

RESPONSE SYSTEMS TO ADULT SEXUAL
ASSAULT CRIMES PANEL

ROLE OF THE COMMANDER SUBCOMMITTEE

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DELIBERATION SESSION

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TUESDAY
JANUARY 28, 2014

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The Subcommittee convened telephonically, The Hon. Barbara Jones, Chair presiding.

PRESENT

THE HON. BARBARA JONES, Chair
THE HON. ELIZABETH HOLTZMAN
VICE ADMIRAL JAMES HOUCK (Ret.)
GENERAL CARTER HAM (Ret.)
MAJOR GENERAL JOHN ALTENBURG (Ret.)
BRIGADIER GENERAL (SELECT) LISA TURNER
PROFESSOR GEOFFREY CORN
JOYE FROST

ALSO PRESENT

MARIA FRIED, Designated Federal Official
COLONEL PATRICIA HAM, Staff Director
LIEUTENANT COLONEL KYLE GREEN, RSP Senior
Attorney

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

4:36 p.m.

MS. FRIED: Good afternoon,
everyone. The meeting's open.

JUDGE JONES: I would like to
start with one suggestion about the findings.
I did ask the staff to include something about
reporting and they included number four, which
was in red. I don't know if that's changed
between drafts.

But in any event, here's my
thought on this. As we all know, in NDAA 14,
Congress specifically asked us to assess the
impact, if any, on reporting that would occur
were the commander to be removed. In other
words, would removing the commander as
convening authority increase reporting.

It seems to me that we should
respond to that if we can and when I reviewed
the transcript from one of our earlier
deliberations, we were unanimous including
Professor Hillman, I believe, and we can go

1 back and look at the transcript, or the staff
2 can, in finding that there is no evidence or
3 evidentiary basis from which to conclude that
4 removing the commander as convening authority
5 will increase reporting.

6 Congress has asked us for an
7 assessment. I think we have unanimity on that
8 so I think that should be a finding. And I
9 wasn't clear, obviously, when I spoke to the
10 staff and, unfortunately, couldn't send in
11 that as a draft finding.

12 But I'm happy to hear reaction to
13 that suggestion.

14 REP. HOLTZMAN: Can you explain
15 where that finding, that additional language
16 is? Is that --

17 JUDGE JONES: I can't remember the
18 date but when we had our -- it was a phone
19 conference. Some of us were on planes and
20 trains.

21 REP. HOLTZMAN: Oh, no, no, no, I
22 was not referring to that. I'm just referring

1 to where in this report -- document?

2 JUDGE JONES: Oh, let me find the
3 page.

4 Well, on the very first page, the
5 staff put in something with respect to
6 reporting. I do not like that; I'm proposing
7 what I just sent in.

8 REP. HOLTZMAN: Okay, good. I
9 just wanted to know where it was so I could
10 approve it.

11 JUDGE JONES: Right.

12 MS. FRIED: And say your name for
13 the court reporter before you start speaking,
14 please.

15 REP. HOLTZMAN: I'm sorry, my name
16 is Liz Holtzman.

17 JUDGE JONES: And previously, it
18 was Barbara Jones.

19 So unless there's some objection,
20 I would make that finding and I haven't
21 actually thought exactly where it should go
22 but I think it's more to the point of what I

1 wanted to add and more to the point of what
2 we're being asked to make a finding on than
3 what currently is number four.

4 And is that -- is everyone in
5 agreement with that, basically?

6 GEN. HAM: This is Carter Ham. I
7 am and I think it's consistent with what you
8 introduced to the full Panel, I think, the
9 last time that the full Panel met.

10 JUDGE JONES: Oh, I see. You mean
11 in the report out that we gave on the foreign
12 militaries?

13 GEN. HAM: Yes, I think -- I mean
14 it just seems to follow on that same line of
15 reasoning. So I'm in agreement with what you
16 propose.

17 JUDGE JONES: Okay. Any other
18 comments? All right.

19 LT COL GREEN: Judge Jones, I
20 guess just so that the staff is clear, so
21 you're saying to remove the proposed finding
22 four and replace that with something

1 indicating that there's no indication that
2 removing the commander will increase reporting
3 and just the references previously have been
4 to the Allies but make that reference more
5 broadly.

6 JUDGE JONES: Yes, because I think
7 we, in deliberating, it was broader. I'm
8 happy to go back and look again. I looked
9 fairly recently when we were deliberating. I
10 don't think we were restricting it to the
11 Allies.

12 LT COL GREEN: No, I understand,
13 ma'am. The --

14 JUDGE JONES: Yes.

15 LT COL GREEN: -- reference we
16 had before to the Allies but you want us to
17 basically mirror the finding according to the
18 one that we had for the Allies and just look
19 at that more broadly.

20 JUDGE JONES: Yes, the ones that
21 we already have for the Allies remains the
22 same. That's number eight. Right?

1 LT COL GREEN: Correct, ma'am.

2 JUDGE JONES: And I also think
3 that within that same finding, that there's no
4 evidentiary basis from which to conclude
5 removing the commander will increase
6 reporting, I see that the staff has suggested
7 we talk about studies indicate, this is back
8 to the text, number four in red, studies
9 indicate the risk for contact sexual violence
10 for women is similar in the military as it is
11 in the civilian sector. And then we talk
12 about how it's chronically under-reported.

13 I think that's something that we
14 do say within the body of the report, if I
15 read it correctly. I'm not opposed to having
16 that as a second sentence of the finding about
17 there being no evidentiary basis from which to
18 conclude removing the commander as convening
19 authority will increase reporting. With
20 perhaps a second sentence that says: Available
21 data indicates that 65 percent of sexual
22 crimes against females are not reported in the

1 civilian sector with virtually the same rate
2 of under-reporting in the military.

3 Maybe I'm getting too
4 argumentative and we should just leave those
5 facts in the text and I can circulate this in
6 writing, you know, after the conference call.

7 REP. HOLTZMAN: This is Liz
8 Holtzman. I certainly support your, Barbara,
9 your proposal. I would just substitute it for
10 the present four because the present four is
11 kind of --

12 JUDGE JONES: Right.

13 REP. HOLTZMAN: -- the argument,
14 well gee, you know, it's so under-reported and
15 maybe nobody can do anything about it is the
16 kind of way it sounds to me. You know, and
17 I'm not sure that's the impression we want to
18 leave. So I don't --

19 JUDGE JONES: No, I don't -- yeah,
20 I would -- this is Barbara Jones -- I would
21 take out four as it is and the new four would
22 make the finding that we don't have that

1 evidentiary basis which the end, you know, to
2 conclude any increase in reporting which is
3 what Congress has asked us to make a finding
4 on.

5 And then the only question is do
6 we want to go to the next step and talk about
7 the fact that under-reporting percentages,
8 which I think are, you know 64 percent in the
9 civilian sector and 66 in the military that --
10 against females -- that those are virtually
11 the same.

12 I don't feel strongly about it. I
13 just think it goes to that point. But it can
14 just -- it is definitely factual material
15 that's in the text already.

16 So I know everybody is for the
17 first sentence and, Liz, what do you think?
18 Do you want to add the second one or leave it
19 out and leave it, just leave it to the text?

20 REP. HOLTZMAN: Liz Holtzman.
21 This is my view is that if it's in the text,
22 I don't know that we need it there.

1 JUDGE JONES: Okay, fair enough.

2 So we'll just --

3 REP. HOLTZMAN: It's just

4 offensive sounding.

5 JUDGE JONES: Okay. I got you and
6 that's fine.

7 Okay, that's really all I wanted
8 to raise because I wanted to change four,
9 basically, the fourth finding.

10 Now I know there were -- Liz, you
11 actually got back some written comments and
12 unless any -- first of all, let me ask this,
13 were there other written comments that came
14 back and I just missed them or is it just the
15 ones I received from Liz Holtzman?

16 LT COL GREEN: Judge Jones, this
17 is Lieutenant Colonel Greene. That's all we
18 received except for comments back and forth on
19 Ms. Holtzman's subsequent issues that she
20 wanted us to incorporate. So everything to
21 the first draft --

22 Let me just clarify since we did

1 just hand out a second or I sent out a second
2 version of this. The copy that I sent you a
3 couple hours ago provides all of the
4 recommended changes -- substantive changes
5 that we received to draft two. So I think if
6 we go through those and we satisfy those, and
7 come to an agreement, it would appear the
8 Subcommittee's satisfied with the text.

9 The second draft that I sent out
10 just prior to the start of this meeting is
11 recommended text to the conclusion and, Ms.
12 Holtzman, you requested perhaps some
13 discussion about the military convening
14 authority versus prosecutor discussion and so
15 we added that to the conclusion portion of the
16 draft. And so that's been added and that's in
17 red on the second copy.

18 So I apologize to make you flip
19 back and forth, but if we could maybe go
20 through the comments first and then go through
21 the proposed additional language.

22 JUDGE JONES: Okay, one second,

1 Colonel Greene.

2 Okay, so the most recent one you
3 sent is actually 20 pages. Is that right?

4 LT COL GREEN: That's correct,
5 ma'am.

6 JUDGE JONES: Okay. So what we're
7 going to try to do now then, I gather, is go
8 through what I believe are all comments by Ms.
9 Holtzman.

10 LT COL GREEN: Yes, ma'am. That's
11 correct.

12 JUDGE JONES: Okay. And if anyone
13 else has comments that they just didn't have
14 time to get in in writing, you know, please
15 let me know as we go along.

16 REP. HOLTZMAN: This is Liz
17 Holtzman. Professor Corn had some comments
18 with regard to some of the comments I made.
19 I hope we're not going to leave those out.

20 PROF. CORN: Kyle, this is
21 Professor Corn. Did you see that e-mail with
22 just a couple of proposed modifications that

1 Representative Holtzman --

2 LT COL GREEN: Yes, sir, I did and
3 so I thought as we would go through her
4 comments we can just incorporate what you
5 recommended for those.

6 PROF. CORN: Okay. Okay.

7 JUDGE JONES: All right, great.
8 I'm sorry, Geoff, I didn't see your additional
9 comments but we'll take them as we go, then.

10 I guess the first proposal by Ms.
11 Holtzman is to change the subject. Instead of
12 Initial Assessment of the Prosecutorial
13 Disposition Authority, etc., Liz proposes we
14 say Initial Assessment of Whether Senior
15 Commanders Should Retain Authority to Refer
16 Cases of Sexual Assault to Special and General
17 Courts-Martial.

18 Is there some discussion for or
19 against that?

20 PROF. CORN: This is Professor
21 Corn. I concur.

22 JUDGE JONES: Yes, I think it

1 seems fine to me, as well. Anybody else?

2 MS. FROST: This is Joye Frost.
3 I'm fine with that. It's a little lengthy but
4 I think it's more specific, so.

5 REP. HOLTZMAN: This is Liz
6 Holtzman. I have no stake in the language, I
7 just thought that this subject was unclear and
8 we have a public audience as well as people
9 who are sophisticated in the subject matter so
10 I thought that the subject should be clear.
11 So if anybody's got length or word changes to
12 what I'm saying, I have no pride of authorship
13 here. I just wanted something that people
14 understand what we're talking about. That's
15 all.

16 LT COL GREEN: This is Kyle again.
17 The only -- we might -- I might offer we could
18 take special and general out because under
19 1744 of the FY 14 NDAA, I mean referral to --
20 the only cases with jurisdiction in the future
21 will be general courts.

22 I know now that they both do, but

1 I mean courts-martial might be more --

2 REP. HOLTZMAN: No, that's fine.

3 I have no objection to that.

4 JUDGE JONES: No -- Barbara Jones
5 -- me neither. All right. Ms. Holtzman --

6 PROF. CORN: Judge, this is
7 Professor Corn. Should we just --

8 JUDGE JONES: Yes.

9 PROF. CORN: -- assume consent by
10 silence to these as we go through?

11 JUDGE JONES: I think -- yes, I
12 think that's right. It'll make it --

13 PROF. CORN: Okay.

14 JUDGE JONES: -- that's fine.

15 The next comment is in the second
16 full paragraph where we talk about a consensus
17 and we were talking about our agreement that
18 the evidence does not support a conclusion
19 that removing such authority will
20 significantly increase confidence among
21 victims of sexual assault, et cetera.

22 And Ms. Holtzman makes the

1 recommendation that we change it from
2 consensus to something like a strong majority,
3 a clear majority, a substantial majority or
4 virtually all.

5 PROF. CORN: Judge, this is
6 Professor Corn. Why can't we say what it is
7 which is all but one?

8 GEN. HAM: This is Carter Ham. I
9 would recommend that we stay away from
10 specific numbers. This is an initial
11 assessment. We will make, I think, a final
12 report. I think that's the intent.

13 JUDGE JONES: Right.

14 GEN. HAM: If we get too specific,
15 I mean what if I change my mind between now
16 and, you know, more information comes in and
17 I change my mind between now and the final
18 report?

19 So I just -- I think we're better
20 off if we stay away from the number. I'm okay
21 with the other, you know, characterizations,
22 so --

1 JUDGE JONES: A characterization
2 of some kind of majority.

3 GEN. HAM: Like virtually all or
4 something like that. But I'd steer away from
5 the number. That's just my opinion.

6 MS. FROST: I would say a strong
7 majority, virtually all makes no sense to me.
8 It's either, yes, you've only got, what, eight
9 or nine? I would just say a strong majority.

10 JUDGE JONES: Any other comments?
11 All right, then we'll switch it to -- hearing
12 no further comments, I also like
13 characterizing it as a majority. So I have no
14 problems with strong majority.

15 MG ALTENBURG: John Altenburg.

16 JUDGE JONES: Hello, John. This
17 is Barbara Jones.

18 MG ALTENBURG: I'm sorry to be so
19 late.

20 JUDGE JONES: Oh, don't be, don't
21 be silly, as far as --

22 MG ALTENBURG: Thank you.

1 JUDGE JONES: -- it's okay.

2 We're going through -- do you have
3 in front of you the --

4 MG ALTENBURG: I do.

5 JUDGE JONES: Okay. We're on
6 essentially the third of Liz Holtzman's
7 comments. Let me recap for you quickly.

8 With respect to the subject, the
9 title being changed, we've agreed that we'd
10 prefer the characterization of the subject as
11 Liz recommends except that instead of saying
12 Referred Cases of Sexual Assault to Special
13 and General, we would just change it to -- I'm
14 sorry now -- I think we were going to just
15 change it to General Courts-Martial or to
16 Courts-Martial. I forget.

17 LT COL GREEN: Just to Courts-
18 Martial, ma'am.

19 JUDGE JONES: Just to Courts-
20 Martial, right.

21 MG ALTENBURG: I'd agree with
22 that, just Courts-Martial. Yes.

1 JUDGE JONES: Okay. Then we were
2 talking about the word consensus in the second
3 full paragraph and I think we've all agreed
4 that it's better characterized as a strong
5 majority.

6 MG ALTENBURG: Yes, I agree.

7 JUDGE JONES: Okay. So now you're
8 right on the page with us --

9 MG ALTENBURG: Good, thank you.

10 JUDGE JONES: -- General
11 Altenburg. Sure.

12 Now, the next comment from Ms.
13 Holtzman relates to one under that second full
14 paragraph on page one. And her suggestion is
15 that it should read: Criticism of the military
16 justice system often confuses the term
17 commander with the person authorized to
18 convene courts-martial for serious violations
19 of the Uniform Code of Military Justice.
20 These are not the same thing. Commanders
21 could include, and then I think you're
22 suggesting that we insert, and I think it's in

1 the text somewhere, a variety of descriptions
2 of commanders.

3 The only commanders who may
4 convene a court-martial under the new changes
5 made by the Defense Department are those
6 holding a rank of O-6 and above, that is,
7 colonels or higher.

8 All right, I'd like to hear some
9 comment on that prospective change.

10 REP. HOLTZMAN: I can -- this is
11 Liz Holtzman. I can be an advocate for
12 myself.

13 I just want to use, I mean,
14 conflates is a very nice word but I just, so
15 I said, again, you know, I've tried to think
16 about the public's reading this, so I just
17 want to try to make it as simple as possible.
18 That's the only thing.

19 It has nothing to do with any
20 criticism of the wordsmithing. It's just to
21 try to simplify it and make it more
22 understandable. That's my only -- it's no

1 intention of a substantive change here and if
2 you don't like my changes, that's fine, too.

3 GEN. HAM: I like the idea of
4 confuse instead of conflates because I think
5 conflates is accurate but I think confuse is
6 just more understandable to a greater number
7 of people.

8 JUDGE JONES: Yes, I agree as
9 well. What about the rest of it?

10 REP. HOLTZMAN: If you people want
11 to rewrite it or make it clearer or whatever,
12 God bless.

13 GEN. HAM: I know I saw a box
14 where they were getting the number of
15 convening authorities and the number of
16 commanders. And I kind of made a couple of
17 phone calls myself and got a sense that at a
18 given installation, in the Army anyway, where
19 there would be one General Court-Martial
20 Convening Authority, there were two Special
21 Court-Martial Convening Authorities but 70
22 total commanders.

1 And that just gives you a little
2 bit of an idea of the difference between the
3 number of commanders out there that victims
4 are complaining about and the number of them
5 that have really serious convening authority
6 responsibilities: 70 to 2. And that's typical
7 on, I think, most bases, Navy, Air Force, Army
8 and Marines. It's just that's the way it is.

9 And using the term commander is
10 really misleading on the part of victims'
11 groups.

12 JUDGE JONES: I agree with
13 everything you've said. I like the text up to
14 the point where I stopped which is after we
15 basically say confuses as opposed to conflates
16 and these are not the same thing.

17 I don't know if we need commanders
18 could include, with an insert. I think this
19 starts to get too long for a finding. But I
20 do like the rest of it.

21 Although, honestly, a lot of this,
22 the detail about O-6 and above is in the text

1 and --

2 GEN. HAM: It kind of has that
3 effect.

4 JUDGE JONES: Yes, no, I think the
5 concept I do like in the finding is that
6 disposition authority for sexual assaults is
7 reserved to a level of commander who will
8 normally be removed from any personal
9 knowledge of the accused or victim.

10 But are there other comments from
11 other Subcommittee members?

12 PROF. CORN: I'm Professor Corn,
13 this is --

14 JUDGE JONES: Any other comments?

15 GEN. HAM: This is Carter Ham. On
16 bullet number one, I like Ms. Holtzman's -- I
17 would just end it with these are not the same
18 thing period. Because I think the rest of it
19 is addressed elsewhere in the text.

20 On the second bullet, with regard
21 to those reverse -- I think Professor Corn
22 made some comments clarifying the statutory

1 responsibility of convening authorities to
2 recuse themselves in cases of personal
3 knowledge. That probably ought to be
4 included.

5 PROF. CORN: This is Professor
6 Corn. I'll read what I put in the e-mail,
7 Judge, so everybody knows.

8 JUDGE JONES: Okay, thanks.

9 PROF. CORN: I suggested that, I
10 think we have to be a bit strong, I don't
11 think it's just policy. The role of the
12 convening authority and his relationship to
13 others is established by statute pursuant to
14 UCMJ and regulation pursuant to rules for
15 courts-martial.

16 And I also thought we might want
17 to emphasize if, unless it makes it too long,
18 that one of the functions of the staff judge
19 advocate would be to advise a convening
20 authority to recuse herself if there was -- if
21 the staff judge advocate perceived an issue of
22 bias.

1 Now that may be all captured in
2 the existing language but I think at least we
3 want to emphasize that under existing statute
4 and court-martial regulations and then policy
5 and practice.

6 JUDGE JONES: All right. And if
7 you would just tell me, are you on number two,
8 the second finding? Where are you exactly?

9 PROF. CORN: Yes, number two, it
10 says --

11 JUDGE JONES: So I see where
12 you're saying you want statute --

13 PROF. CORN: I'm responding to the
14 proposal Ms. Holtzman made. So she said, and
15 this is her comment four, change under current
16 policy, change to under current policy and
17 practice the authority to refer sexual
18 assault.

19 And my only point is, I don't
20 think it's just policy and practice. I think
21 --

22 JUDGE JONES: Okay.

1 PROF. CORN: -- pursuant to
2 statute, the Rules for Court-Martial and other
3 policies and practice.

4 COL. HAM: This is Colonel Ham.
5 For clarification, the legal term, again, I
6 don't know if you'd want to use it is, other
7 than an official interest in the case, that's
8 from the case law and you were sent a case a
9 while back, Nix, N-I-X, which discussed this.

10 So it's -- maybe it's semantics
11 but having a personal interest may or may not
12 be the same as having an other than official
13 interest.

14 REP. HOLTZMAN: This is Liz
15 Holtzman. Going back to the point that you
16 were making, Professor Corn, why don't -- can
17 we just shorten it, say under current law and
18 practice?

19 PROF. CORN: Yes, I think, or
20 under existing law and policy. I think that's
21 fine.

22 REP. HOLTZMAN: Whatever it is --

1 PROF. CORN: I just want --

2 REP. HOLTZMAN: -- it can refer,
3 sexual assault allegations for prosecution and
4 we can leave out a general and special court
5 for prosecution by court-martial is reserved
6 to a level of whatever commander so you can
7 take that part and you can condense it a
8 little bit.

9 MS. FROST: This is Joye Frost.
10 But you, Professor Corn, you also had a
11 comment about the obligation of the JAG to
12 advise senior commanders when they do have a
13 conflict of interest, which I think should be
14 or to advise --

15 PROF. CORN: Yes.

16 MS. FRONT: -- them. I mean that
17 happens all the time. I confer with my
18 General Counsel quite a bit and that's one of
19 the most important roles that they play.

20 PROF. CORN: Yes, and I think that
21 that could be captured under existing law and
22 practice. I mean that is --

1 MS. FROST: Okay.

2 PROF. CORN: -- existing
3 practice, if we want to keep it simple.

4 If we want to emphasize --

5 MS. FROST: But we can also put it
6 -- but you could also put it under number
7 three where you specifically are talking about
8 an inherent conflict of interest.

9 I do think it's an important point
10 you brought up.

11 REP. HOLTZMAN: And I would put
12 under -- this is Liz Holtzman -- I agree. I
13 think point three is a good place for it to
14 go.

15 JUDGE JONES: It seems a natural
16 spot to talk about recusal. I agree.

17 All right.

18 REP. HOLTZMAN: So, are you
19 junking the second part of that point two,
20 sorry, in the unlikely event? That's fine
21 with me. This is Liz Holtzman.

22 JUDGE JONES: Yes, Liz, I'm sorry,

1 I don't see, where is in the unlikely event?

2 REP. HOLTZMAN: Where do we have
3 that language? Bottom of the point two.

4 LT COL GREEN: Ms. Holtzman, we
5 paraphrased the way you said it. Your last
6 sentence says this precludes --

7 REP. HOLTZMAN: Oh, I don't have
8 that. I'm just looking at what I said to you,
9 it's bad to look at the original document.
10 Can you tell me where you're reading from so
11 I can follow you?

12 LT COL GREEN: Comment four at the
13 bottom of the box: This precludes the
14 possibility that a convening authority

15 REP. HOLTZMAN: Okay, fine.
16 Great, okay, sorry. Thank you. I apologize.
17 Don't wait for me, you can just --

18 JUDGE JONES: Okay. So, I think
19 from our discussion, are we clear on what
20 we're doing with -- and I'm going by the
21 numbers in the text, for number two? I think
22 we've talked about confuses rather than

1 conflates.

2 I would not insert -- I would not
3 put in: Commanders could include by and --
4 because I think it's overly long.

5 And how is it that we've decided -
6 - what are we doing with the suggestion: The
7 only commanders who may convene court-martial
8 under the new changes made by the Defense
9 Department are those holding a rank of O-6 and
10 above, that is, colonels or higher?

11 And that would be in there instead
12 of: Current policy and practice ensures that
13 the disposition authority is reserved

14 I think I like, again, the more
15 specific statement that you've made there,
16 Liz. And I guess what we're also saying is we
17 want to call it by statute and policy to
18 inform what we're doing.

19 PROF. CORN: This is Professor
20 Corn, again. I think what we agreed for two
21 is to adopt basically Ms. Holtzman's
22 suggestion and just --

1 JUDGE JONES: Right.

2 PROF. CORN: -- begin it by
3 saying, pursuant to or under existing law and
4 policy or law and practice.

5 JUDGE JONES: Okay, fine.

6 PROF. CORN: And then on number
7 three, perhaps add a reference to the
8 responsibility of the staff judge advocate to
9 raise -- to advise commanders to recuse
10 themselves when they perceive a conflict of
11 interest.

12 COL. TURNER: This is Colonel
13 Turner, I don't know if there is value of
14 going back to what Colonel Ham suggested and
15 instead of saying if there is a conflict of
16 interest, use official language of other than
17 official interest.

18 GEN. HAM: This is General Ham,
19 and I find myself in agreement with Colonel
20 Ham.

21 JUDGE JONES: All right. All
22 right, then it's other than official interest.

1 All right, we've -- is there
2 anything else to talk about on page one? I'm
3 sure we'll all be able to take another look
4 when this comes back out. But I think we've
5 been through Professor Corn's and Ms.
6 Holtzman's suggestions here and we've changed
7 four.

8 So moving on to page two --

9 REP. HOLTZMAN: I'm sorry, I don't
10 seem to have the correct document everybody's
11 working off. Page two, is that, have you
12 passed by point five?

13 JUDGE JONES: No, it's the top of
14 my page two starting with: Sexual assault
15 victims currently have numerous channels
16 outside the chain of command.

17 REP. HOLTZMAN: Yes, ma'am.
18 That's at point five.

19 JUDGE JONES: Right.

20 REP. HOLTZMAN: Okay.

21 JUDGE JONES: And your suggestion
22 would be to add: These alternative reporting

1 options are well and broadly publicized
2 throughout the military and we are confident
3 that most, if not all, military personnel
4 understand them well.

5 I know that we all agreed that we
6 should -- I believe we did in the last
7 conference that we should put in are well and
8 broadly publicized throughout the military.
9 I'm not -- okay, I don't -- how does everybody
10 feel about then going the next step and saying
11 we're confident most, if not all, military
12 personnel understand them well?

13 REP. HOLTZMAN: This is Liz
14 Holtzman. I would withdraw that because I
15 don't think we need it.

16 JUDGE JONES: I would take it out
17 as well. It may just be going a step too far.
18 We've made our point and it's out there and
19 people can, you know, see it and get it
20 through their training.

21 The next -- any other comments?
22 Otherwise, I'll move on to the next one.

1 On six where Ms. Holtzman suggests
2 that we add to six which begins: Under current
3 law and practice, sexual assault allegations
4 must be referred to and investigated by
5 military criminal investigative organizations,
6 etc.

7 The suggestion is we add: A
8 commander and then in parentheses, whether the
9 convening authority or not, has no power to
10 stymie an investigation nor by refusing to
11 forward an allegation for prosecution, cover
12 up its existence.

13 Any comment on adding that
14 language?

15 PROF. CORN: This is Professor
16 Corn, Judge. I agree with the language. I
17 just suggest that we change power to authority
18 to be precise.

19 JUDGE JONES: Right, yes.

20 PROF. CORN: And also, I also
21 suggest that we add what I put in there was:
22 Any attempt to do so would constitute a

1 dereliction of duty or perhaps even
2 obstruction of justice, both in violation of
3 the UCMJ, subjecting the commander to
4 administrative and/or disciplinary sanction.

5 JUDGE JONES: Since I haven't
6 moved sufficiently, my lights just went off in
7 my office. I'll be right back.

8 MG ALTENBURG: I agree with the
9 changes, this is Altenburg.

10 JUDGE JONES: I'm just wondering
11 if it's not a little long, Professor Corn.
12 Can we -- I am --

13 PROF. CORN: Your Honor, I don't
14 mind, I am, you know, I just put the thoughts
15 out. I don't mind wordsmithing it.

16 JUDGE JONES: Okay.

17 PROF. CORN: I do think that we
18 heard senior level commanders tell us that if
19 they learn that a junior commander improperly
20 stymied or suppressed an allegation of sexual
21 assault, it would result in administrative or
22 disciplinary sanctions. And I think it's --

1 JUDGE JONES: All right --

2 PROF. CORN: -- would be a
3 violation of the law.

4 JUDGE JONES: Right, I think we
5 have a record before us that indicates that
6 that would be exactly what they'd be subject
7 to.

8 So you're right. Let's -- I agree
9 with the comment and I just suggest we might
10 try to, as you say, wordsmith it a little.

11 MG ALTENBURG: I don't think we
12 have to add what I'm going to say right now,
13 but it could result in court-martial charges,
14 not mere disciplinary action, and I've been a
15 witness to that myself 30 years ago where
16 charges were brought against a colonel for
17 obstruction of justice because of the way he
18 was handling a case.

19 So it's, anyway, I don't think we
20 need to put all that in there but I just
21 wanted those of you that --

22 JUDGE JONES: Yes.

1 MG. ALTENBURG: -- didn't know
2 that.

3 PROF. CORN: Why don't we just say
4 -- why don't we just end it with both -- why
5 don't we just end it with: in violation of the
6 UCMJ?

7 Because if it's a violation of the
8 UCMJ, it can result in removal, relief, court-
9 martial, Article 15, reprimand, whatever.

10 MG. ALTENBURG: Right.

11 REP. HOLTZMAN: This is Liz
12 Holtzman. I think the language, you know, I
13 wasn't drafting this for a final so I think
14 the language is a little strong, cover-up or
15 stymie. I mean there may be more elegant ways
16 to saying that. You know, suppressing it,
17 interfere with an investigation, or suppress
18 an investigation, would be better language.
19 I would be happy to try to see it modified in
20 some way just to tone it down a bit and of
21 course, shorten it, too.

22 JUDGE JONES: All right, great.

1 I, for instance, would think interfere might
2 substitute for stymie. But, yes, I agree. So
3 we'll change the language a little bit but
4 that's an agreed-to finding.

5 The next one is for seven which
6 talks about: The authority to resolve sexual
7 assault allegations is limited to senior
8 commanders who must receive advice from judge
9 advocates before determining appropriate
10 resolution.

11 And, Professor Corn, if you made a
12 comment, I don't have it. But let me start
13 with Ms. Holtzman who suggests that we add:
14 Despite making repeated requests for such
15 evidence, the Subcommittee has heard of no
16 instance in which a staff judge advocate
17 recommended prosecution and the convening
18 authority disagreed. We have, however, heard
19 of instances in which the staff judge advocate
20 recommended against prosecution of sexual
21 assault allegations and the convening
22 authority nonetheless proceeded to refer the

1 matter to a courts-martial.

2 Professor Corn, or anyone else,
3 did you have further comments with respect to
4 that?

5 PROF. CORN: I concur, this is
6 Professor Corn, no comment.

7 JUDGE JONES: Okay, anybody?

8 COL. TUNER: This is Colonel
9 Turner. It is accurate that we received no
10 such evidence. I think judge advocates who
11 have practiced for a while may have heard of
12 cases where particularly a lower level
13 convening authority, a Special Court-Martial
14 Convening Authority was going to make a
15 particular decision contrary to their staff
16 judge advocate and so the SJA or the commander
17 elevated it, a Superior General Court-Martial
18 Convening Authority was aware of and withdrew
19 authority to make the decision.

20 So I just, as we craft it, to be
21 careful that it does -- I mean it does happen
22 but we don't have evidence of a particular

1 case.

2 JUDGE JONES: Or it was stopped in
3 time before it could happen.

4 COL. TURNER: Exactly. Exactly,
5 yes, ma'am.

6 COL. HAM: Judge Jones and
7 members, this is Colonel Ham. We sent you a
8 request for information that we had sent out
9 on the 12th of July. I think Admiral Houck is
10 on the phone. It was in response to a
11 question he had on 27 June, the first meeting,
12 we asked the services for this information.

13 The question was, do you have any
14 statistics indicating in how many cases an SJA
15 advised a commander to dispose of a case in a
16 particular way and the commander declined to
17 follow his advice.

18 So we received responses from all
19 of the services. The Air Force, I'll just
20 read you their response. The commanders
21 declined to prosecute a case though JAG
22 recommended for trial in 22 of 2,511 cases

1 tried from 1 January 2010 to 23 April 13,
2 which is less than 1 percent. Of those 22,
3 there were ten in which a superior commander
4 preferred charges and only 12 where no
5 commander preferred charges.

6 So Kyle had sent out an e-mail
7 saying we -- there is some written indication
8 that it's extremely rare but it may happen.

9 As far as the testimony, the
10 transcripts reflect repeated questions by the
11 Panel members of witnesses and none of them
12 were able to provide you an instance.

13 REP. HOLTZMAN: Well it has to be
14 -- this is Liz Holtzman. It has to be
15 accurate so this statement is not accurate,
16 that's all.

17 JUDGE JONES: I don't --

18 REP. HOLTZMAN: It's very rare
19 that, you know, that it's very rare, in some
20 services it's non-existent and in other
21 services, extremely rare.

22 Unless you want don't want to

1 leave -- then you might want to just leave
2 that point out.

3 VADM HOUCK: I think -- this is
4 Jim Houck speaking. I think the point ought
5 to be made but I think in a way that, as
6 everybody has said, is accurate and there's
7 got to be a way to say that, you know,
8 extraordinarily rare. Some, I don't want to
9 wordsmith right here on the phone but there's
10 got to be a way to make the point in a way
11 that's accurate.

12 I also think that the statement
13 which begins with: despite making repeated
14 requests for such evidence, I'm not sure we
15 need that preamble there. We may just want to
16 shorten it some.

17 JUDGE JONES: All right. Me, too.
18 And I did see that e-mail that was the
19 response to the question, I guess it was
20 yours, Jim. And I think if we just look at
21 that, we can say something along the lines
22 that you suggested, like extremely rare or in

1 very few instances, something along those
2 lines.

3 All right. Then the next comment
4 relates to number nine. And it just says:
5 It's not clear what impact removing the
6 convening authority from senior commanders
7 would have on the effectiveness of the
8 military justice system and goes on.

9 And the suggestion of Ms. Holtzman
10 is that we add: This is a matter of concern
11 because the role of the convening authority at
12 present is intertwined with the securing of
13 witnesses, the selection of jurors and the
14 funding of discovery.

15 REP. HOLTZMAN: I don't know that
16 that really -- this is Liz Holtzman -- I think
17 it was a matter of concern to me but I'm not
18 sure that's the point here and was just
19 pointing out that that somehow needs to be
20 addressed in the report somehow. Now I don't
21 know it belongs in a finding.

22 JUDGE JONES: Yes, I wouldn't put

1 it in the finding either, but do we have
2 anything about this in the report as it's now
3 constituted? I'm not sure we do, but maybe we
4 do.

5 VADM HOUCK: Jim Houck here. I do
6 wonder, and I'm completely agreeing with what
7 people are saying about the finding. I do
8 wonder, though, if we're going to begin to
9 catalogue all the reasons that it's a matter
10 of concern that -- and we may want to do that.
11 But it's going to be a longer list than this.

12 JUDGE JONES: Yes, no, I don't
13 think I would add, this is a matter of
14 concern. I guess my only question is, I think
15 it's an important point to make and at the
16 moment, I can't put my finger on where it is
17 in our proposed report but I think it should
18 be in there. Or are you speaking about that,
19 Jim?

20 PROF. CORN: This is Professor
21 Corn.

22 JUDGE JONES: Yes.

1 PROF. CORN: I had some
2 recollection that in our last conference call
3 there was a discussion about not addressing
4 these kind of issues that were peripheral to
5 the convening role of the commander in the
6 initial assessment.

7 I think in the comments that I
8 wrote before the last conference call, I may
9 have suggested we indicate -- I thought that
10 was the one area where there was almost
11 uniformity in our -- or total consensus that
12 there are some issues in terms of the
13 commanders' authority that should be explored.
14 And I recall some discussion of that being
15 peripheral to the primary focus now.

16 So I don't know, maybe Kyle knows
17 if it ended up in the report or not. But I
18 think it's a good question. Do we want to
19 address those, what we might say secondary or
20 peripheral issues in the preliminary report?
21 Because right now, the preliminary report
22 seems pretty much targeted on the authority to

1 send the case to trial.

2 JUDGE JONES: Yes, I agree and I
3 remember the conversation you're talking about
4 and we were trying to stay away from, as you
5 described these other issues -- peripheral
6 issues.

7 I guess it's still fair to make a
8 finding that it's not clear what impact
9 removing convening authority from senior
10 commanders would have because I guess that's
11 truly where we're at now.

12 But I think we did all agree that
13 we have more to do with respect to that and
14 other issues.

15 So I guess I'm saying let's leave
16 nine and not put in Ms. Holtzman's suggested
17 additional comments and I don't think we need
18 any support in the text when all we're finding
19 is it's not clear to us what impact removing
20 the convening authority will have.

21 What does everybody think about
22 that?

1 VADM HOUCK: I think it makes good
2 sense at this point, Judge.

3 JUDGE JONES: Okay, great. Thank
4 you. All right.

5 COL. TURNER: Judge Jones, Colonel
6 Turner here.

7 JUDGE JONES: Yes, Colonel?

8 COL. TURNER: So just note six that
9 we just talked about and went through seven.
10 Back on note six, we were talking about no
11 power to stymie investigations.

12 JUDGE JONES: Right.

13 COL. TURNER: The word that the
14 instruction uses there is impede an
15 investigation.

16 JUDGE JONES: Okay. That is even
17 better than interfere with, okay. Impede
18 sounds good to me. Any problems with that?

19 REP. HOLTZMAN: No, excellent.

20 JUDGE JONES: Great. Thank you,
21 Colonel.

22 REP. HOLTZMAN: So you're -- so in

1 other words, Barbara -- this is Liz Holtzman
2 -- Barbara just to --

3 JUDGE JONES: Yes.

4 REP. HOLTZMAN: -- just to
5 understand, you don't want any reference to
6 the fact that in terms of the -- taking the --
7 in this finding, you don't want any finding
8 about that there's not enough information as
9 to how the prosecutorial authority would be
10 handled in the absence of giving it to the
11 commander? You don't want a reference to
12 that?

13 My only reason for including that
14 was because this is the key, you know, of the
15 points in terms of why the commander's
16 authority has to be removed. The key point is
17 that they're giving it to these professional
18 prosecutors, but how that's going to work is
19 unclear and I don't think people really
20 understand the vagueness of that.

21 So I don't know, that's the only
22 reason I put it there was that, okay, you want

1 to take the commander's power away, well what
2 -- who's going to have it and how is that
3 going to work?

4 And that's my only reason to do
5 that but if you think it doesn't belong here,
6 I'm okay with that, too.

7 JUDGE JONES: Yes, well, my
8 concern is I just don't know how much we've
9 gone into what the alternative is, which is
10 what I think you're talking about.

11 REP. HOLTZMAN: Okay, well --

12 JUDGE JONES: It's unclear what --

13 PROF. CORN: Your Honor?

14 JUDGE JONES: Yes? I'm sorry.

15 PROF. CORN: This is Professor
16 Corn. First up I have to say, I didn't
17 understand the comment with the -- in the
18 context which Ms. Holtzman just put it.

19 I think result --

20 If we could just somehow get in
21 there the effectiveness and execution or
22 implementation of the military justice

1 process. Then you're -- then that captures
2 that concern. We don't know how it would all
3 work.

4 JUDGE JONES: Well that would be a
5 true statement and I think it would be a
6 finding and it would distinguish
7 organizational discipline or operational
8 capability and effectiveness from what we're
9 -- what, Liz, I think you're talking about
10 which is sort of the more basic implementation
11 of the whole system. Is that fair?

12 PROF. CORN: So I would suggest we
13 change the current one where it says
14 effectiveness, say: on the implementation of
15 the military justice process, and then finish
16 it with: or the consequences that would
17 result.

18 JUDGE JONES: Any -- I like that.

19 LT COL GREEN: Professor Corn, I
20 know you were coming up with that probably as
21 you were going along. Did you -- can you
22 repeat that again?

1 PROF. CORN: Yes, so number nine
2 would read: It is not clear what impact
3 removing convening authority from senior
4 commanders would have on the implementation of
5 the military justice process and then just
6 leave the rest. So you take out,
7 effectiveness of the military justice system,
8 and substitute therefore: implementation of
9 the military justice process.

10 REP. HOLTZMAN: What does
11 implementation mean? Maybe just take that
12 word out? Do you need that?

13 PROF. CORN: Okay, you could, yes,
14 you could say on the military justice process,
15 so it is superfluous. But it means all, in my
16 mind, it means all the things you raised the
17 concerns about, Ms. Holtzman, discovery, jury
18 selection, witness production, all these
19 authorities that we'd have to figure out how
20 they would be exercised, funding --

21 REP. HOLTZMAN: But that's one of
22 the concerns, right. But the other is how is

1 that, that authority actually exercised? Who
2 makes the decision to prosecute each case?
3 Who sets policies? All those other issues
4 which are not --

5 PROF. CORN: Right.

6 REP. HOLTZMAN: Yes.

7 PROF. CORN: So we don't have to
8 say the implementation, right? Just on the
9 military justice process.

10 REP. HOLTZMAN: Yes, fine, that's
11 fine.

12 JUDGE JONES: Okay, Kyle, is that
13 -- you've got it?

14 LT COL GREEN: Yes, ma'am. I
15 understand it, can I just -- on the second
16 part of that, when: the organizational
17 discipline and operational capability and
18 effectiveness, really go to the argument that
19 commanders have made about impacting their
20 ability to maintain good order and discipline
21 and maintain combat readiness.

22 So those are distinct, obviously,

1 from the military justice process and are we
2 -- based on what I'm hearing, I just want to
3 make sure, are we comfortable talking about
4 all those things or are we mixing things that
5 the Subcommittee doesn't want to yet talk
6 about?

7 PROF. CORN: This is Professor
8 Corn. My view is that we should leave that
9 second prong of the sentence that begins with:
10 or what consequences, but it's not -- I think
11 that's unclear.

12 JUDGE JONES: Yes, I think it's
13 unclear, too. We're not -- I don't know if we
14 ultimately will make a different finding but
15 now I think it's fair to say it's not clear,
16 at least that's how I feel about it.

17 Any other --

18 REP. HOLTZMAN: This is Liz
19 Holtzman. Kyle, could you just tell me what
20 document we're reading from because I have a
21 couple of documents here and I'm trying to
22 understand where -- how to find where we are.

1 LT COL GREEN: The -- it's the
2 document that we sent you after 2:00, Ms.
3 Holtzman, it's the --

4 REP. HOLTZMAN: At 4:31?

5 LT COL GREEN: I'm sorry?

6 REP. HOLTZMAN: At 4:31?

7 LT COL GREEN: No, it's earlier
8 than that. It was -- it says Member Comments
9 on 27 Jan. Draft.

10 REP. HOLTZMAN: Do you have the --
11 I'm sorry to bother you about this. Oh, is it
12 the one at 3:57, proposed revisions?

13 LT COL GREEN: I think it was --

14 REP. HOLTZMAN: I'll just copy --

15 COL. HAM: Ma'am, I'll resend it
16 to you, it's Colonel Ham.

17 REP. HOLTZMAN: Okay. Thank you.

18 JUDGE JONES: All right. Then we
19 have an additional finding number ten:
20 Congress has enacted significant reforms
21 addressing sexual assault in the military and
22 the Department of Defense has implemented

1 numerous changes, etc. Recent statistics show
2 sexual assault reporting and prosecutions have
3 increased and the longer term impact of
4 current initiatives should be evaluated before
5 adopting more substantial or far reaching
6 change--

7 PARTICIPANT: Is this the Deputy
8 General Counsel of WHS? I'm sorry, I have the
9 wrong -- I have the wrong number, sorry.

10 JUDGE JONES: Okay.

11 MG ALTENBURG: Who was that?

12 Okay.

13 JUDGE JONES: All right, then Liz,
14 do you know where we are because we have
15 another -- we have a comment from you but I'm
16 not sure, well I guess it can't go to the --
17 to number ten because that was added.

18 I think that had been dropped and
19 then added, I can't remember, Kyle. But --

20 LT COL GREEN: That's correct,
21 Judge Jones. This was the new comment that
22 you had us add back in based on that language

1 regarding reporting that you had us add to the
2 text and we have not received any comments
3 prior to the meeting on that. So --

4 MS. FROST: This is Joye. If I'm
5 following everybody and we're on number ten --

6 JUDGE JONES: Yes.

7 MS. FROST: -- I do think where
8 it says should be evaluated, I think we either
9 need to say formally evaluated or externally
10 evaluated.

11 This goes to the heart of my
12 comment about a lot of mistrust here around
13 with the military and I just, I find it pretty
14 incredible that the military has not yet done
15 some formal evaluation or I don't know, maybe
16 they're planning to, but I would like to at
17 least say formally evaluated. I'd prefer
18 externally, but.

19 Because evaluated means a lot of
20 different things to people.

21 JUDGE JONES: I understand exactly
22 what you're saying. I don't have a problem

1 with formally. Is there --

2 MS. FROST: There might be a
3 better word or phrase.

4 JUDGE JONES: Yes, that's why I
5 don't want to go to externally either because
6 I don't -- we really -- but I --

7 GEN. HAM: You're talking about
8 more of a recommendation than a finding
9 though, aren't we?

10 REP. HOLTZMAN: This is Liz
11 Holtzman. I was just going to make that
12 point. I mean if we rephrase it, it's a
13 recommendation. If you want to phrase it as
14 a recommendation.

15 MS. FROST: Yes, that's a good --
16 this is Joye. That's a good point, that part
17 really should be moved to a recommendation.

18 REP. HOLTZMAN: It's very simple
19 that the -- that none of these programs has
20 been formally evaluated up to this point and,
21 if you want to, I mean that's a finding and we
22 could make a recommendation that one, you

1 know, of the importance of evaluating in a
2 formal and systematic --

3 MS. FROST: Right.

4 REP. HOLTZMAN: -- way that can
5 seem credible.

6 MS. FROST: Right.

7 REP. HOLTZMAN: So not -- I don't
8 think it belongs in a finding. We can make a
9 recommendation.

10 JUDGE JONES: Are you talking
11 about all of ten, Liz, of some of ten or what?

12 REP. HOLTZMAN: I'm definitely
13 talking about the second sentence. The second
14 part of it --

15 LT COL GREEN: Judge Jones?

16 JUDGE JONES: Yes.

17 LT COL GREEN: Judge Jones, what
18 if we said the longer term impact of current
19 initial -- initiatives are not yet known?

20 REP. HOLTZMAN: I guess you can
21 say they have not been evaluated by -- also
22 why do we want to leave it longer term? It

1 could be even middle term or --

2 JUDGE JONES: Right, even short
3 term reporting within -- from one year to the
4 next. But I like the basic approach that's
5 not been evaluated.

6 REP. HOLTZMAN: Yes, you can put
7 it -- the reasons this issue shows sexual
8 assault reporting and prosecutions have
9 increased, but there has been no systematic
10 evaluation of these changes, you know, of the
11 changes that have been made so far. Something
12 like that.

13 JUDGE JONES: Yes, evaluation and
14 assessment of the, yes, no, I agree.

15 REP. HOLTZMAN: That'd be another
16 way of saying without making it a
17 recommendation.

18 JUDGE JONES: Yes, I like ten
19 basically in there and let's not make a
20 recommendation but let's convert it into a
21 finding.

22 Any other suggestions other than

1 what we've heard? I think I like assessment
2 and evaluation.

3 All right, I guess we're, on this
4 one, we're wordsmithing again and, Kyle, is
5 that you?

6 LT COL GREEN: Yes, ma'am. This
7 is an additional finding that's proposed by
8 Ms. Holtzman.

9 REP. HOLTZMAN: Which?

10 JUDGE JONES: The one after.

11 LT COL GREEN: Commanders -- Ms.
12 Holtzman, this is: Commanders and leaders at
13 all levels must continue their focused
14 efforts.

15 REP. HOLTZMAN: Right. Me, I took
16 my -- my recommendation was to cut this
17 paragraph because it's not a finding.

18 JUDGE JONES: Right.

19 REP. HOLTZMAN: It's a
20 recommendation and so that's my recommendation
21 on that. And then I also had another proposed
22 finding but that's what I thought it was

1 talking about before but you can look at it.
2 If you don't think it's appropriate, take it
3 out. I don't think that --

4 JUDGE JONES: Right.

5 REP. HOLTZMAN: -- paragraph
6 belongs there. Unless you want to take --

7 JUDGE HONES: That's -- is that
8 finding something we can say in the report?
9 It's -- I think I agree because we're
10 basically saying we're going to get in
11 additional information and analysis on this
12 issue.

13 I don't know what -- I mean what
14 we're trying to say here, I guess, well we say
15 it is that their commanders and leaders are
16 essential to creating and enforcing
17 appropriate command climates. And senior
18 leaders must ensure all commanders effectively
19 accomplish this fundamental responsibility.

20 I mean we could say that and I
21 guess the -- we all know that that's -- we've
22 learned a lot about accountability and the

1 other programs to create the very best tone
2 from the top, if you want to call it that.
3 But we're not really reporting out on it to
4 anything final at this point.

5 So, I don't -- do you want to
6 leave in the affirmative statements of what
7 we've said so far and just cut out this they
8 must continue their focused efforts sentence?
9 And the fact that we're telling them that
10 we're going to provide additional information
11 later?

12 REP. HOLTZMAN: My view is if we
13 take this out instead of it -- because it
14 sounds to me like a recommendation, the must
15 is an injunction, it's not a fact.

16 So I would take the second -- I'd
17 take the first sentence out and --

18 JUDGE JONES: Right.

19 REP. HOLTZMAN: -- rephrase the
20 second sentence so that, and senior leaders
21 are responsible for ensuring that all
22 commanders effectively accomplish this

1 fundamental responsibility and full report to
2 the Subcommittee, dot, dot, dot.

3 JUDGE JONES: All right. Well, I
4 think that's right. I like that a lot better.

5 Now there's an additional comment.

6 LT COL GREEN: Judge Jones, I
7 misspoke before, the comment number nine is a
8 recommended additional finding from Ms.
9 Holtzman. The last paragraph you were just
10 discussing was just part of the conclusion of
11 this letter. It is repeated -- that some of
12 that text is in the conclusion of the report
13 at the end as well.

14 JUDGE JONES: Hello? Is everybody
15 still there?

16 REP. HOLTZMAN: Yes, I'm here.

17 JUDGE JONES: All right. Well,
18 let me switch off this for a moment. Liz, you
19 have a suggestion that we add an additional
20 finding. So let's talk about that.

21 There is inadequate information as
22 to who would have the prosecutorial authority,

1 how that authority would be exercised if the
2 authority were removed and what would the
3 impact of such a change would be. And that
4 does go back to the subject matter that we
5 were discussing before in nine.

6 REP. HOLTZMAN: Right, so if you -
7 - that's fine. I'm --

8 JUDGE JONES: Yes, all right. So
9 I mean at some point, hopefully, we will be
10 able to figure out what the alternative is
11 that's been proposed and make the finding.

12 PROF. CORN: Geoff Corn. Sorry
13 about that Judge, I think I'm getting jammed,
14 I got cut off.

15 JUDGE JONES: Okay. All right.
16 So, to recap, we're going to -- I think not
17 adopt the last -- second-to-the-last comment
18 of Liz Holtzman's which is consistent with
19 what we've decided to do with respect to
20 number nine.

21 And then is there any more comment
22 or what do people think about, I guess for the

1 last paragraph, are we making that a finding
2 or are we leaving that as a -- I don't know
3 what it's doing there, Kyle. You started to
4 mention that we've said it in the report?

5 LT COL GREEN: Yes, Judge Jones,
6 this is just wrapping up the cover letter.
7 Again, this is somewhat --

8 JUDGE JONES: Oh, I see.

9 LT COL GREEN: Again, just --

10 JUDGE JONES: Yes.

11 LT COL GREEN: -- I think the
12 important -- as I understand the comments and
13 we can certainly take it out, probably the
14 most important part is whether we want a note
15 in the cover letter that the full report will
16 provide additional information.

17 JUDGE JONES: You know what? I'm
18 sitting here looking at it thinking that you
19 wanted to make it number 11 even though I'd
20 forgotten that what we were actually dealing
21 with here was not just one through ten and
22 findings but an actual memorandum with

1 commentary.

2 But I guess we sort of now have
3 discussed it as a finding. Do people want to
4 amend it and make it a finding the way we've
5 discussed, cutting out the first sentence,
6 making it a finding in the sense that senior
7 leaders are --

8 PROF. CORN: Your Honor, this is
9 Professor Corn.

10 JUDGE JONES: Yes.

11 PROF. CORN: -- Processor Corn, one
12 option might be to just make the finding that
13 the authority to send a case to trial is not
14 the only mechanism for ensuring or battling
15 this problem. It seems to me this is -- there
16 are other components to it and leadership is
17 a vital component for it. I mean --

18 MS. FROST: This is Joye. I
19 really like that because it is -- it elevates
20 it, I think, to a finding when you put that
21 component there that it isn't just about
22 reporting and prosecution.

1 JUDGE JONES: All right, so we
2 would start with the sentence: Military
3 commanders ...? Geoff, is that where you're
4 starting?

5 PROF. CORN: Could you -- I wish
6 we had the chance to draft something up.

7 I think the relationship to the
8 other finding is our finding that it's just
9 the issue with what is the difference between
10 a commander and a convening authority, that we
11 are emphasizing that through all of this
12 information gathering, it's clear to us that
13 the prosecutorial process is only one
14 component of protecting members of the Armed
15 Forces from the danger of sexual violence.

16 JUDGE JONES: Yes.

17 PROF. CORN: And another equally
18 vital component is effective leadership and
19 implementation of policies and training and so
20 on and developing a culture. How, you know,
21 how to put that in two sentences, I think we
22 could do it. I just think, you know, we need

1 to have a little chance to do it.

2 JUDGE JONES: All right. Well, I
3 think that's right. So why don't -

4 PROF. CORN: I'm satisfied --
5 (Simultaneous speaking.)

6 JUDGE JONES: Right, and anyone
7 else who wanted to suggest something there to
8 get it into Colonel Greene because I like that
9 as well, Joye, I think you're right.

10 Any other comments before we go to
11 the text, which is my page three? Okay.

12 I really do like the way it's been
13 reorganized. Are there any -- anybody think
14 we may need to do a -- not commentary now on
15 any particular part of the text, but does
16 everybody approve of the way it's been
17 reorganized? It sounds like no one
18 disapproves of it.

19 All right, the first comment,
20 then, I find is on page seven. Oh, I see, and
21 this is the staff telling us about a column
22 that you've added, is that right, Kyle?

1 LT COL GREEN: That's correct,
2 Judge Jones. We -- just looking at this, the
3 commanders and courts and the convening
4 authority information, we just thought it
5 would be helpful to just provide the most
6 current demographics for active duty
7 populations.

8 Just, again, it just spells out
9 and shows the information. I just didn't want
10 to add that without getting all of y'all's
11 approval.

12 JUDGE JONES: I like it. I think
13 the numbers -- the total number of active duty
14 personnel really makes a point.

15 GEN. HAM: This is Carter Ham.
16 Kyle, I just recommend if you can go back to
17 the -- and confirm the number with the Coast
18 Guard. That seems a little odd, that the
19 number of Special Court-Martial Convening
20 Authorities almost equals the number of
21 commanders, that seems quite unusual.

22 LT COL GREEN: Yes, sir, you know,

1 you -- the Navy numbers, and I've talked to
2 the Navy rep and asked them about that twice
3 now, and I'm waiting for an answer. That's
4 what they've indicated, but we're trying to
5 confirm that, so yes, sir.

6 Oh, I see, sir. You're talking
7 Coast Guard as well.

8 JUDGE JONES: Yes, they're both
9 odd-looking, Navy and Coast Guard.

10 LT COL GREEN: Yes, sir, we're
11 trying to track that down with the Navy.

12 The one thing I will say with the
13 Coast Guard is, commanders also includes
14 officers-in-charge which, with their station
15 system includes NCOs above the grade of E-7
16 and officer-in-charge billets, but I'll
17 confirm with them that the number of Special
18 Court-Martial Convening Authorities is
19 accurate.

20 JUDGE JONES: All right, any
21 further discussion on that?

22 Okay, then let's move to page

1 nine. Here we're talking about the
2 relationship between a convening authority and
3 his or her staff judge advocate, and it's the
4 third full paragraph where Ms. Holtzman
5 suggests that we add the following: In other
6 words, legal advisors testified that they not
7 only had the power to, in quotes, go over the
8 commander's head, end quote, if the commander
9 disagreed with their recommendations but had
10 done so. Despite this, no legal advisor could
11 recall any instance in which they had
12 advocated for prosecution and the commander
13 rejected that advice.

14 REP. HOLTZMAN: Very wordy.

15 JUDGE JONES: Well, I think when
16 we were talking about accuracy before, this
17 does not suffer from being inaccurate. It is
18 the testimony that we heard.

19 (Telephonic interference.)

20 We may have lost Professor Corn
21 again.

22 VADM HOUCK: Jim Houck here. I

1 don't know that it's a matter of power to go
2 over the commander's head as much as it is, I
3 think, legal advisors. I mean, if that was
4 their testimony, then that was their
5 testimony. That's not how I would describe
6 it. I would describe it as the -- as an
7 obligation or a moral or ethical obligation to
8 go over a commander's head if one thought that
9 the commander was acting in a way that, you
10 know, violated the law. I notice there,
11 especially under the law.

12 You know, likewise, it goes to
13 Judge Jones' comment, no legal advisor could
14 recall any instance in which they had
15 advocated for prosecution and the commander
16 rejected that advice.

17 I'm not sure if we need that in
18 light of the fact that we have more specific
19 information as reported in this e-mail or
20 earlier to --

21 JUDGE JONES: Right and --

22 VADM HOUCK: -- in response to

1 the RFI.

2 REP. HOLTZMAN: All right, so
3 maybe it doesn't belong here. This is Liz
4 Holtzman. You can -- if we think it's
5 redundant, given, first of all, that it's
6 going to be modified slightly by the other
7 information if we have other information
8 later, then take it out.

9 JUDGE JONES: I agree.

10 COL. TURNER: Colonel Turner here,
11 ma'am. For what it's worth, there is the
12 statutory protection for the legal chain of
13 command, or legal officers rather, to go up
14 their legal functional, so -- you know, maybe
15 a footnote is something to reference that --

16 JUDGE JONES: Yes.

17 COL. TURNER: -- statutory
18 protection.

19 JUDGE JONES: Well, you know,
20 Kyle, help me out here. We talked about the
21 fact that in NDAA 14, we have, is it 1744?
22 I don't remember the specific number. But

1 it's now, under the law, a must situation when
2 there's a disagreement, correct?

3 LT COL. GREEN: That's correct.
4 That is 1744, Judge Jones. And we talk about
5 that later. On page 14 of the text is a
6 paragraph --

7 JUDGE JONES: I thought so.

8 LT COL. GREEN: -- on that
9 disagreement. And there's discussion
10 elsewhere in that same -- also on page 14, or
11 right around there, that talks about the
12 Article 6 authority as well.

13 So this is essentially just a, I
14 guess what we intended it to be was just an
15 intro or a discussion that was raised in the
16 arguments, the discussion of it is deeper in
17 the other section of the report.

18 JUDGE JONES: Yes, like what
19 actually, what the law actually is now, I see.
20 Why don't we go back and just -

21 AUTOMATED OPERATOR: Joining the
22 meeting.

1 PROF. CORN: Geoff Corn, again.

2 JUDGE JONES: Welcome back, Geoff.

3 All right. So we're on page nine.

4 My suggestion is that we get rid of this
5 second line of Ms. Holtzman's recommendation
6 and let's just go back over the actual
7 testimony and see, there was some notion about
8 what was actually the, you know, what they
9 said. Whether it was only the power or if it
10 was, if they were talking about obligation.
11 Just take a look at that and note it so that
12 we can all see that change and see if there's
13 any objection.

14 It may stay, it may stay power. I
15 don't know. It's not a quote, though.

16 REP. HOLTZMAN: Okay, the -- this
17 is Liz Holtzman. I would just, if you think
18 it's useful, I would just, instead of that
19 whole paragraph that's there, I would just put
20 a comma and say, and that -- and noted that
21 right had been exercised whatever it is, felt
22 - know their authority, okay, and that they

1 had exercised and that authority had been
2 exercised, from time to time.

3 JUDGE JONES: All right, I would
4 have --

5 VADM HOUCK: I was just going to
6 say, this is Jim Houck again. And it might be
7 that instead of power, we substitute legal
8 authority.

9 REP. HOLTZMAN: The word authority
10 is what they used here, legal advisors, if you
11 look not in the comment, but if you look in
12 the text they used, the word noted their
13 authority under Article 6, then I would just
14 put a comma and authority that they note it
15 had been exercised in the past. Or they've,
16 you know.

17 JUDGE JONES: All right.

18 COL. HAM: This is Colonel Ham. I
19 think that was testimony on the 25th of
20 September by Colonel Kenny, the Air Force
21 colonel, female colonel who was with General
22 Rice, the four-star Air Force general officer.

1 We can find that.

2 JUDGE JONES: All right. That's
3 my recollection that someone testified to it
4 as well. So we can add that.

5 REP. HOLTZMAN: The only point --
6 this is Liz Holtzman -- the point of doing
7 this is, it's very nice to say they have the
8 authority to go over somebody's head, but have
9 they ever exercised that? That's another --
10 you know, that point is not, one thing doesn't
11 necessary follow from the other.

12 So that's the only reason to
13 include it. If you think it should be in a
14 footnote, that's fine with me, too.

15 JUDGE JONES: All right. Any
16 other comments on page nine? All right.

17 On page ten, you'll see in red,
18 additional text which is intended to support
19 the additional finding with respect to
20 reporting which we've made. And have people
21 had the opportunity to read that?

22 I see there's one comment from Ms.

1 Holtzman farther down under five (a),
2 reporting channels.

3 MS. FROST: This is Joye. I do
4 have a comment regarding where it says:
5 Studies indicate that the risk for contact
6 sexual violence is the same for women in the
7 military as it is for women in the civilian
8 sector. So -- and I then went down and looked
9 at the source of that --

10 JUDGE JONES: Right.

11 MS. FROST: You know, the
12 statistics vary pretty considerably around
13 sexual assaults' reporting depending on the
14 population. I would suggest, I know it may
15 sound nitpicky, but instead of saying it's the
16 same, saying that the risk for contact sexual
17 violence for women in the military is
18 comparable to that of women in the civilian
19 sector.

20 JUDGE JONES: I like that word
21 better.

22 REP. HOLTZMAN: I do, too. Well,

1 what is contact sexual violence as opposed to
2 sexual assault or sexual violence? What's the
3 word contact mean? I mean, is that a standard
4 term or --

5 MS. FROST: That's a really good
6 point and I couldn't answer that.

7 JUDGE JONES: Well, and the other
8 thing --

9 LT COL GREEN: Ms. Holtzman,
10 that's the term that was specifically used in
11 the 2010 National Intimate Partner and Sexual
12 Violence Survey. So when Dr. Galbreath quotes
13 that, that's exactly the phrase that he uses.
14 I mean, again, it just lends itself to the
15 many different terms that are used to describe
16 the issue and this is just the one in that
17 survey that was used. It encompasses much the
18 same offenses but all of them have their own
19 nuances.

20 REP. HOLTZMAN: Well then, put it
21 in quotes, don't you think? I mean, it's a
22 very unusual term. That's just my take on it.

1 JUDGE JONES: Yes, I have to
2 agree. The average person reading that, you
3 know, it's subject to wide interpretation.
4 Are we talking again everything from, you
5 know, the pat on the butt all the way to
6 sexual assault?

7 REP. HOLTZMAN: Right, I'm just
8 troubled by that phrase. I tried to change
9 it, too, in my other comments, but I guess you
10 just rejected them.

11 LT COL GREEN: We have the
12 definition from the presentation and if you
13 think it would be helpful, we can certainly
14 add that to the footnote.

15 REP. HOLTZMAN: Oh, I don't think
16 you should use the definition, I think you
17 shouldn't use the term. I think that's the
18 point I'm trying to make. Excuse me, this is
19 Liz Holtzman.

20 LT COL GREEN: I understand, Ms.
21 Holtzman, I just -- I think we're limited by
22 that just based on the study and the source

1 and if -- but if you think it does need
2 clarification, we can add it.

3 JUDGE JONES: I would be fine with
4 footnoting so that the reader would know what
5 was meant in this particular study around
6 contact sexual violence.

7 REP. HOLTZMAN: And maybe put that
8 in quotes.

9 JUDGE JONES: Yes. Yes, that's a
10 good idea. If we're going to do the footnote,
11 putting that in quotes makes a lot of sense
12 and make it clear in the footnote.

13 REP. HOLTZMAN: But then you see,
14 you don't use the term in the next sentence.
15 So crimes of sexual violence, is that
16 different? That's the problem that I have
17 with using this very specific and unusual
18 term. Are you talking about the same thing in
19 the next sentence as you were in the prior
20 sentence?

21 COL. HAM: Ma'am, it's Colonel
22 Ham. I think we're using the term of the --

1 that the presenters who discussed those
2 studies used. So I understand your concern.
3 I guess our -- we're trying to be very
4 accurate in what they've discussed.

5 So they're discussing two
6 different studies. If you remember way back,
7 Dr. Addington was discussing the National
8 Crime Victimization Survey, Dr. Galbreath was
9 discussing the NISVIS, the INSV, the National
10 Intimate Partner Sexual Violence Survey.

11 So there are two different surveys
12 that use different terms.

13 REP. HOLTZMAN: Well, that's --

14 COL. HAM: I don't know.

15 REP. HOLTZMAN: That's why I think
16 the previous suggestion that we use the word
17 comparable, then you don't have to worry so
18 much about what the terminology is. Right?
19 Am I wrong?

20 PROF. CORN: This is Professor
21 Corn. I'm just wondering why we need the
22 first sentence at all. Why don't we just say

1 sexual assault crimes are chronically under-
2 reported in American society and the reporting
3 rate for the military is comparable to that of
4 civilian society?

5 JUDGE JONES: Well that's what
6 matches up with the finding that we added. We
7 didn't actually talk about the risk for sexual
8 assault or sexual -- contact sexual violence.
9 But what we do need is the crimes of sexual
10 violence are chronically under-reported. I
11 mean, I -- and there I would use the word
12 comparable and we may want to go back and use
13 it in the finding as well.

14 I don't mind the fact that the
15 risk for sexual assault or whatever contact
16 sexual violence is, is comparable for women in
17 the military as it is for women in the
18 civilian sector. But we don't need it for
19 that finding.

20 The only way to do this, however,
21 I think would be footnotes explaining what the
22 difference is -- what contact sexual violence

1 is and then exactly what we mean by crimes of
2 sexual violence in the second sentence.

3 I mean, I might suggest that you,
4 you know, make the -- put the definition in
5 that footnote for contact sexual violence.
6 You want to get rid of it entirely, though,
7 Liz, and I understand that impulse.

8 REP. HOLTZMAN: Listen, if they
9 see -- I don't feel that strongly. I mean,
10 that's fine. That's fine.

11 JUDGE JONES: Okay. All right.
12 Then I think I would vote for adding some more
13 information to the footnote.

14 LT COL GREEN: We can do that,
15 Judge Jones.

16 JUDGE JONES: Okay, thanks. I'm
17 putting my light back on again. All right.
18 I'm back.

19 Okay, then we have reporting
20 channels for victims of sexual assault and
21 there's a -- and that's five (a), and there's
22 a comment by Ms. Holtzman to add: These

1 options are well-publicized and, we believe,
2 well understood.

3 I think I would just leave it at
4 well-publicized. But I don't know, do others
5 feel that we have had -- we've heard enough
6 that they're well understood by victims?

7 REP. HOLTZMAN: Well, I think at
8 Lackland we found that out. But can we say
9 that, you know, military-wide? I'm not sure.
10 I mean it's fine to say if you just want to
11 say well-publicized, it's fine. We've said it
12 before, but that was in the finding.

13 JUDGE JONES: Right.

14 REP. HOLTZMAN: I guess we need to
15 have some backup here, right?

16 JUDGE JONES: I think what we did
17 in the findings was, we also took out the part
18 about whether that everybody understood it or
19 --

20 REP. HOLTZMAN: Right.

21 JUDGE JONES: -- they believed
22 they -- so I think I'd take it out again and

1 just say well-publicized and cut there. Any
2 further comment on that one? Okay.

3 All right, if there are any other
4 comments between that one, and now I'm on page
5 13, and this is something that you're bringing
6 to our attention, Colonel Greene. You've
7 added something to the text -- okay, to
8 clarify the new NDAA provision.

9 LT COL GREEN: Right. We had a
10 comment that the -- what we added about the
11 new provision was a little bit confusing. I
12 mean it's pretty hard to describe the new
13 jurisdiction restriction, but we tried to
14 provide some clarification for that, so.

15 REP. HOLTZMAN: What's an initial
16 disposition authority?

17 COL. HAM: The lowest level
18 commander that can handle the offense, ma'am,
19 the O-6 withholding provision you're familiar
20 with?

21 REP. HOLTZMAN: Oh, I see.

22 COL. HAM: Lowest level convening

1 authority that can handle it and in this case,
2 it is, the lowest level commander that can
3 handle it is the O-6.

4 REP. HOLTZMAN: Instead of
5 disposition authority, can we say the initial
6 convening or the -- it's just that there's so
7 much terminology here. Is there some way of
8 making that clearer? Is that -- can we say
9 the initial convening authority?

10 LT COL GREEN: Right, the only
11 problem with that, Ms. Holtzman, is that
12 because it's restricted to in the grade of O-
13 6, somebody may be a convening authority lower
14 than that. So you could have a SPCMCA who's
15 lower grade than O-6. So initial disposition
16 authority becomes almost a term of art to
17 describe who you're talking about and who has
18 the authority.

19 JUDGE JONES: I mean, the one
20 thing that we have to all be very clear on as
21 we go through is that for sexual assault
22 offenses, whatever you call the authority,

1 it's always an O-6, right? It goes right --
2 it's withheld to the O-6?

3 LT COL GREEN: That's correct,
4 Judge Jones.

5 REP. HOLTZMAN: Well, how can that
6 be when you just said it could be a non-O-6?

7 LT COL GREEN: No, that's what I'm
8 saying, Ms. Holtzman, is that you can have a
9 Special Court-Martial Convening Authority who
10 is an O-5, and that person then would not be
11 able to, under the DoD policy, to be the
12 initial disposition authority.

13 To be the initial disposition
14 authority, you have to be both a Special
15 Court-Martial Convening Authority and in the
16 grade of O-6. So that's why you can't use the
17 term SPCMCA here.

18 REP. HOLTZMAN: Well, what
19 difference does that make? Why do we care
20 about this?

21 COL. HAM: The thought is that the
22 experience in years that go with the rank as

1 well as the authority, rather than just the
2 designation of Special Court-Martial Convening
3 Authority.

4 REP. HOLTZMAN: Okay. I guess I'm
5 not understanding.

6 JUDGE JONES: You know, maybe we
7 should just try to --

8 REP. HOLTZMAN: I don't understand
9 the prior sentence. What does it mean,
10 restrict jurisdiction to general courts-
11 martial, what does that mean?

12 COL. HAM: Under the NDAA, ma'am,
13 the only level court-martial that sexual
14 assault offenses can go to is general court-
15 martial. They eliminated the ability to send
16 them to special court-martial.

17 REP. HOLTZMAN: Right. Maybe that
18 can be clear -- more clearly stated. That's
19 very confusing.

20 LT COL GREEN: Ms. Holtzman, I can
21 take the first part of that sentence out so it
22 would just read, in other words: If an offense

1 warrants trial by court-martial, the case
2 cannot be referred to a special court-martial.
3 Instead, the offense may only be referred to
4 a general court-martial. If that -- we can
5 take the IDA out of that and maybe that'll
6 help.

7 REP. HOLTZMAN: It does.

8 LT COL GREEN: Okay.

9 JUDGE JONES: All right, great.

10 After that, as I go through --

11 REP. HOLTZMAN: Before you -- I'm
12 sorry, this is Liz Holtzman again.

13 JUDGE JONES: Sure.

14 REP. HOLTZMAN: I just, can you do
15 something about the IDA in the first line of
16 that paragraph?

17 JUDGE JONES: What's the page
18 again that we're looking at? Oh, I see, 13?

19 REP. HOLTZMAN: I guess I just
20 blurred over that, I'm sorry. Anyway --

21 JUDGE JONES: I think we -- yes, I
22 think we need to take a shot at making this

1 all simpler in this paragraph and figure out
2 what we want to say.

3 REP. HOLTZMAN: Yes, that's all,
4 so maybe if something could be done about
5 simplifying that -- the concept of the initial
6 disposition authority in the first sentence,
7 I would appreciate that. That's all.

8 JUDGE JONES: All right. We'll do
9 that. I'm now on page 19. Were there any
10 comments in between? I didn't see any. All
11 right.

12 We're in eight and this is called
13 Initial Assessment Conclusions, the second
14 full paragraph. All right. And it reads
15 essentially: Congress recently enacted
16 significant reforms, preliminary indicators
17 demonstrated in recent reporting and
18 prosecution statistics are encouraging. And
19 then the last sentence is: Given these trends,
20 we do not believe wholesale changes to
21 prosecution disposition authority are
22 warranted or advisable.

1 And then, Liz, your comment: I am
2 not sure I can support this regardless of
3 these other changes. If there were evidence
4 that the role of the commander in prosecuting
5 cases was having a deleterious effect on
6 reporting, I would support a change regardless
7 of how the rest of the system was responding
8 to all the other changes.

9 I'm just going to look back for a
10 minute and see what we're saying back on page
11 two.

12 Any comments? I think if I saw
13 evidence that the role of the commander in
14 prosecuting cases was having a deleterious
15 effect on reporting, I might also support a
16 change. So I agree with that.

17 I'm just trying to figure out how
18 that fits into this second paragraph.

19 VADM HOUCK: Jim Houck here. I
20 think most of us would, I know I would, if
21 there was evidence that there was persuasive
22 compelling evidence that, the role of the

1 commander was deterring reporting or
2 interfering with prosecutions, but isn't that
3 the point? We haven't seen that evidence.

4 So I'm not sure, I'm having
5 difficulty connecting the comment to this --
6 to what we've got in the draft.

7 REP. HOLTZMAN: Okay, just -- it
8 just -- okay, this is Liz Holtzman. It just,
9 maybe my comment is confusing. I guess my own
10 reaction was, what you're saying is exactly
11 right and maybe given these trends and the
12 absence of any evidence that, you know, that
13 changing the role of the commander and, you
14 know, will have an effect on reporting --

15 JUDGE JONES: Or on prosecution,
16 yes.

17 REP. HOLTZMAN: Prosecution,
18 right. We now believe it is, weren't
19 advisable at this time.

20 Now I would add, by the way,
21 weren't advisable at this time, at the end of
22 that anyway.

1 JUDGE JONES: Yes, I think that
2 makes it, now I understand exactly what we're
3 trying to do here.

4 So given these trends --

5 PROF. CORN: Your Honor?

6 JUDGE JONES: Geoff?

7 PROF. CORN: Yes, could I just
8 jump in? I would say, at this time should
9 lead the sentence. So instead of given these
10 trends, just say: At this time we do not
11 believe wholesale change to prosecution
12 disposition authority is warranted or
13 advisable. That qualifies it so that if, at
14 a later date, the trends or the evidence
15 reveal something different, nobody's locked
16 into anything.

17 REP. HOLTZMAN: Oh okay, that's
18 another possibility.

19 JUDGE JONES: Any other comments?

20 GEN. HAM: This is Carter Ham.

21 Perhaps to make it even a little more
22 specific, just say: At this time, you know, to

1 date, the Subcommittee has not heard evidence
2 that would indicate wholesale changes, so
3 something like that so the tie in --

4 REP. HOLTZMAN: Oh, yes, good.

5 GEN. HAM: - to leave the door
6 open that we could change it if we get more
7 evidence, but so far, we haven't heard the
8 evidence that would support the change.

9 JUDGE JONES: I like that. Do you
10 have that, Kyle?

11 LT COL GREEN: We're madly
12 writing, ma'am. Yes, ma'am, we have it.

13 JUDGE JONES: Okay. Any other
14 comments on that? Let's rewrite it and we'll
15 take another look when the next-to-final draft
16 comes out, I guess.

17 COL. HAM: Ma'am, we also had
18 after Kyle sent the draft, we had some
19 additional comments from Representative
20 Holtzman --

21 JUDGE JONES: Right.

22 COL. HAM: -- that were -- that's

1 why Kyle sent a draft at 4:31, and so there
2 was additional drafting on page 19 of that
3 draft sent on 4:31. It's trying to address --
4 well, Ms. Holtzman, why don't you say it, I
5 don't want to put words in your mouth.

6 REP. HOLTZMAN: Does that -- you
7 already did, Colonel, so you can say it even
8 better than I could. I'd be happy with that.
9 She solved the problem, the Colonel, so you
10 can take whatever credit is necessary here.
11 I'm trying to bring up the document on my
12 computer anyway. Colonel Ham, why don't you
13 explain what happened?

14 COL. HAM: Okay, ma'am. The,
15 Representative Holtzman emailed some comments
16 that went to all of you on saying she thinks
17 we need some more directly, or you need to,
18 I'm reading the, Professor Hillman's -- I'm
19 sorry, let me start over.

20 Representative Holtzman commented
21 that having seen Professor Hillman's dissent,
22 she personally thought it needs to be directly

1 -- more directly addressed in the document,
2 that we, meaning you, have not responded to
3 the point that the prosecutorial decisions of
4 professional judge advocates should be
5 adequate. There were serious flaws in the
6 argument, in Representative Holtzman's
7 opinion, and then it went on so you all got
8 that sent to you at 3:59.

9 So the suggestion was made to
10 perhaps look at the White House report that
11 came out last week that all of you were sent
12 separately, I know, maybe you haven't had a
13 chance to open it. But it commented in
14 several places on the lack of prosecution or
15 lack of both prosecution expertise and the
16 lack of prosecution of sexual assault cases,
17 so Kyle pulled out some of that language.

18 I guess I would point out, I don't
19 -- it's up for you to determine, I'm not sure
20 what, if Professor Hillman is referring in her
21 defense to military judge advocates handling
22 the cases or civilian prosecutors handling the

1 cases. I don't -- that's up for you to
2 determine whether she's clear on that.

3 She says it should be left to
4 trained, experienced prosecutors. She does
5 not say trained, experienced military
6 prosecutors. I don't know if that's reading
7 too much into it or not.

8 PROF. CORN: Well, Colonel Ham,
9 this is Professor Corn. First off, I think
10 that whether you read into it military or
11 civilian, the essence of her document is that
12 a trained legal officer is in a better
13 position to make these judgments, and I think
14 that what Ms. Holtzman put in the email that
15 was sent to us is very compelling information
16 of the flaws in that assumption. And so, I
17 agree that it is the -- it's been kind of the
18 elephant in the room since inception, which is
19 why don't we have people trained in the law
20 making these legal judgments and what Ms.
21 Holtzman points out, which I think has been
22 established by numerous witnesses, by the way,

1 is that assumption that lawyers are per se
2 better suited to make these judgments is
3 false.

4 And actually, I would love to see
5 the language that Ms. Holtzman put in that
6 email incorporated into the document, because
7 I don't think anybody could have captured it
8 better than that.

9 VADM HOUCK: This is Jim Houck. I
10 also agree with Representative Holtzman
11 completely.

12 REP. HOLTZMAN: Well, the question
13 is what language we use to capture that idea.
14 I mean, I wrote that -- listen, I wrote that
15 kind of, I was not writing for a report, so
16 the language definitely needs a lot of work.
17 And Colonel Ham kind of softened some of what
18 I was saying, by -- or strengthened what I was
19 saying, by kind of pointing to the White House
20 report that said that there were problems in
21 prosecution.

22 So the idea that you could just

1 rely on trained prosecutors wasn't going to be
2 an answer. You know, it's up to you, I don't
3 have any real commitment to any specific words
4 about this but I do think the concept needs to
5 be in there because, one, that's a point that
6 we were told repeatedly by some of the groups,
7 advocacy groups, and secondly, it's in a
8 written dissent and I think we need to kind of
9 address it.

10 But whether my comments were
11 adequate, words are adequate, I leave that to
12 your better judgment.

13 JUDGE JONES: I think we need to
14 address it. I would like to just take a
15 little time and re-read your email, Liz, and
16 then read, which I haven't read before, the
17 staff's effort to capture this. And then, I
18 know we'd like to finish tonight, but I think
19 the language in the email could use some
20 changes.

21 And again, it may be that we have
22 an amalgam of these two, and then I'd like to

1 go back and look at the dissent. And I
2 apologize to everybody but I just have not had
3 time to make those comparisons and to think
4 about this. But I definitely agree that we
5 need to do it.

6 REP. HOLTZMAN: I mean, mine was
7 so flawed that I used professional
8 prosecutors, and what she said was trained and
9 experienced prosecutors. So, I mean it's --

10 JUDGE JONES: Right, we have to --

11 REP. HOLTZMAN: -- you know, so
12 it definitely -- it was just a very rushed
13 effort to get the issue in front of you,
14 that's -- and so I apologize for that. I
15 didn't have time to polish it up.

16 JUDGE JONES: I personally will
17 take a look at this and, Geoff, I know you
18 were going to take a shot at some language and
19 get it back to the staff. And I'm going to
20 ask the staff to take a look again, and I will
21 send something in tomorrow.

22 COL. TURNER: Colonel Turner here.

1 JUDGE JONES: Yes? Colonel?

2 COL. TURNER: Yes, ma'am. If it's
3 helpful, I absolutely agree with
4 Representative Holtzman completely, in terms
5 of the content and the importance of
6 emphasizing this issue.

7 JUDGE JONES: Right.

8 COL. TURNER: I would just offer,
9 perhaps though, on the second -- the first
10 sentence of the second paragraph in the email,
11 which says prosecution is not just a matter of
12 whether there's sufficient evidence or
13 probable cause. That is absolutely true for
14 the civilians under ABA standards, Standard 3-
15 3.9 in Discretion and Charging Decisions.

16 The military has actually just
17 focused on probable cause, though. So for
18 example, in the Air Force, our Air Force
19 standards adopted Paragraph A, which is: A
20 prosecutor should not institute or cause to be
21 instituted or permit to continue pendency of
22 criminal charges when the prosecutor knows

1 that the charges are not supported by probable
2 cause.

3 However, we have not adopted the
4 rest of that standard, which talks about other
5 reasons a prosecutor may decline to prosecute.
6 So just in terms of nuance there, if we keep
7 it general, the point is absolutely critical
8 and well-made.

9 JUDGE JONES: All right. Then why
10 don't I take a stab at this and anyone else
11 who might want to send something in, and I
12 will get it in as early as possible.

13 REP. HOLTZMAN: That means we have
14 only one paragraph really to look at, or just
15 a few sentences. Right?

16 JUDGE JONES: I have --

17 REP. HOLTZMAN: And then we're
18 finished.

19 JUDGE JONES: This may be -- yes,
20 that's completely right. I haven't even read
21 your two paragraphs. I've read your
22 paragraph, I haven't even read the new text in

1 the report. That's why I just would rather
2 take a look at it, take some time and then get
3 something in.

4 But yes, you're right. I think
5 we're almost done. We're certainly at the end
6 of the draft. Was there anything else that I
7 may have overlooked from the latest draft,
8 Colonel Greene or Colonel Ham?

9 LT COL GREEN: No, Judge Jones. I
10 think we've gone over all of the comments and
11 we'll incorporate that, that that ending
12 changes to the conclusion section. We'll wait
13 on that and then clean up -- and we're just --
14 we're finalizing all the footnotes and form
15 and all that, so I expect when we get that, we
16 should be able to turn this out pretty
17 quickly.

18 JUDGE JONES: Right, and once I
19 have a chance to read this, I may be able to
20 get it back to you pretty quickly. You know,
21 I'll just turn to it right away. Okay?

22 REP. HOLTZMAN: Great.

1 JUDGE JONES: All right. Do we
2 need any further times to talk again? Okay.
3 And then I think we can adjourn for the
4 evening and we'll all wait for the final
5 draft, which hopefully will be very early
6 tomorrow.

7 (Whereupon, the meeting was
8 adjourned at 6:23 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

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

Before: US DoD

Date: 01-28-14

Place: teleconference

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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