could do something
4 to go past everybody else about the
5 prosecutorial discretion exercise.

6 COL HAM: Colonel Ham. It would
7 be like a local prosecutor going to the
8 governor, if they disagreed with their
9 supervising prosecutor. This is Colonel Ham.

10 COL TURNER: Colonel Turner. And
11 that local prosecutor may be first year out of
12 law school.

13 PROFESSOR HILLMAN: This is Beth
14 Hillman. We are also dealing with this on the
15 Comparative Systems Subcommittee but we are
16 deferring as much of the legislative stuff to
17 this body right here.

18 So, I strongly recommend that we
19 make a statement about what we think it should
20 say, rather than saying in both this and the
21 next recommendation, Congress should clarify.
22 I think we should tell them what to do. We

1 know more about this. The views you just
2 expressed now are more informed than the
3 members who are drafting this, necessarily.
4 That is why we have been appointed.

5 So, I would make a recommendation
6 for what this is. This is another, is another
7 one-way ratchet that gives senior trial
8 counsel another attempt by going to the
9 Secretary to get the prosecution to go
10 forward. What do we think should happen in
11 those situations? If we think what should
12 happen is what happens now, I think we should
13 say that. If we think there is a process by
14 which it could be documented, I think we
15 should say that.

16 MS. FROST: And what is the process
17 now or before?

18 REP. HOLTZMAN: Trial counsel had
19 no right to trigger a Secretarial review.

20 COL HAM: Nobody had any right to
21 trigger Secretarial review. This is Colonel
22 Ham.

1 MS. FROST: But the trial counsel,
2 period. If they disagreed, too bad. The
3 trial counsel --

4 COL TURNER: Correct.

5 MG ALTENBURG: This is Altenburg.
6 I'm sure district attorneys have this, too,
7 where a specific trial counsel would be so
8 adamant that it ought to be tried, then he or
9 she could argue with the special court
10 convening authority or with the staff judge
11 advocate and ultimately the general, and maybe
12 get another hearing with them, so to speak,
13 and actually persuading that it ought to go to
14 trial. That happens within the normal course
15 of business in the civilian sector and the
16 military sector.

17 That is why this thing is really
18 addressed for something that somebody
19 perceived as a problem and it is not. In my
20 experience, it is not a problem that needs to
21 be addressed by legislation but here we got
22 it.

1 REP. HOLTZMAN: Right. And my
2 experience also as a DA in a big office, there
3 are trial counsel. You have a case that has
4 proceeded all the way through or a case that
5 is started and the district attorney or the
6 supervisors think that this case doesn't
7 warrant prosecution.

8 Well, what would happen now is
9 that this person takes Colonel Ham's
10 suggestion, this person, who could be a brand
11 new assistant district attorney, could go to
12 the governor and say well, they don't want to
13 prosecute this case. Appoint a special
14 prosecutor.

15 I mean, I don't think you really
16 need that because I think there are mechanisms
17 for resolving disagreements about how a case
18 should be handled in a professional way in all
19 of these circumstances and particularly the
20 staff judge advocate that has to be persuaded,
21 who is involved, too.

22 This is Liz Holtzman. I think,

1 personally, that it should stay the way it is.
2 But that is just my view. I mean the law
3 should stay the way it is, not this new
4 amendment in the Victims Protection Act of
5 2014.

6 MS. FROST: But I thought it was
7 essentially not addressed, that it is sort of
8 a gray area. Am I misunderstanding that?

9 COL HAM: This is Colonel Ham.
10 There is no right of the trial counsel now to
11 override the staff judge advocate or the
12 convening authority and go over their head to
13 the Secretary of the Service. That has never
14 existed.

15 MS. FROST: Okay. I think I
16 understand better. I was actually looking at
17 it more from --

18 LT COL GREEN: This is Kyle of the
19 Staff. We are just talking. Obviously, the
20 VPA has not passed. It is pending
21 consideration by the House. And the questions
22 that we have gotten from the House is they are

1 looking for the RSP to provide opinions on
2 this pending legislation.

3 So, I think this is a prime point,
4 speaking to her point, that if the
5 Subcommittee believes that something should
6 not be included or adopted, we need to say
7 that.

8 COL TURNER: Kyle, this is Colonel
9 Turner. Did we ever get the views of DoD on
10 this legislation?

11 COL HAM: Yes, we did. Colonel
12 Ham. I think Kyle sent that out. And that
13 was requested by the Senate Armed Services
14 Committee and we were provided a copy.

15 COL TURNER: Do you recall what,
16 if any, comment they had on this particular
17 provision?

18 LT COL GREEN: Ma'am, they advised
19 against this, for exactly the reasons that you
20 all have said.

21 I think that is the opinion that I
22 sent out on Friday, along with the law review

1 article and the updated DEOCS information. I
2 think DoD's point, everything that I have
3 heard is exactly in line with what you have
4 talked about today.

5 COL TURNER: So do you all --
6 sorry. Go ahead.

7 COL HAM: Go ahead, Colonel
8 Turner.

9 COL TURNER: I was just going to
10 ask if they had some language that might make
11 a clear recommendation on that.

12 PROFESSOR HILLMAN: This is Beth.
13 I think we could actually make a finding that
14 says this modification, Section 2 of the VPA,
15 this modification would actually shift
16 authority away from persons of high rank and
17 experience who are currently making decisions
18 that take into account the advice and counsel
19 of the senior trial counsel.

20 In other words, I think we should
21 make a finding that this would be -- that this
22 could be counterproductive. The

1 recommendation ought to do more than ask
2 Congress to clarify but then say what we
3 think. If we think it should stay the same,
4 we could certainly state that. We want to
5 state it in an affirmative way to say that it
6 should continue to be a decision made by the
7 convening authority in consultation with the
8 staff judge advocate, with review already
9 established in cases where they decide not to
10 prosecute.

11 MG ALTENBURG: I agree with Beth
12 about the finding and recommendation, they not
13 make that change.

14 PROFESSOR HILLMAN: This is Beth
15 again. Kyle, I have one more question.

16 On footnote 45, which is
17 describing the VPA, again, this is in the
18 footnote. It says, "Secretarial review may be
19 warranted where the SJA disagrees with the
20 convening authority not to refer but it is
21 less clear that differing opinion from the
22 senior trial counsel warrants Secretarial

1 review."

2 Is that an interpretation of the
3 provision in the act itself? I couldn't quite
4 understand what that statement was.

5 LT COL GREEN: You are exactly
6 right. That is just reflecting that the
7 change of the more recent NDAA required that.
8 And so that was essentially an assessment, I
9 think, based on what I heard before. I don't
10 think anybody took issue with the change
11 requiring Secretarial review where you have an
12 SJA and convening authority difference.

13 REP. HOLTZMAN: But I think that
14 -- excuse me.

15 I just wanted to say though what
16 Beth is raising is whether this is a matter --
17 whether the lack of clarity is in the statute
18 or whether it is something else. What are you
19 referring to in that footnote?

20 PROFESSOR HILLMAN: Representative
21 Holtzman, that is right. And I think that
22 that is referring -- Kyle was saying -- I

1 think that is referring to the change that has
2 already happened, right, Kyle?

3 LT COL GREEN: In the FY14 NDAA.
4 That is correct.

5 PROFESSOR HILLMAN: Correct. So,
6 because Section 2 modifies the FY14 NDAA.

7 REP. HOLTZMAN: Oh, okay.

8 PROFESSOR HILLMAN: But it is not
9 clear in the footnote. I was confused by
10 that.

11 REP. HOLTZMAN: Okay.

12 LT COL GREEN: Right. And I think
13 from a staff perspective, all of the material
14 that we have included discussing this has been
15 included in the footnotes. And I realized,
16 and I think that we owe it to the body to
17 expand on that and I think we can clarify this
18 to make it more direct.

19 REP. HOLTZMAN: Okay. So, we will
20 clarify the footnote. We will put it in the
21 text.

22 Is anybody objecting to that, by

1 the way? Okay, I don't hear any.

2 Now, how do we feel about having
3 Kyle draft a finding and recommendation based
4 on the conversations that we have had? I mean
5 do we have a consensus on the suggestion of
6 Professor Hillman as modified by others or do
7 we have any objection to that?

8 MS. FROST: So, is the rest of the
9 group saying that they do not believe that the
10 senior trial counsel, if they disagree, should
11 not be able to elevate this to Secretarial
12 review?

13 MG ALTENBURG: I think that
14 anybody that has been in the military would
15 agree that that person should not have that
16 kind of authority. Most anybody who has got
17 the title senior trial counsel has got, at the
18 most, in most Services, five years' of
19 experience, at the most, and is probably a
20 captain or a major.

21 MS. FROST: Then I think there
22 needs to be some explanation as to why the

1 group would make that recommendation.

2 MG ALTENBURG: And in some places,
3 somebody could have the title senior trial
4 counsel and be one basic class ahead of the
5 other two prosecutors and be someone that is
6 only a year or two out of law school.

7 REP. HOLTZMAN: So are you
8 suggesting --

9 MS. FROST: My point is that I
10 really would then provide some explanation.
11 Because somebody who reads the term senior
12 trial counsel would not understand that,
13 unless, as you said, had been in the military.

14 MG ALTENBURG: Right.

15 REP. HOLTZMAN: Okay, I think what
16 we are suggesting now is that we get some
17 language, Kyle, on this that would go to
18 framing both language in the text of the
19 report and a finding and a recommendation.

20 People, without taking a vote on
21 that right now, do people agree with that?

22 MG ALTENBURG: I agree.

1 MS. FROST: Yes, I agree.

2 VADM HOUCK: This is Jim Houck.
3 Believe it or not, I have been monitoring the
4 whole thing very attentively. And my only
5 comment on the experience level of senior
6 trial counsels would be that what John just
7 said, I think, is probably true most all of
8 the time but I think sometimes in our
9 experience in the Navy, they were more
10 experienced than the way John just
11 characterized it.

12 So, my only comment would be,
13 Kyle, you may not want to be so specific as to
14 say they only have five years' experience or
15 they are a captain or a major. Just draw it
16 a little more broadly than that. But
17 otherwise, it sounded right.

18 MG ALTENBURG: Right. And I
19 actually agree with Jim on that because the
20 Army, when they tried the murder case at Fort
21 Hood of 13 people, the senior trial counsel
22 there was a full colonel. So, there are

1 exceptions in all the Services that way.

2 VADM HOUCK: Exactly.

3 REP. HOLTZMAN: Okay. So, we are
4 going to get a draft finding text and
5 recommendation. Is that correct? We are all
6 in favor of getting that. And then we will
7 decide when we have Kyle's brilliant work.

8 Are we going past five o'clock,
9 Kyle?

10 LT COL GREEN: Ma'am, we can
11 continue if everyone has the time. Certainly,
12 I know there is a lot left to look at in terms
13 of this and the other section. So, it is up
14 to you all.

15 REP. HOLTZMAN: I can only go for
16 about another ten minutes. I have to leave
17 here at a quarter after.

18 MS. FROST: And I am willing to go
19 to 5:15 as well. I have got some things I
20 have to finish up here tonight. So, another
21 ten minutes.

22 MG ALTENBURG: I suggest we go for

1 another ten minutes and see what we can knock
2 out.

3 REP. HOLTZMAN: Okay, let's go to
4 recommendation number 2. Here we go about
5 clarifying again. "Congress should clarify
6 the requirement in Section 3(d) of the Victims
7 Protection Act which requires climate
8 assessment for the commands of the accused and
9 the victim following an incident involving a
10 covered sexual offense. Organization and
11 climate may not be a contributing factor in
12 every alleged crime of sexual assault, and
13 climate survey results may be biased
14 immediately following a sexual assault
15 allegation, which may create confusing or
16 misleading information that does not reflect
17 long-term perspectives or climate in the
18 organization. Additional survey requirements
19 for personnel also increases concerns about
20 survey fatigue, which may reduce the accuracy
21 of feedback and the effectiveness of
22 assessments."

1 What do we think?

2 MS. FROST: This is Joye. And I
3 said I actually concur but I would go back to
4 what Professor Hillman has said. If it is a
5 requirement, why are we asking for
6 clarification?

7 COL HAM: This is Colonel Ham.
8 The DoD's comments to the Senate Armed
9 Services Committee were against this
10 provision. Correct, Kyle?

11 LT COL GREEN: Yes, ma'am.

12 MS. FROST: Well, we are asking
13 Congress to rescind the requirement, not
14 clarify. Correct?

15 REP. HOLTZMAN: No, we are not
16 asking Congress to rescind because it has only
17 been adopted by the Senate. Am I correct in
18 that, Kyle, or not?

19 LT COL GREEN: That is correct,
20 ma'am.

21 MG ALTENBURG: That is correct.
22 This is a pending bill.

1 MS. FROST: Well, then we should
2 say amend Section -- I mean whatever. But my
3 point is, we are not asking Congress to
4 clarify it. Because it is clear that it is a
5 requirement, right, to do the climate
6 assessment, whenever there is an incident?
7 So, it is a matter of amending, which I don't
8 know if we can.

9 REP. HOLTZMAN: What we could say
10 is Congress should not adopt the requirement
11 presently contained in Section 3.

12 MG ALTENBURG: That is what I
13 think. I think this is the oversight gone
14 mad, quite frankly.

15 This is what happens when we get
16 into too many details.

17 REP. HOLTZMAN: Anybody else have
18 any comments about this section? Anybody --
19 people who are in favor of this section?
20 Anyone opposed to this section? I guess we
21 have to clarify the initial language but
22 anybody opposed to this section --

1 recommendation, I mean? Recommendation 2 --
2 go ahead.

3 PROFESSOR HILLMAN: Sorry,
4 Representative Holtzman. This is Beth. I
5 just think our specific suggestion -- our
6 specific opposition, I think, is that
7 organizational climate surveys are not -- will
8 not be effective here. But if Congress wants
9 to find some other way to encourage a
10 commander, because we are talking about the
11 commander, a commander to be attentive to the
12 climate of the unit, that would make good
13 sense to me.

14 So, to me, that is what the
15 amendment would be. Congress should alter the
16 requirement -- Congress should amend the
17 requirement for climate assessment in favor of
18 other commander action.

19 And if you all want to rescind the
20 requirement, I think that that might be what
21 you all want to do, that is certainly what DoD
22 wants to do and I understand. But to me, the

1 intent here is to just check again on how
2 things are going when there is an incident.
3 And that makes sense. The climate assessment
4 and the survey, the repeat survey does not
5 make sense, given what we understand about
6 surveys and instruments and accuracy and
7 fatigue.

8 REP. HOLTZMAN: Well, this is Liz
9 Holtzman. I mean one of the things that could
10 be done is that there might be a protocol
11 after -- which is not a climate assessment,
12 but some kind of protocol after there has been
13 an incident to figure out whether there needs
14 to be corrective action. It shouldn't be
15 climate survey.

16 It should be, was there sufficient
17 lighting? I mean you know, just analyze what
18 happened. Was this in a dark place on the
19 base? Do we need more lighting? Was this a
20 situation between trainer and trainee? Do we
21 have to do something about that? I think that
22 might make more sense.

1 I think your suggestion is right
2 but --

3 MS. FROST: Yes, I agree.

4 REP. HOLTZMAN: I don't feel as
5 though we know enough to make the specific
6 suggestion about what should be done. But
7 there should be a general suggestion that
8 after an incident there ought to be a review
9 of what measures can be taken to avoid
10 repetition, if they can. Because not all of
11 them, of course, are susceptible to that.
12 Maybe it is off base or maybe something else
13 happened. I don't know.

14 MS. FROST: Yes, there is a, well,
15 they use this a lot in wrongful convictions,
16 talking events. And it is literally going
17 back and reviewing processes, protocols,
18 training, whatever, to figure out what went
19 wrong. I don't know exactly how we could
20 phrase that but I agree that would be more
21 positive and more useful than doing yet
22 another survey.

1 MG ALTENBURG: I agree and I think
2 we should let the Staff work on that
3 recommendation.

4 (Laughter.)

5 REP. HOLTZMAN: What a brilliant
6 idea. A-plus.

7 Okay, does anybody disagree with
8 that suggestion? Hearing none.

9 MG ALTENBURG: Anybody besides
10 Kyle.

11 REP. HOLTZMAN: Sorry?

12 MG ALTENBURG: Anybody besides
13 Kyle not agree with that suggestion?

14 LT COL GREEN: Thank you, sir. We
15 don't get a vote.

16 REP. HOLTZMAN: Okay. Well, I
17 think we have time maybe for one more
18 recommendation.

19 We are up to recommendation number
20 3. "A strong majority of the Subcommittee
21 continues to recommend against any
22 modification of the existing authority vested

1 in commanders as also designated as court-
2 martial convening authorities. Accordingly,
3 this majority does not recommend Congress
4 adopt the reforms in either the STOP Act or
5 the MJIA."

6 Any discussion of this? I know,
7 Professor Hillman, we will take into account
8 your opposition to this. But does anybody
9 else want to express any objection,
10 opposition?

11 MG ALTENBURG: I'm okay with that
12 language.

13 REP. HOLTZMAN: Anybody else have
14 any changes, suggestions, thoughts?

15 Great. Well, we can go past this.
16 We can skip this. I don't hear any
17 objections. So, recommendation 3 is adopted
18 with one dissent.

19 And now we are up to
20 recommendation number 4. "In light of the
21 significant oversight provisions enacted, do
22 members want to say anything regarding

1 increased concern about or guarding against
2 both the parents and/or actual UCI?"

3 PROFESSOR HILLMAN: This is Beth,
4 Representative Holtzman. I'm not sure that
5 that belongs right here in legislation and
6 policy. I do think it is important that we
7 recognize that there is an opportunity for the
8 pressure to prosecute, to create unlawful
9 command influence but I don't think it is here
10 in the analysis of legislation.

11 PROFESSOR CORN: This is Professor
12 Corn. I agree with that and I think that the
13 law and jurisprudence related to UCI is there.
14 There is a defense bar that is acutely aware
15 of the consequence of high-level pressure
16 focused on a particular category of offenses
17 and the system will play out and run its
18 course. I don't think that we have to say
19 that there is an increased concern over this.
20 That is the function of the defense bar and
21 they are doing it.

22 MG ALTENBURG: I agree.

1 Altenburg.

2 REP. HOLTZMAN: So, does anybody
3 want to say anything at this point? Is there
4 any member of the Subcommittee who thinks we
5 should be saying something at this point in
6 this document number 5 about UCI? I don't
7 hear anything.

8 So we are up to -- we have got
9 four more minutes. We are up to
10 recommendation number one, two, three, four,
11 five. "In light of the many oversight
12 provisions enacted, do the members want to say
13 anything about the potential danger or
14 existing concern of rushing to judgment or
15 rushing to court-martial based on an
16 allegation made against a servicemember? Do
17 the statutory changes increase the potential
18 that charges may be inappropriately referred
19 to court-martial, which may result in
20 increased acquittals or unjust convictions, et
21 cetera?"

22 PROFESSOR CORN: This is Professor

1 Corn. I have the same feeling on that as I do
2 on the one before. I don't think it should be
3 in there. There is always risk of overzealous
4 prosecutors. There is always risk of policy
5 influences directing efforts at certain
6 offenses. And that is why servicemembers are
7 provided due process, so that the system can
8 adjust to that. And I don't think there has
9 been anything recommended that we have looked
10 at that has fundamentally altered the due
11 process rights of an accused servicemember.
12 I think we just let the system work.

13 REP. HOLTZMAN: Anybody have any
14 other comment on this?

15 MG ALTENBURG: I agree with that.
16 Those issues are there and the defense bar is
17 well aware of them. And as Geoff said, they
18 get worked out. I think the whole system is
19 sensitive to that.

20 REP. HOLTZMAN: Anybody else have
21 any thoughts, any other comments on
22 recommendation number one, two, three, four,

1 five?

2 So nobody is recommending, in
3 other words, that we do something in response
4 to the question there.

5 MG ALTENBURG: Right.

6 REP. HOLTZMAN: Okay.

7 LT COL GREEN: And then Ms.
8 Holtzman?

9 REP. HOLTZMAN: Yes, sir?

10 LT COL GREEN: Six and seven are
11 repeats from the previous section. I think we
12 have the discussion that you provided. And so
13 I, we raised those here just to make sure that
14 they do have some application but I think we
15 have comments on those from the previous.

16 REP. HOLTZMAN: You mean we
17 finished this Section V? Amazing.

18 Let me thank everybody then, for
19 your cooperation and thank you for your
20 patience in dealing with me as a temporary
21 whatever. Convening authority. Right?

22 (Laughter.)

1 REP. HOLTZMAN: Okay, so I guess
2 we finished this session. Thank you, Kyle.
3 Thank you all the members. I appreciate your
4 cooperation. Okay, bye-bye.

5 LT COL GREEN: And if I could, we
6 will try to continue some sessions next week,
7 as I noted in my email. So, thank you very
8 much.

9 (Whereupon, at 5:15 p.m., the
10 foregoing meeting was adjourned.)

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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: RSP Role of the Commander

Before: Elizabeth Holtzman, acting Chair

Date: 04/17/2014

Place: US DOD

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