U.S. COMMISSION ON CIVIL RIGHTS

BRIEFING

SEXUAL ASSAULT IN THE MILITARY

FRIDAY, JANUARY 11, 2013

The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman
ABIGAIL THERNSTROM, Vice Chair
ROBERTA ACHTENBERG, Commissioner
TODD GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner*
DAVID KLANDNEY, Commissioner
MICHAEL YAKI, Commissioner*

VANESSA EISEMANN, Parliamentarian

* Present via telephone
STAFF PRESENT:
LILLIAN DUNLAP
PAMELA DUNSTON, Chief, ASCD
YASMIN ELHADY
ALFREDA GREENE
JENNIFER CRON HEPLER
LENORE OSTROWSKY, Acting Chief, PAU
ELOISE PLATER
EILEEN RUDERT
MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:
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ALEC DEULL
TIM FAY
JOHN MARTIN
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   (Defense Counsel)
3. Nancy Parrish, President, Protect Our
   Defenders
4. Bridget Wilson, Major, California Guard,
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(9:31 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: This meeting will come to order. My name is Marty Castro. I am Chair of the United States Commission on Civil Rights. I want to welcome everyone here this morning to our statutory enforcement report briefing on Sexual Assault in the U.S. Military.

It is currently 9:32 a.m. on January 11, 2013. The purpose of this briefing is to investigate current efforts to both reduce and address the incidence of sexual assault in the armed forces of the United States of America by examining the Department of Defense's policies and practices concerning sexual assault.

Those of you who are not familiar with the Commission, our agency was born in 1954, sorry, 1957, as part of the Civil Rights Act of 1957. Congress and President Eisenhower created us at the fledgling moments of the U.S. civil rights movement to examine the issues that were being faced in the United States and to make recommendations to the
President and Congress on how to address those civil rights issues.

I am pleased that through the history of this Commission, which is an independent, bipartisan Commission, made up both of presidential as well as congressional appointees, that we have recommended to the President and Congress over the years, actions that have resulted in the Civil Rights Act of 1964, the Voting Rights Act of 1965 and other protections which cover all of us today.

The Commission's role is an independent, oversight Commission, so our statutory enforcement report allows us to look at those federal agencies who have enforcement of civil rights as part of their agenda, to ensure that they are meeting their obligation.

I want to thank Commissioner Kladney for bringing this topic to our attention. I want to thank my fellow Commissioners for supporting us, examining this issue in a bipartisan fashion.

I remember when I was a boy, my father was a Navy veteran, we would often watch the movie In Harm's Way. However, today, the topic that we are looking at is that yes, our men and women in uniform are in harm's way, but unfortunately it's not only
exclusively from foreign opponents.

We see from the information that we received in preparation for this hearing that they are in harm's way unfortunately from folks in their own ranks, from their colleagues and from a command that in some instances has not addressed issues of sexual assault in the military.

Yet, if you look at the statistics of the Department of Defense, by their own estimate, in 2011 there were approximately 3,192 sexual assaults. They also, in another report, estimate that about only 14 percent of those assaults are actually reported, so the numbers could be as high as over 22,000.

That's a travesty. When we can't protect those in uniform who are there to protect us, there is something that we need to do about it. If we cannot ensure the rights of those who fight and give their lives so that we might enjoy our rights, then the system is broken.

Justice has got to be done, and this is not just a partisan issue or a political ideology issue. This is an issue that affects all Americans. So I hope that today, as a result of the information that we gather from our witnesses, and from the
materials that we received today and in advance of this briefing, as well as from public comments 30 days after this, that we will prepare a report on a bipartisan basis to the President and Congress with findings and recommendations that will hopefully thoughtfully contribute to addressing this issue.

Today we have a number of very distinguished speakers. We have 14 speakers who are going to provide us with a diverse array of viewpoints.

The speakers have been divided into three panels. Panel I speakers will represent the perspectives of the victim and the accused. Panel II will consist of academic scholars. And Panel III will consist of presenters from our armed forces.

During the morning session, our panelists will have eight minutes to speak. During the afternoon session they will have five minutes to speak.

After each panel presentations, Commissioners will then have the opportunity to question the panelists, and at that point panelists can continue to elaborate on their earlier remarks.

We have, however, time periods that we have to allot and abide by, so as Commissioners speak
and as panelists speak, we ask you to remember that we have to accomplish this in a certain period of time.

Now, you are going to notice, panelists, that there's a series of warning lights here. They are like your typical traffic lights. When the light goes from green to yellow, that means -- that usually means slow down but here it means speed up so that you can finish.

And when it goes from yellow to red, that means stop. You know, we ask you to try to conclude at that point. I don't want to have to cut off anyone in mid-sentence, and then we'll have the opportunity to speak further.

My fellow Commissioners know the process well. I will identify them when they want to speak and I will try to do so in a fair and balanced way. Sometimes they may want to ask multiple questions. We will ask them to try to keep it to one. But sometimes questions do require follow-ups and we will abide by that if possible.

So with those bits of housekeeping aside, I want to now present the panelists in our first panel. Rachel Natelson is the director of legal services for the Service Women's Action
Network, also known as SWAN. Our second panelist is Retired U.S. Navy Commander Philip D. Cave, who is also defense counsel in the Law Office of Philip D. Cave. Our third panelist is Nancy Parrish, president of Protect Our Defenders. Our fourth panelist is Retired U.S. Army Major Bridget Wilson, who is also defense counsel with Rosenstein, Wilson & Dean.

Now I will ask each of the panelists to swear or affirm that the information that they are about to provide to us is both true and accurate to the best of your knowledge and to your belief.

(Whereupon, the panelists were sworn in.)

CHAIRMAN CASTRO: Okay, Ms. Natelson, please proceed.

II. PANEL I: PERSPECTIVE OF VICTIM AND ACCUSED

MS. NATELSON: My name is Rachel Natelson and I am the legal director of the Service Women's Action Network. SWAN's mission is to transform military culture by securing equal opportunity and freedom to serve without discrimination, harassment or assault, and to reform veterans' services to ensure high quality healthcare and benefits for women veterans and their families.

We run a national help line. We engage
directly with stakeholders whose individual experiences all too often point to larger patterns of injustice.

As widely as the needs of our clients vary with personal circumstances, they stem primarily from the shared challenge of military sexual trauma. Their narratives, moreover, reveal a common arc of betrayal, first by their brothers in arms, then by their command, and finally by the very institutions they fight to protect.

While much of the national conversation around military sexual violence has focused on criminal justice, the rights of crime victims exist largely outside of actual criminal proceedings.

Under the law, police and prosecutors represent and owe a professional duty to the state, not to individual crime victims whose interests may or may not align with their priorities.

How best to advance these priorities, moreover, is a matter of discretion rather than obligation. There are no legislative or conditional guidelines about charging and decisions not to investigate or file charges are ordinarily immune from review.

While victims may play only a limited
role in criminal proceedings, civil courts offer a considerably more active forum in which to vindicate rights. In cases of workplace crime, victims can pursue a variety of claims for relief, both from perpetrators and from employers, not only to individual assailants, they can also bring negligence claims against employers who knew or should have known of the potential for crime to occur.

In addition, Title VII of the Civil Rights Act obligates employers to act when employees report threats, harassment or other potentially violent conduct in the workplace.

Unless an employer can prove that it exercised reasonable care to prevent and correct harassment or assault, the employer can be held liable for the misconduct of its employees, as well as for any retaliation following.

By holding powerful institutions financially accountable for inaction, successful civil suits exercise an important deterrent effect against workplace crime.

While these remedies are available to defense contractors and civilian employees of the Department of Defense, not to mention most other civilian employees, they may not be accessed by
uniformed personnel, an injustice stemming from a
degree of judicial deference prescribed neither by
statute, nor by the Constitution.

The foundation of this doctrine of
immunity from civil liability is *Feres v. the United
States*, in which the Supreme Court relieved the U.S.
government of liability under the Federal Tort Claims
Act for injuries to service members that arise out of
or in the course of activity incident to service.

Although the plain language of the Act
contains no such limitation, barring only liability
on claims arising out of the combatant activities of
the military during times of war, the ruling has
since been applied to virtually all claims for
damages by a military member, including sexual
assault.

While the *Feres* decision itself only
addresses negligence claims, it ultimately laid the
foundation for a far broader doctrine of immunity,
barring discrimination claims under both Title VII of
the Civil Rights Act and the U.S. Constitution.

In the wake of *Feres*, a series of
federal appeals courts interpreted Title VII to
suggest a distinction between the rights of civilian
employees of military departments and uniformed
personnel.

In extending the reach of the Feres doctrine to cases of intentional discrimination, however, they notably cited the availability of constitutional claims to aggrieved service members.

While Congress may have implicitly excluded military personnel from the purview of the Civil Rights Act, they argued, it never intended to deprive them altogether of a remedy for discrimination.

Two years later, in Chappell v. Wallace, the Supreme Court did just that, in barring uniformed personnel from bringing constitutional claims. In denying such relief, the court pointed to the Boards for the Correction of Military Records, an internal office authorized to correct military records in instances of error or injustice, as a parallel enforcement mechanism for discrimination complaints.

The doctrine of separate but equal, however, rarely delivers true equality, and the military civil rights enforcement scheme falls woefully short of its civilian counterpart.

While every base maintains an equal opportunity office to review complaints of discrimination or harassment, the office is not
intended to serve as an advocate for victims, and
generally has a greater responsibility to the
military than to the complainant.

Confidentiality isn't guaranteed and
many members who report incidents of sexual violence
experience retaliation. Appealing such reprisals,
which can range from demotion to termination of
service, is daunting, and access to counsel is
erratic at best.

While EO for sexual assault response
coordinators -- complainants who suffer retaliation
may indeed petition their branch or for the
correction of military records for redress, they must
first file a grievance through the Office of the
Inspector General or IG, which often demonstrates
more allegiance to the command than to the
complainant.

Since IGs may determine at the outset
whether or not a complaint merits further attention,
remarkably few full investigations occur. According
to a recent GAO study, the IG fully investigated only
29 percent of all reprisal complaints over the past
five years, and substantiated only a fifth of those
investigated.

This means that only six percent of all
complainants during this time period ultimately obtain the findings necessary to petition the board for a remedy.

The boards, moreover, are considerably limited in their authority and capacity. Unlike Article 3 or Article 1 judges, members are not authorized to award damages or approve settlements. They are not actually staffed by judges or necessarily by attorneys or personnel specialists, but simply by civilian DoD employees who convene on an ad hoc basis in addition to their full-time employment duties.

They may not undergo extensive or specialized training in military law, are not bound by the judicial doctrine of precedent, or even required to review case files in advance of convening.

In fact, recent FOIA data has found that Army or Navy board members devote an average of 3.72 and 6.73 minutes respectively to deciding each case. In short, the boards hardly constitute the guarantor of due process envisioned under Chapell.

Reprisals meanwhile remain widespread among victims who file reports of sexual harassment and assault. Service members suffering the
psychological wounds of military sexual trauma
routinely contact SWAN for assistance in challenging
improper administrative separations alleged in either
misconduct or behavioral disorders.

These accounts are consistent with Armed
Forces Health Surveillance Center statistics, which
have found adjustment disorder diagnoses to be 10
times more prevalent than PTSD diagnoses among women
in the military.

These experiences, however, are by no
means inevitable. While courts and legislators have
pointed to the potential for civil claims to
undermine the need for unhesitating and decisive
action by military officers, history suggests that
the enforcement of civil rights is not only
compatible with, but in fact necessary for, mission
readiness.

Even the most fundamental rights,
however, are all but illusory in the absence of the
means to enforce them. In establishing the doctrine
of judicial review, Chief Justice John Marshall
observed that our government cannot be called the
government of laws and not of men if the laws furnish
no remedy for the violation of a vested legal right.

If service members have a right to be
free from sexual violence and discrimination, we can no longer deny them the remedies that go along with it.

CHAIRMAN CASTRO: Commander Cave, you may proceed.

COMMISSIONER GAZIANO: Mr. Chairman, just --

CHAIRMAN CASTRO: I'm sorry.

COMMISSIONER GAZIANO: if you don't mind me helping the witnesses understand, the triangular boxes are the microphone that help you project to the back of the room. The microphone-looking things are for C-SPAN and are equally important, but try to place both in front of you. Thank you.

COMMANDER CAVE: Good morning and thank you for the invitation to talk to you briefly from the perspective of the person accused of military sexual assault and the defense counsels who represent them.

Sixteen years ago, two Marines went to the base emergency room, showed the staff rope burns around their wrists and said that they had been raped by two Marines in the barracks.

The two Marines accused were arrested, placed in the brig for pre-trial confinement, and...
were pending court-martial. They denied the rape. Their defense was to be consent. Consent, by the way, is the most frequent defense offered in court-martial cases.

About a week later, an emergency room corpsman came back to work from leave and heard about the excitement. Realizing he had important information, he went to the Naval Criminal Investigative Service.

It turns out, as he was leaving work to go on leave for a week, he had seen two women in the hospital parking lot. Each of them were taking turns rubbing their fingers around each other's wrists, and let me demonstrate, in this fashion.

I don't know if you can -- excuse me. Obviously he thought nothing of it at the time. But then of course once he heard on his return what had happened, the excitement in the unit emergency room, he went to NCIS and told them what he had seen.

NCIS did in fact decide to go out and challenge the complaining witnesses as to the veracity of their complaint. They did in fact admit that they had falsely accused the two Marines, and they had deliberately faked these rope burn injuries.

When they were asked, "Why did you make
this false complaint?" this is what they told the investigators: "We were sitting outside the barracks, smoking, when the two Marines," the two men walked out past them.

One of them overheard the other say to the other male Marine, "Now you know what it's like to have sex with a fat chick." Now, let me be clear, I'm not saying that that was appropriate by any means. But that was the cause for these two Marines to make a false allegation of sexual assault.

The two Marines were released from the brig. They received administrative punishment and administrative separations from the Marine Corps for having sex in the barracks. It is an offense under those circumstances, or was -- excuse me.

Nothing happened to the two Marines who made the false allegations, and to my knowledge they were allowed to stay in the Marine Corps and serve out at least their enlistment.

These two Marines were lucky because there was a witness. If that case happened today, in 2011, and there were no witness, it's quite likely that they would still be in the brig, and they would have a 50-50 chance of being convicted at court-martial, and ultimately having to register as a sex
offender for the crime of rape.

That is what concerns the individual accused, and obviously us as defense counsel who represent them. In other words, when that person walks in my door or talks to me, is he one of those?

I don't know how many false rape accusations there are. There is research, there is talk that it varies anywhere from -- excuse me -- two percent up to 60 percent, depending on who you talk to. But from an accused perspective that doesn't matter. What matters is, will he get a fair trial?

Currently almost all of the investigative and legal services and assistance are focused on the prosecution. There are no investigators assigned on a permanent basis to assist military defense counsel.

They do the work themselves. These are young lawyers often just out of law school. They don't have assigned experts to consult them.

Now some of this is changing, obviously, because of some of the highly qualified experts that are being introduced to the system, those kinds of things.

But keep in mind, the military justice system already had the perception that when you are
accused, you are guilty, and that you are facing the full resources of the government against you, and in military sexual assault trials, that concern is heightened because of the politics.

Concerns. Current rape myths. I am well aware of the research and discussions about rape and rape myths and that kind of thing. But there are also some rape myths from the defense perspective that we have to be concerned about, and this comes up in the area of training.

One drink means no consent. This myth has been consistently taught and trained over the years, but it's a fallacy. It's not scientifically, medically, psychologically and legally correct. But we have to deal with that and in my written remarks, I explained to you and referenced a false accusation case of my own where that issue became significant in choosing the panel members.

Another issue that I have referenced in more detail in my written remarks is this: I understand the point from a therapeutic perspective, that if you have a victim you have to treat that person as a victim. That's necessary for their physical and emotional health.

The problem is that when the belief of
the victim gets into the investigative process and the prosecution process, we end up, as I have again discussed at more length in my written remarks, this whole issue of confirmation bias.

And what happens is, and you still see this in the quality of investigations, confirmation bias leads to inadequate investigations from both sides, and if you notice, in my remarks, I mention a particular case where, had they done their work in investigation, it would have helped the prosecution more than it helped me.

I had other remarks, but I'm going to leave that and let's move on, Mr. Chairman. Thank you.

CHAIRMAN CASTRO: You'll have an opportunity to elaborate upon request.

COMMANDER CAVE: Exactly.

CHAIRMAN CASTRO: Thank you. Ms. Parrish, you may proceed.

MS. PARRISH: Unpunished sexual assault in our military has long been rampant. It seriously undermines mission readiness and unit cohesion. This epidemic of these violent crimes predated the recent wars and the increase in women in the military.

Males are the majority of the one half
million veteran victims. The Department of Defense has failed to protect the rights of service members. In fact, it frequently treats victims unjustly and even overtly retaliates against them.

Protect our Defenders is a place for survivors to build community, amplify their voices, and take collective action. I am here to represent survivors. It is important for you to hear their voices, and since I am not one, I will now play a brief video clip.

Is it working, folks?

(Whereupon, a video was played.)

MALE VOICE: When I reported my assault, I was laughed at, I was ridiculed.

FEMALE VOICE: I was told how could I possibly want to tarnish a good serviceman's military career, and that I was a liar, a whore and a slut, and if I wanted to keep my military career, I should drop any kind of verbiage of rape, take an aspirin, and go to bed.

SECOND FEMALE VOICE: I was sent back to the station for a recommendation to get med boarded out for adjustment disorder.

THIRD FEMALE VOICE: They had my clothing where my zipper was broken and his
fingerprints on my articles of clothing. They had
his DNA on my comforter. They found his DNA inside
my rape kit. He was still found not guilty of
anything.

SECOND MALE VOICE: There was a group of
assailants that decided they were going to sexually
assault me. Two of them got caught in the act doing
it to somebody else, and because they got caught they
were given bad conduct discharges, and that was it –
no sex offender status, no jail, no nothing.

THIRD FEMALE VOICE: He retired with
full
benefits and I don't know how many more rapes he
committed after me, but like he told me, I wasn't the
first and I wouldn't be the last.

FOURTH FEMALE VOICE: Despite the fact
that he has got multiple charges, he got away.

(Whereupon, the video clip ended.)

MS. PARRISH: Three months ago, Air Force
Sergeant Jennifer Smith, who is now honorably serving
our country, filed an official complaint alleging
harassment and sexual assault.

Sergeant Smith earned stellar
performance reviews on several tours of duty,
including Iraq. For 17 years under a number of
commanders and on several bases, she endured what
thousands of others endure every day: an environment
of hate speech; military traditions of violent,
gender-based, degrading behavior; and sexual assault.

Eventually she sought help from her
chain of command. None was forthcoming. Twenty
years ago, during the Tailhook Scandal, Secretary
Sean O'Keefe said all the right things.

Quote: "We get it. We know that the
larger issue is a cultural problem, which had allowed
demeaning behavior towards women to exist. Our
senior leadership is totally committed to confronting
the problem. Those who don't get the message will be
driven from our ranks."

Now, faced with another scandal, Air
Force Chief of Staff General Welsh's words are eerily
similar. Words matter, but only if they are followed
with fundamental legislative reform and culture-
changing action.

For over 25 years, repeated scandals of
sexual violence, cover up, and abuse of authority in
the military have come to light. Military leadership
has repeatedly investigated itself, committed to
change the culture, released reports and touted
supposedly new reforms, all to no avail.
As important as fixing the culture is fundamentally reforming the broken military justice system. Every aspect is dysfunctional, from prevention and victim care to reporting, investigation, prosecution and adjudication.

One survivor recently discharged put it this way, "I still cannot grasp what happened to me. When mentioned to commanders, nothing is done. Your reports get lost. People turn their backs on you."

The system is encumbered with command bias and conflicts of interest: inexperienced and under-trained staff, arbitrary and inconsistent application of the law, no sentencing minimums or guidelines. Article 32 preliminary hearings are often a defense free-for-all, where the rules of evidence don't apply and the appeals process often renders those few victim's rights which exist ineffectual.

The system elevates an individual commander's authority and discretion over the rule of law. Commanders can and do arbitrarily decide to not proceed with prosecutions or set convictions and sentences aside.

Although a minority, commanders are also capable of bad behavior. Forty percent of women
victims report that the perpetrator was of a higher rank, and 23 percent in their chain of command.

2011 brought unprecedented attention to this issue. In response to each wave of publicity, the Pentagon churned out mostly recycled or ineffective reforms, some of which place the burden on the victim.

Even limited reforms passed by Congress to address this epidemic are sometimes not implemented or promulgated or inconsistently applied or encumbered with requirements that often render the policies ineffective.

The Pentagon has repeatedly declared a policy of zero tolerance, yet recent actions challenge that notion. In December of 2011, faced with a victims' class action lawsuit, the military successfully argued that the alleged harm to victims are incident to military service, an occupational hazard.

In September of 2012, the Secretary proposed the President sign an executive order which would have effectively eviscerated the military's rape shield rule.

Victims know they put their career at risk if they come forward, so 86 percent of them do
not. Perpetrators know the likelihood is they will continue their career with little risk of being caught, much less punished.

In 2011, only eight percent of reported assaults resulted in court-martial convictions, and of those, many of those convictions are for lesser charges.

The Department of Defense is responsible for failing to effectively govern its personnel. The problems are so longstanding and actually require countenancing of the violations of the rights of women and victims of assault in the service.

We are a democracy. Congress, the executive and the judiciary have roles to play in righting this horrible situation. Retired Brigadier General Loree Sutton recently said: "The only credible solution is an independent, special victims unit completely outside the unit chain of command, under professional, civilian oversight."

We agree.


MAJOR WILSON: Thank you. If we do not have military solutions to military problems, we will fail. For example, the mission of the United States
Army is to fight and win America's wars, and everything that happens in that institution is within that framework.

My boots on the ground, my ear to the ground, tells me that the current efforts against sexual assault in the military are now meeting with cynicism and skepticism and a complete lack of credibility in the ranks.

CHAIRMAN CASTRO: Can you speak up a little bit, Major?

MAJOR WILSON: Yes. Not only with regard to the soldiers in the enlisted ranks, but even the lawyers and the officers who are involved in enforcing it.

In part, what we are starting to see is complete abdication of responsibility by commanders who fear that their careers will come to an end if they are seen as interfering with any prosecution, and they will often be forwarding charges simply with the idea, ‘I am not putting my neck on the block, I am not ending my career to be accused of tolerating sexual assault,’ and therefore end up forwarding cases that are not the strongest cases.

And then the inevitable happens: you are not getting the results in trial that you would like.
to have if what you are looking for is convictions, because the cases you are sending there lack merit.

There are cases going to court-martial that would not cross the threshold of any civilian court. I have seen, where I live in San Diego, cases turned away by the district attorney's office, subsequently prosecuted by the military because commands feel pressured into making that happen.

I am having a little trouble. When the process is driven by fear, when the process is driven by the goal being set, as opposed to the truth of the situation, the possibility and the adequacy of the case, you have what we have right now -- a system that has begun to lack credibility and belief.

A week ago the United States Military Academy, for example, issued a report in which they proudly announced that they had more reports of sexual assault at the military academy, and some of my more civilian friends, "They are proud of having more reports of sexual assault?"

And I said, "No, you don't understand. They were told that their goal for this year was to have reports, and by God, they had more reports."

Now the pressure is to have more convictions, and trust me, they will have more
convictions because that's what the military does. You give it a mission, it gets it done, regardless of how that works.

Military justice is very different than civilian justice. It is a two-pronged system -- justice and discipline. And that means when you walk into that courtroom, much more so than even a civilian court -- and I remind you that the vast majority of civilians who go to trial in criminal trials are convicted -- there is the belief that if we have this guy in a courtroom, the old man must think he is really -- must have thought he's really done something.

We had the Secretary of Defense, the Commandant Marine Corps, any number of public officials making it clear that they believe, quote, "These guys ought to be convicted."

When your superiors express that wish, guess what happens? You get that result. We have all the rules we need -- in fact, before any of this reform ever started.

In fact at the time of Tailhook, we had all the tools that we needed in the all-encompassing military justice system, that has incredibly broad power to prosecute crimes in a system that has the
incredible ability to carry out investigations, all the tools we need to deal with sexual assault.

   The question is, the will to do it. You can make another set of rules that will only be window dressing unless the will to enforce that is there. A great deal of that has to do with the status of women in our armed forces and an understanding that women are equal as peers. Right now women remain 15 percent of the total force.

   It means that the military might have to come into the 21st century. You know, in any civilian office the men in the office don't have nude girly pictures hanging in their offices. Why would they be allowed to do it in the military in their workplace as well?

   Those sorts of culture changes are pretty obvious and pretty simple. But we need to properly interpret how this thing works. For example, the Military Rule of Evidence 412 -- the rape shield rule -- that rape shield rule is not being modified because we hate victims. It's being modified so that it conforms to the Federal Rules of Evidence, the civilian, similar rape shield rule, and of course that pesky thing, the U.S. Constitution.

   At the end of the day, these accused are
entitled to due process and the solution to military
sexual assault is not simply to remove due process,  
it is also to take a look at those solutions that are 
not simply floating through the criminal courts,  
because if that's the only solution, if that's what  
we are telling people is the solution, that is what  
we will get without the concurrent changes in    
culture, the changes in opportunity, the changes in 
how the military handles this and having women in its  
ranks.

How we deal with that. Have I seen  
false reports of sexual assault? For years I worked  
hard for the repeal of Don't Ask Don't Tell, trust  
me. To escape being separated under Don't Ask Don't  
Tell, I saw any number of individuals who had been  
falsely accused of sexual assault. It does happen.

Right now, we are rejecting the  
practical. If I suggest that we take a serious look  
at binge drinking, I will be accused of trying to  
blame the victim. I'm not trying to blame the  
victim. I'm trying to recognize the fact that a  
significant percentage of these assaults occur among  
the lowest enlisted ranks, the likes of the college  
campus syndrome, and that if we start to address  
binge drinking among the victims, alleged victims,
and also the alleged perpetrators of these crimes, maybe we can keep someone from being raped and some young man from ruining his life.

It's a prevention matter. We want to take the course of action that actually addresses the problem instead of throwing the window dressing out. Criminal prosecution is one part of that.

Right now, there is a very broad perception that this system has become increasingly tilted against the accused, that that scale is not balanced.

I myself personally have a significant interest as a woman who has served in the idea that we can reduce sexual assault among our troops. It is a terrible violation of the integrity of this armed force and is something that we must deal with.

But we have to do it right. We can't do it in a way that makes this look like a feeding frenzy and a witch hunt, as opposed to actually doing the hard work that it takes to change that culture and to address these issues and to end abuse of authority for example. Thank you.

CHAIRMAN CASTRO: Now open it up for questions from Commissioners. Actually Major, I'll ask you a question. So I want to understand what you
testified to us this morning. You indicated that military problems need military solutions, and yet you went on to tell us how the military justice system is producing results that, in your estimation, may not be just.

Is your opinion, then, that the military system should still be in place versus perhaps a civilian system for these sorts of assaults?

MAJOR WILSON: I think that the people within this institution have to own it, I think, for the process to have credibility. The people in this institution have to be the people who make that change.

I am sure that there are some things we can do to poke and prod, but in reality, at the end of the day, these are the people whose boots are on the ground, and it has to be bottom up, it has to be command driven.

And we have the capacity to do that. I genuinely believe that. You know, the civilians are lovely people, but when you look at what the legislative process did with Article 120, the rape statute that had to be revised last year because in essence it had a patently unconstitutional provision in it on shifting burdens for a consent, sometimes
they just don't get it right because they are not paying attention to the people in that institution.

I can have cynicism about a lot of what happens in the military, but it's an absolute lie that those people in that system all do not care about rape.

I don't know very many women in the -- men and women in the armed forces who are that uncaring. We have to make sure that that solution belongs to the services as well.

CHAIRMAN CASTRO: How do you solve that? I mean you yourself just told us: this is the mission and it's accomplished and the result that they say -- more charges. You talked about a specific instance where -- instance went out to a civilian prosecutor who turned down the charge but it went into the military and it was charged.

Would it not be better then -- and maybe justice was done in that case -- would it not be better then to have a civilian process in place where cases which aren't being charged, that should be charged in the military context, might have a fresh and different view in the civilian process?

MAJOR WILSON: I think we have to have good cases. These are courts of law. They are not
therapy sessions. I mean, the reality is that the desire for vengeance and vindication on the part of a victim, and our ability to convict someone, are not the same thing, not to mention the fact that perhaps it got rejected by the D.A. because it wasn't provable because it didn't happen that way.

You talk to civilian prosecutors, they will talk to you about rarely pursuing the drunken party, he-said-she-said cases, because they are so tough to pursue.

Sometimes the criminal solution is not all. In the military, we have the ability to do other things and we do. We can get rid of these people. We can take administrative actions against them even in situations where we don't have a criminal case that can be sustained.

So there are lots of ways to do this military style, and I think it has to be done military style, so that the people in that institution understand that this belongs to them, and that the change is happening in that culture.

CHAIRMAN CASTRO: I'll let some of the other Commissioners ask questions. Commissioner Gaziano? Commissioner Kladney after that, Commissioner Achtenberg.
COMMISSIONER GAZIANO: Thank you all.

This is a very complex problem and I am going to try to just, in my limited time, focus on one aspect of it. But let me just state at the outset that in my sort of crash course to try to learn as much as I can before this hearing, I am convinced that the military justice system can be improved, and there have been some efforts, to me, that make sense, to move in that direction.

It will -- any of those efforts would take a lot of time. To create a more professional corps of lawyers, I think, is one of the factors I may ask about at a later panel. And I think that that would serve both victims and those accused, whether falsely or not.

But there's one point that keeps coming up, that three of the witnesses, or maybe four, testified about, and that's the command influence. First of all, I should also state, I think the military justice system unquestionably moves to put it -- move it into the civilian context, I know in some cases, I'm going to ask a law professor perhaps about opportunities for referrals, I don't think that's a good idea. I certainly concur with Major Wilson's comments that the military has to solve this
and there are a lot of important reasons for that.

But on this command influence issue, there are constitutional concerns with decoupling the command influence that go back to a series of Supreme Court cases from the '90s that began with Weiss v. the United States that I was actually integrally involved with.

But I think even putting aside the constitutional concerns with decoupling, which possibly could be taken care of but would have to be very carefully legislated, there are -- I have other concerns with decoupling.

But I would like at least the three of you, who in your written testimony talked about this, before I even form my own decision about whether it's worth going down that line, are ways in which command influence -- some more examples can be reflected both against, you know, an unwarranted dismissal or in favor of the confirmation bias that we heard today that results in charges and conviction.

It seems to me, by the way, that -- I don't know if it's a good thing that it cuts both ways. But it clearly can cut both ways. I'm not -- again, I am -- my bias is I don't think that's an argument against eliminating command influence, but
it might be. So I'll throw that out to all the panel. Feel free to jump in, any one of you.

MS. PARRISH: Well, may I just say that we want justice, an unbiased, fair and competent process. Command bias that convicts the innocent is as bad as command bias that wreaks retribution on the victim and ignores the crime.

Regarding the facts, I mean the Department of Defense' own data reports that between 2010 and 2011, commander actions on the grounds of sexual assault decreased 23 percent.

The number of initiated court-martials fell eight percent. Numbers of perpetrators convicted of committing assaults decreased 22 percent. This concern validates the standing up of an independent, impartial, expert office.

In terms of command influence, although a legal term, victims will tell you there had been command influence, undue influence, against the victim, punishing the victim when they come forward, when they attempt to report.

The fear and the destruction of the victim's character. They become investigated. They are put in psych wards, given psychotropic drugs, released for purposes other than the fact that they
were raped or assaulted.

The numbers, the Department's statistics, show you that the only influence by the command to date has been to punish the victim, and where the perpetrator often remains in the service and continues unimpeded in their -- with their career.

COMMISSIONER GAZIANO: With respect, I don't think that's the only testimony we have today, that the command influence only cuts one way. For example, Major Wilson, you talked about, if more reports and more convictions are required, then we will get -- and how is that -- can you give me a few examples of the -- I'm sure it doesn't need to be -- sometimes it's probably overt, but it can also be very subtle.

And you spoke of the, Commander Cave, of the confirmation bias, and could you give us, can you -- I don't know, elaborate a little bit and give us some examples?

MAJOR WILSON: I think it's the same coin, in the sense that what we don't want to do is to have something that says here's the result, now get it, in that sense.

I don't -- no one is here being pro-
rape, let's put it that way. Command influence. Command influence is a proper thing. It's unlawful command influence we all dislike.

And we want commanders to run this show and we want commanders to make it sure, make it clear that sexual assault will not be tolerated in their ranks, and my experience, at least in the contemporary -- with the contemporary military is that for the most part, they do that.

There is -- you know, it's a large topic without a single, simple solution from the beer pong party-driven junior enlisted problem, to the general officer abusing his authority with a subordinate. Slightly different problems, different approach.

I want to see some things that work. I want to see us do things that really work as opposed to putting out lots of rhetoric and lots of window dressing, to take the rules that exist and have the people within that structure use them to that benefit.

I have no heartburn with exposing the fact that indeed, there is abuse of authority with regard to rape victims. And might I add that my clients with PTSD from combat who got pushed out with personality disorder discharges, had the same
problem.

It's the power of that institution. And we do need to keep an eye on it, and we do need to keep linked up to it, and we are a society in which we have civilian oversight. That's not the argument.

What we want to do is not assume results before we see what's really there.

COMMANDER CAVE: Let me approach it from this perspective if I can. As a naval officer, I think command influence is a proper thing and appropriate in disciplinary areas, if it is used in the -- if you approach it from the perspective of command influence as a leader, in other words, leadership.

What I get concerned about and my colleagues get concerned about and ultimately our clients get concerned about when it enters the military justice system, in other words the complaint is made, the 32 is ongoing, those kind of things, our concern becomes the commander who is putting his or her thumb on the scale to get a particular result in that particular case.

That's the issue with command influence.

UNNAMED PARTICIPANT: How does he put the thumb?
COMMANDER CAVE: Sure, it's done in many ways, some of them direct and some of them subtle. For example, we have cases, reported cases in the appellate cases, where commanders have told witnesses they will not cooperate with the defense. They will not talk to the defense. They cannot assist the defense as a character witness, and if they do, they will be punished for something.

That is, you can read the cases, those are issues of command influence. You can -- a subtle command influence is the training. I talk about this somewhat in my written remarks about how the sexual assault training can be a roadmap on how to make a false complaint.

That is a subtle form -- so you screw your -- people screw their eyes up about that. But look at the individual cases and you will see how that has happened.

It's subtle, and this is the issue of the -- in a sense, the one drink issue which comes up, as Major Wilson has talked about, is we all know that -- we all know that that's false, but yet that is consistently put out there.

So, and then you have the more general but less subtle, the General Amos issue. And from a
commander's perspective, you would think you would not want to do that.

In fact, if I recollect correctly, in some of his statements he said he knew he was doing the wrong thing but he was going to do it anyway, and what he ended up doing was affecting, I think it was, 20 or 21 cases.

I was involved in one of those cases and there's a gag order on it because of some things that were said. So you know, it's not just the accused who needs to worry about command influence. It's the other side, if you want to look at it as sides, that needs to worry about command influence too, because they end up prejudicing their cases.

And you lead to this lack of trust in the system. And if you don't have trust in the fairness of the system, the research will tell you, the fact that you are going to get prosecuted and convicted is meaningless unless the people have trust in the system and then as a result of that they are willing to obey the law.

That's the way I would approach that.

MS. NATELSON: May I add one thing? I definitely agree this is a problem that goes both ways. These are bad charging decisions so it's a
problem for the defendant and it's also a problem for
the victim, and I think it's interesting that you
brought up Weiss, because in, you know, among our
closest allies, Great Britain, Canada, Australia, all
of their high courts have actually moved away from a
command-driven system of case disposition towards a
more independent model, out of concern for the rights
of the accused.

So you know, from my perspective, I see
it on the ground as it affects the victim, where if
you are coupling personnel decisions with criminal
justice case disposition decisions, you know, you are
-- those two things are going to affect one another
and things, sort of extralegal concerns like the
value of the accused to the, you know, to the unit,
and you know, the relative lack of value of the
victim to the unit are going to kind of color and
inform the way that the criminal case is being
disposed of, and other countries have recognized this
and moved away toward what they perceive to be a
model that is as destructive to the prospects of the
defendant as to the victim.

CHAIRMAN CASTRO: Thank you all very
much. The Chair is going to recognize, in the
following order, Commissioner Kladney, Commissioner
Achtenberg, and I understand Commissioner Yaki is on the phone and he has asked to ask a question. So Commissioner Kladney, please proceed and let me know if anyone else wants to ask a question.

COMMISSIONER KLADNEY: When you talk about command authority, command authority can work the other way too in terms of disposition of sentences, can it not, Commander Cave?

COMMANDER CAVE: Yes sir.

COMMISSIONER KLADNEY: Have you seen that happen?

COMMANDER CAVE: I'm not sure exactly of your question, but certainly the commander has the authority not to make -- not to move a case forward, if that's what you mean.

COMMISSIONER KLADNEY: No, I mean subsequent to courts-martial.

COMMANDER CAVE: Oh yes, if a person goes to court-martial and they are convicted of one or more charges on the charge sheet, then the case is returned back to the convening authority, the staff judge advocate makes a review of that and makes a recommendation to the CA, the convening authority.

At that point in time, the convening authority may make a clemency decision. That
clemency decision could be to reduce the sentence, or in the right case, set aside some or all of the findings of guilty.

And once that happens there's a double track. There's a two-track -- one is the -- depending on the sentence, the mandatory appeal or a less mandatory appeal, and then the clemency and parole process.

The commander does not get involved in those processes. The commander's influence on the case is to reduce the sentence, for example, and we have all had -- I think we can all claim cases where we have got some clemency.

That ends once he or --

COMMISSIONER Kladney: the Judge?

COMMANDER Cave: The Judge -- if the Judge is the finder -- if it's a Judge alone trial in other words he or she is the finder of fact and of sentence, then yes, he or she makes the sentence.

If it's a member’s case, the Judge has no influence on it. However, there is a -- there is a provision within the rules, sometimes followed, where the Judge, in a member’s case, or actually in his own case, can make a recommendation to the convening authority as to potential clemency.
Now the idea is he is not challenging
the sentence he gave himself, or she gave, but he or
she, the Judge is saying look, go take a look at this
and --

COMMISSIONER KLANDNEY: I think my point
is, is that it works the other way as well.

COMMANDER CAVE: It can work the other
way. Sure. Yes sir.

COMMISSIONER KLANDNEY: Okay. So the
other thing that I found of interest in your paper
was you found these, quote, "false reports" going
from 2 percent to 60 percent. Have you ever really
looked at those studies?

COMMANDER CAVE: I have looked at many
of those studies, and I am frankly not sure which one
I want to believe and that is for any number of
reasons, which the studies themselves point out.

And what I did, is I have taken the
conservative approach of two percent. And that means
that --

COMMISSIONER KLANDNEY: I want to make
that clear for the record because you were actually
underlining 60 percent during your presentation.

COMMANDER CAVE: I apologize if I did,
but I meant to establish that the research indicates
a range, quite frankly, all over the place, and it depends on who you talk to.

Dr. Lisak is on one of your later panels. Certainly under the circumstances his 2 to 10 percent seems a reasonable approach to take, which means if you have 3192 reports in 2011, you know, arguably -- arguably, I'm not saying are -- but arguably, 2 to 10 percent of those are false reports. You know --

COMMISSIONER KLADNEY: I understand. I just want to make clear that when you quoted Dr. Lisak's study, he actually negated the study, I believe, by McDowell and Kanin.

COMMANDER CAVE: That's correct. I agree with you on this.

COMMISSIONER KLADNEY: And also, in your report you also talked about how -- or you seem to speak to the fact that we offered victims lie detector tests and that's when they decided not to prosecute, when in fact, in Dr. Lisak's study, he cites Dr. Kelly's study that says that that is a primary bad thing to do, because victims will then back down, even if -- I mean, I am just trying to clarify your report. You wrote 19 pages of this stuff.
COMMANDER CAVE: You lost me at the record, sir.

COMMISSIONER KLADNEY: So am I correcting the record here? Is that correct, what I am saying?

COMMANDER CAVE: I don't think you are correcting the record sir. I think you are -- I think you are doing what I was trying to explain, which is that there is a great deal of work still to be done to understand the full nature of what is or isn't, by definition, a false report, and to what extent they comprise the number of these complaints.

And that comes up, I would argue, most often in the cases involving alcohol. I mean, the example I gave obviously is a significant way to express it, and we certainly have other cases where we can say definitely this is a false report.

But in the -- this may be changing, but we used to say that most of our cases were alcohol-related, and how do you really tell, under the facts of the individual cases, whether that case really is a false complaint or not, and that's the issue from my perspective.

So I think we are in agreement, the numbers --
COMMISSIONER KLADNEY: I think that's why you have a trier of fact.

COMMANDER CAVE: Say that again sir?

COMMISSIONER KLADNEY: That's why you have a trier of fact?

COMMANDER CAVE: That's true. Yes.

COMMISSIONER KLADNEY: And I'd like to ask Ms. Parrish a question. You quoted in your written statement as well as sitting here today the diminishment, 23 percent less prosecutions or whatever.

But quite often, in a vacuum, those statistics don't really mean much to me. Have you ever had an opportunity or has there ever been an opportunity -- I mean there's only 2,000 cases a year that are prosecuted, whether they are administrative or whether they are 500 and something, 500 courts-martial, something like that.

Have you ever thought of approaching the military and asking them if you all could get together and appoint say a non-partisan panel to audit those cases, to see exactly why they went to Article 15 or why they went to a field Article 15 or just other administrative duties, or how those sentences were -- came about?
Because I mean, because I didn't get that anywhere in any of the information I was given.

MS. PARRISH: Right, well I think that's a great idea. I think it's much needed. The data, as presented, at times is very confusing and even sometimes contradictory.

The bottom line, though, I mean, in terms of the numbers between 2010 and 2011, you know, there were 1,025 actions were taken by commanders on the ground of sexual assault, and in 2011 there were 791, a decrease of 23 percent.

COMMISSIONER KLADNEY: Well I understand that, but we don't really, we don't really know what was brought, what was rejected, what wasn't.

MS. PARRISH: You're right, we --

COMMISSIONER KLADNEY: I mean that is --

MS. PARRISH: We don't, but I wish --

COMMISSIONER KLADNEY: On its face, it's an unfair --

MS. PARRISH: Right.

COMMISSIONER KLADNEY: It's unfair. It's maybe indicative of something. But --

MS. PARRISH: Well, I would say though that you know, only eight percent of cases were 'quote unquote' convictions, but of those
convictions, so many are often for lesser charges. You know, rape --

COMMISSIONER Kladney: Eight percent of the 500 courts-martial?

Ms. Parrish: That -- in -- between 2010 and 2011, the number of initiated court-martial -- well, total court-martials were, are eight percent, and so the numbers, compared to civilians, are so low, and of those eight percent, many of them are often lesser charges.

I mean, you know, if you take lieutenant -- Marine Lieutenant Klay for example, who know, was -- allegedly was raped by two -- by a Marine and friend, you know, one of the perpetrators was of the 191, the eight percent listed in the 2011 report that was convicted, and that three star general reduced the perpetrator’s 45-day sentence, which ended up being for only adultery and indecent language, to seven days.

So there are all kinds of signals that happen here. You've got rape charges that -- they get reduced to adultery and indecent language. They get a sentence of 45 days and the three-star general reduces that to seven.

Now, that's the message and that's why
we are here today, because unpunished sexual assault in the military is an epidemic, and Secretary Panetta accepts that notion.

And so you know, victims don't come forward and report because it's futile.

COMMISSIONER Kladney: And so do you believe an audit would go a long way?

Ms. Parrish: I believe an audit would be a wonderful thing.

COMMISSIONER Kladney: And now one more thing I'd like to ask, can you all explain to me this thing about personality disorders and adjustment disorders which -- when a victim gets discharged, they do not receive services for that, or a disability claim because it's a preexisting condition? How does all that get set up? Yes.

Major Wilson: Let's talk a little about personality disorder separations -- I have done a fair amount of personality disorder work. It's begun to go away a bit because there was a public outcry about the use of personality disorder separations on soldiers suffering from combat stress-related disorders, and we would see people being diagnosed with personality disorders after a 40-minute interview with a psychologist, almost an
impossibility.

And access to a disorder like that, it is presumed to be a preexisting condition and therefore not compensable under the military disabilities system.

And it was often used as the fastest and easiest way to get rid of someone because you -- you know, you had far less due process because you weren't being separated for misconduct, you simply had this problem.

And I certainly saw it, I mean one of my most -- one of my, shall we say, favorite cases was stopping the Navy from discharging a woman with a personality disorder discharge after she complained about her chief petty officer having pornography on his computer all day, okay?

I know this stuff happens, but I also know that they do go after it, we do see those. The services, and in fact with the assistance of civilian oversight, have indeed stopped doing personality disorder diagnoses in the ways they were.

Now, one of the difficulties we have is that the adjustment disorder has become the substitute for personality disorder in these evaluations. But it's not just a problem with sexual
assault.

COMMISSIONER KLADENY: Well, does the --

CHAIRMAN CASTRO: Commissioner Kladney, I want to move on to Commissioner Achtenberg, but we'll come back. Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Thank you Mr. Chairman. I just want to begin by saying that my own view is that, given that enlistment in the military has become a critical piece for young people in general and young women in particular, a critical place for people to gain skills and to better their lives and to make themselves highly employable, not only during their stint in the military but particularly afterward, it's become a very important institution for positive, life-altering uplift and social mobility.

And to the extent that, as acknowledged by the Secretary of Defense, there has developed in the United States military an epidemic of sexual harassment and exploitation, that alters profoundly the ability of particularly women, although not exclusively, to take advantage of the enormous benefits that the military confers on a striving population, an aspiring population, that's a big problem.
And I am less concerned about the legal particulars than I am concerned about the aggregate impact of this phenomenon. So, given that that's my area of concern, I'd like to ask Ms. Natelson and Ms. Parrish to express their own views about how this problem, which everyone acknowledges is a problem, even Mr. Cave, even Major Wilson --

COMMANDER CAVE: You didn't ask my personal opinion.

COMMISSIONER ACHTENBERG: Everyone acknowledges that this is a problem to some extent, how would you have the military address this, given what you know, because of who you work with, and who you represent, Ms. Natelson and Ms. Parrish, if you could opine?

MS. NATELSON: How would, I guess I'll need clarification, how would I want the military to address some of the kind of repercussions of sexual assault?

COMMISSIONER ACHTENBERG: How would you have them address this phenomenon that we see here? What would you have them do in order to make a difference for the people that we are concerned about?

MS. NATELSON: Well, I mean I think you
are right, that there are -- this goes beyond just being a military issue. I mean these are -- the consequences of sexual assault follow our clients into the civilian world, and from my perspective, it becomes very much a poverty issue. It's very destabilizing if you are not able to access disability compensation from the V.A.

There are enormously elevated rates of homelessness among women veterans, that far outstrip comparable rates among non-veteran women and male veterans, and a very high percentage of homeless women veterans, you know, have histories of sexual assault in the military.

So you know, again I think the real problem is one of lack of remedy. If you are a victim of a crime that -- and are injured and you know, sustain economic and non-economic injuries outside of the military, you have avenues for compensation. You know, you can sue your employer, hold your employer accountable, and you know, receive damages.

These -- in addition to finding that the criminal justice system fails them, our clients are, you know, they are trapped, they can't leave their job and they have no access to any kind of remedies
or compensation for the injuries that they have suffered.

So that, you know, I think it's of relatively limited value as an advocate for victims and as somebody who is interested in the civil rights of victims, to focus on the criminal justice system, because the focus of that system is perpetrators.

My concern is what can we do to ensure that victims of crime in the military are being able to access compensation for their injuries.

COMMISSIONER ACHTENBERG: Okay, so your testimony is then that instead of this being an opportunity for economic uplift, when you see women veterans being disproportionately economically harmed as a result of what happens to them in the military, A, and B, your view is that the most significant contribution that could be made is that legal remedies would be made available that currently are not available, to address this -- are you saying tort and Title VII-like remedies?

MS. NATELSON: Right, and I do think that those remedies, in addition to offering compensation to individual victims, it's those remedies that hold those institutions accountable, so it's those remedies that have the greater potential
to make this problem go away by, you know, by putting it in the military's financial interest to, you know, to improve the setting for women, and assuming that happens then, you know, there's less harm done to women and it's less likely that they will experience you know, incidents that will destabilize them and diminish their economic prospects when they get out of the military.

COMMISSIONER ACHTENBERG: Ms. Parrish, do you have a prescription for how this issue might be more effectively addressed?

MS. PARRISH: No, well, I've spoken somewhat about the, you know, broken system and the bias in the system and the undue influence by the command culturally that happened.

I think that the traditions that are -- that still objectify women, that are inculcated into the service, is something that has to be faced. You know, impressionable 17- and 18-year-old female trainees forced to walk into mess halls and face something called a cat walk, which consists of demeaning and organized shout-outs that demean their gender, or female Marines are called upon to repeat cadences that humiliate and objectify them.

Sergeant Smith was forcibly carried into
a bar and thrown on top of the counter and forced to endure a naming ceremony as it's called, which loudly sings songs of the most graphic descriptions of being mutilated and sexually violated, these are traditions embedded in the military and you know, the military has shown itself effective to address this system in the past.

I mean, during the -- when racism was an extreme problem in the military in the '60s, you know, there was a -- Congress had a role to play. It passed sweeping, transformative legislation, the Civil Rights Act, and then there was a subsequent decision within the military that racism was a fundamental problem and it had to be addressed.

And according to contemporaneous news reports, Admiral Zumwalt for one created stiff new rules against racial bias and ordered senior officers to uphold them or be dismissed.

They were held accountable, and until the military faces the traditions of gender bias and discrimination in the military and holds seniors accountable, then the problem of this culture of punishing the victim, of blaming the victim, of discrimination against women because she is one, won't end.
And so you know, it's both -- and the system, I would just say, quickly, that the broken justice system, where inexperience is rampant, many judges are -- in the Coast Guard, it's collateral duty, they are not trained properly on MRE 412 or 513, victims' privacy with the rape shield rule, there are so many problems in the system and dysfunction and inexperience and turnover, and influence by the command, that the Congress must address modernizing the military uniform code of justice. They wrote it. They need to fix it.

CHAIRMAN CASTRO: The Chair will recognize Commissioner Yaki, who is on the phone, thereafter the Vice Chair, and then Commissioner Heriot will likely have the last question.

COMMISSIONER YAKI: Thank you very much Mr. Chair, can you hear me?

CHAIRMAN CASTRO: Loud and clear sir.

COMMISSIONER YAKI: Thank you. [i-n-a-u-d-i-b-l e] I have been watching it on C-SPAN at the same time with a slight delay.

When I worked, when I was the chief of staff for Nancy Pelosi many years ago, one of the things that I encountered were complaints made from discharged women veterans on the unequal treatment
that they had received in discharges and benefits, and then when we probed further, it became evident that a lot of this was predicated on rather traumatic sexual experiences that they had when they were in the service.

I mean, this is an issue that I have been concerned about for many years and I will be very honest with you, I now am very concerned about it right now, because I have a niece who is in one of the academies, and I was very concerned when she went in, I am very concerned about, you know, what's going on now.

I am concerned what happens when she graduates and goes and does her service time, because what we have here, I think can only be described as, as living in the hell of -- if you were an African American in 1947 living in the deep segregated south. I mean, that's the comparable position that many if not all women face in the military today, and I was glad about Commissioner Achtenberg's question and the last response, because I do believe that to break this culture of sexism and discrimination and violence, is something that requires the type of commitment within the military that it took to end or end its own segregation, but also in our own country,
to end segregation.

I mean, the problem when you are in the military is that, is that unlike in civilian life where you can move somewhere else, you can try and change jobs or what have you when you face harassment or discrimination, the military will only give you -- you can get punished, you go AWOL, you get dishonorable discharges, there are a whole set of consequences to your mobility. You are essentially trapped. It would be like if you were trapped in a segregated town in 1947.

So my question goes along the lines of Commissioner Achtenberg, but focuses on one aspect of it, which is punishment. From reading various panelists' statements, from reading what victims have written to us in heartrending detail over the past two weeks as word of this hearing came out, the issue of discretion and either lack of, or a wide variety of punishment available are at the discretion of the military in these sorts of situations, seems to me one of the common themes, and I just wanted the panelists to expand on whether there needs to be something along the lines of what has happened in civilian courts, which is much more -- heavier emphasis on the kinds of punishments available and
mandated by statute or by code, including the
addition -- the recent additions in the last 10, 20
years or so, of sexual offender databases of people
who commit these crimes being forced to report as
registered sex offenders, and whether these kinds of
civilian-type punishments would have a salutary
impact on these sorts of offenses when they occur in
the context of the defense department.

CHAIRMAN CASTRO: Whoever would like to
answer that?

MS. NATELSON: I would just caution
again, against looking to the criminal justice system
as, you know, a potential point of salvation,
particularly the criminal civil -- the civilian
criminal justice system where sex crimes are
enormously under-prosecuted.

Also, I mean, over 90 percent of
criminal offenses in general plead out. I mean, the
hallmark of the criminal justice system is
discretion. So it's dangerous to attach too many
expectations to the criminal justice system, when at
the end of the day you can never make, you know, the
police investigate a crime. You can never compel a
prosecutor to prosecute a crime.

That's why I keep returning to the civil
justice system, because that's where victims have more agency. You actually, you know, if a victim decides to bring a civil claim, they own that claim. Nobody can tell you we are not going to do this, you are not allowed to bring this claim.

And these are the rights that are available to every other employee or crime victim in the country, other than uniformed personnel. You know, a service member can be performing the same job as a DoD contractor or a civilian DoD employee, and they have remedies that they can access if the criminal justice system doesn't work for them, but the woman in uniform doesn't.

MS. PARRISH: Well, Rachel makes a very good point, but I would say, in terms of the question, I do think minimum guidelines in sentencing is something that needs to be considered, within -- it's, you know, juries are notorious for light sentences on these crimes in the military, and as, you know, defense counsel knows, even if they lose at verdict, they could still win at sentencing.

And as I have said before, judges, you know, it's collateral duty in the Coast Guard and in the Navy, you know, sometimes they only have had one or two tours and they have previously served in non-
military justice roles prior to taking the bench.

So the inexperience there, and the lack of training on victims' rights, is a big issue. And I would also say in the appeals courts, the Air Force appeals court is extremely -- they are extremely defense protective, and they should be defense protective, but it's the extremis that the position, recently in the Marines appeals court, reverses a rape conviction by a jury, broadly endorsing the rape myth, you know, ignored frozen fear, claimed victim wasn't -- didn't seem depressed enough, so they reversed a jury's decision.

So there are so -- throughout the entire system, and also I would say incidents where victims' rights to legal counsel, which the Congress passed and is now subject to interpretation within the military. The Air Force, in fact, is trying to do something about that recently. We are pleased to hear them making those efforts.

But there's pushback in the other branches, in fact many have been told, we have been told, that the interpretation of the new law passed by Congress was that really it was nothing the same and the only right a victim had to counsel was to remove a rapist out of their will, or to break a
lease and get them out of the lease.

So you know, it's a confused and unprofessional system, with undertrained personnel, young prosecutors where their bosses are even less experienced than they are.

I mean, so it's a lot of problems within that system that need to be addressed.

CHAIRMAN CASTRO: The Chair recognizes Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: Thank you very much Mr. Chair. Well, I would ask quite a different question than the sort of questions that have been posed so far. A basic thought I would say, maybe I would use the word -- adjective-loaded question, one of the themes running through everyone's testimony this morning, it seems to me, is the need to change military culture such that women are fully integrated.

But my reaction to that theme is, is that really possible? I mean, sex and violence go hand in hand in our popular culture. If you look at video games, if you look at the movies, if you listen to popular music.

When you join the military, you sign up for training to kill. How is it possible to
encourage that aggression, needed aggression, on the part of military members, and to simultaneously suppress sexual aggression?

I mean these seem to me at odds. And you know, it leads to another obvious question, perhaps, the military should be sexually segregated, female-only units, which is of course a wild idea in today's culture.

MAJOR WILSON: I really don't know. You know, sexual assault in the military didn't appear last year or in this decade. I raised my hand in 1977. It was there in 1977. It was there in 1987.

VICE CHAIR THERNSTROM: But you aren't at war forever.

MAJOR WILSON: Well, it raises the idea that all men are rapists, which is not true. It raises the idea that all soldiers are potential rapists, which is not true.

I find myself, as someone who has spent a lifetime opposing abuse of military authority as counsel for service members, sounding like I am defending the institution.

But I think it's important that we understand that this is the one institution in our society that has the 24/7, 365-day-a-year control
over their people in a way that will allow them to make those functional changes.

That's the difference from the civilian world, and the idea that the longstanding violation of law of war, as we would call it now, that is sexual assault, is something that is actually a part of being a soldier, I really have to take exception to that.

I think it's a terribly bad idea. I think it misinterprets our soldiers.

VICE CHAIR THERNSTROM: I don't think that's what I said. But --

MAJOR WILSON: Well, and I think that you are right. We are teaching -- on one level we are teaching people to kill. But we also channel it, and that's why we have military law. It is our leash on the dogs of war.

But never forget that actually the vast majority of people in the military are not in combat. They are sitting behind desks. They are pushing paper. They are doing all sorts of things.

And I don't think that's a solution. I don't even -- even jokingly, sarcastically or as a suggestion, Ma'am, I think it diminishes the value of the people in that institution and the women in that
institution.

Yes, sexual assault is a problem in the military for women, and it has been for a very long time.

VICE CHAIR THERNSTROM: My point, and I'd like to hear from other people, there is a kind of a cultural problem here, that it seems to me is part and parcel and always has been historically. We have had wars as long as we have had men and women on this planet.

There is a cultural problem, a clash of cultures here, where you want to train people who are preparing to fight wars, whether they end up with desk jobs or not, that's the initial training, and you also want them to be -- not to be kind of aggressive in a way that is deeply embedded in our culture.

COMMANDER CAVE: I thought I had brought it with me. I don't have it. But there is a very useful discussion of almost this very topic from, I want to say 2000.

Commissioner Achtenberg, women and men do join the military for a lot of different reasons. She is absolutely right. People leave poor backgrounds. I have met many, many military personnel
who have gotten out of bad circumstances through --

she is absolutely correct.

But to get back to this, and I'll make
it available to you through Ms. Eisemann, I'll send
it to her once I get on the web.

And it discusses this sort of point of
yours, and one of the takeaways is, at least from my
perspective, is that this discussion and focus on
what is a problem -- I agree with you, my personal
opinion -- this topic has, is and has required us to
focus on a problem but in the process, we ignore the
good things.

I have had the privilege to serve with
many wonderful people. You are going to hear from
one of them later on. She is now Vice Admiral Nan
DeRenzi.

The point is, there are -- she is the
first woman to be a flag officer, a Judge Advocate
General of an armed forces. My point is, and the
takeaway from this article, and there's more to it,
much more to it, is that focusing on this problem,
obviously it needs a focus, but in the process we
ignore what have been some very profound and
substantial gains by military women who have served
and continue to serve and hopefully will serve in the
military.

And so -- and part of this article's point is that unfortunately, if we continue to talk about this, then we go back to some old, conservative -- apologies here -- some old, conservative thinking that we need to have segregated barracks and segregated galleys, mess halls, chow halls, whatever, and that women shouldn't serve in the military, and personally I think they are wrong.

MS. NATELSON: I also think that it's not at all inevitable that military training and sexual violence go hand in hand. I'd say just look to our allies. Look at Israel.

I think the problem is in fact reversed, that there aren't enough women serving in the military. There are so few women that they are marginalized and until their presence in the military is greater, greater in number, greater in meaning, greater in impact, you are going to find that they continue to be marginalized.

So I think, you know, there are other countries where men and women are able to serve together without this being a problem, and that -- as Mr. Cave says, I think it would be an enormous shame to cut off those economic opportunities, those very...
real economic opportunities, to women who want to serve in the military for various reasons.

CHAIRMAN CASTRO: Vice Chair, I am going to recognize Commissioner Heriot. We are a little over time already.

VICE CHAIR THERNSTROM: I just wanted one sentence.

CHAIRMAN CASTRO: Okay, go ahead.

VICE CHAIR THERNSTROM: My basic point here is -- and I'll just focus on men -- you can't train men for war by stripping them of their aggressive drive. I mean, the two go hand in hand. And that's it.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Heriot for her -- for the final questions.

COMMISSIONER HERIOT: Mr. Chairman, I think my final question is going to be pretty brief. Ms. Natelson, you brought up the Feres Doctrine earlier in your testimony. I just want a clarification.

You may have already answered this, but I want to make sure that I understand you. Is it your position that sexual assault should be a special exception to the Feres Doctrine, or are your problems
broader with the Feres Doctrine?

And also, Commander Cave and Major Wilson, if you could comment briefly on the importance of the Feres Doctrine for the military.

MS. NATELSON: I'm not suggesting a particular course of action. I think, you know, taking into account political realities and taking into account the narrow focus of this particular hearing, you know, my concern is how the Feres Doctrine impedes access for remedies for victims of sexual assault.

But I do think that the injustice of the Feres Doctrine and sort of what it's, you know, sort of what it's created, which is not just barring negligence claims but baring intentional discrimination claims also, that that is an injustice to all service members.

COMMANDER CAVE: Thank you, I am going to wave off on that question. I don't do -- I just do court-martial work.

MAJOR WILSON: I do do civil tort litigation, and as a private practitioner, sure, line them up. If you want to give FTCA, Federal Tort Claims Act authority for service members to sue, I'll happily take on those cases.
However, the tradeoff is not that there is no remedy, and I think that's false. It may be a poor remedy, or, well, not a well-administered remedy, but the tradeoff for Feres is that we offer service members the 365-day-a-year, 24/7 ability to have military disability and veterans' disability related to their injuries.

How well that is managed is a whole other discussion, as we all know. But that's the tradeoff. Do I think it's a fair tradeoff? Do I think it's a proper tradeoff? Do I think there may be some overriding policy issues that would merit change, for example in medical malpractice cases in stateside hospitals?

Yes. But that -- I don't think that the -- again, oh, I wish these things were as simple as eight-minute discussions.

CHAIRMAN CASTRO: Well, thank you all. It was a very informative panel. We appreciate the input that you have given us. And we look forward to continuing conversation throughout the day.

We are going to now begin with panel 2, so in the interests of time, we will ask folks to -- panelists for panel 2, to begin to take your places. Commissioners, don't stray too far away. We are
going to start immediately once the panelists are seated.

(Whereupon, the proceedings in the foregoing matter went off the record at 11:06 a.m. and went back on the record at 11:10 a.m.)

CHAIRMAN CASTRO: All right, I am calling the second panel into session.

III. PANEL II: ACADEMIC SCHOLAR PANEL

CHAIRMAN CASTRO: All right, I’m calling the second panel into session. Let me briefly introduce the panelists in the order that they are going to be speaking. I will ask Commissioners to sit down and take your seats please. Our first panelist --

COMMISSIONER YAKI: Mr. Chair can you hear us?

CHAIRMAN CASTRO: Yes we can hear you, Commissioner Yaki. Is Commissioner Kirsanow on the phone?

COMMISSIONER YAKI: We momentarily just dropped there.

CHAIRMAN CASTRO: Okay, you’re there. We got you. Our first panelist is Dwight H. Sullivan with the George Washington University School of Law. Our second panelist is Elizabeth Hillman with the
University of California, Hastings School of Law.

Our third panelist is Victor Hansen with the New England School of Law and our fourth panelist is Dr. David Lisak with the University of Massachusetts, Boston, Department of Psychology.

I will now ask each of you to swear or affirm that the information that you are about to provide to us is true and accurate to the best of your knowledge and belief. Is that so?

(whereupon, the panelists were sworn in.)

CHAIRMAN CASTRO: Thank you. Mr. Sullivan, please proceed.

MR. SULLIVAN: Thank you Mr. Chairman, members of the Commission. It's a pleasure to be with you today. Because my name tent had this indication I will throw in the obligatory disclaimer that I am speaking only on behalf of myself and I'm not purporting to give the views of any governmental agency.

Oliver Wendell Holmes of course famously said that the life of the law has not been logic, it's been experience. And experience teaches us that there are certain dangers when attempting to reform the laws governing sex offenses in the United States
military, and I'd like this morning to concentrate on
some of those dangers.

One lesson that experience has taught us
is that reforms can do more harm than good, and the
best example of this is the 2006 National Defense
Authorization Act, which fundamentally changed the
criminal statutes governing sex offenses in the
military.

It resulted in a holding that the way
that it criminalized substantial incapacity offenses
was unconstitutional. As a result of that several
convictions were lost, and it threw other cases into
disarray, kept cases on hold for literally months
while these issues were hashed out in the appellate
system, and obviously holding military cases in
abeyance for months not only harms the accused with
his statutory and constitutional right to a speedy
trial, but also harms military efficiency, good order
and discipline and morale, to have these people often
not able to perform their primary duties because
their security clearance has been pulled, or because
there's a military protective order that compelled
them to be separated from the alleged victim. It
makes it difficult for the command to hold these
cases in abeyance. So that was one example of how
the 2006 legislation had an unintended effect.

Another way is that the legislation eliminated a theory of liability for rape of a child. So one way to prove force of rape of a child before 2006, was parental compulsion, which was recognized as a form of constructive force.

The 2006 legislation did away with that, and as a result there was a naval case, Valentin, in which a rape conviction was set aside because the 2006 statute did not incorporate that parental compulsion theory.

Now obviously no one in Congress intentionally did away with the constructive force notion of parental compulsion. But the previous statute was a very broad statute that had been supplemented with case law and regulations.

And so when Congress then defined force, they didn't bring in all of the case law that had interpreted that under pre-2006 case law. They missed that, and as a result, we once again had the unintended consequence of a service member going free who would have easily had his conviction affirmed under the pre-2006 legislation.

So if the objective of the 2006 legislation was to hold more military sex offenders
liable for their actions, a very noble and worthwhile goal, the legislation was actually counterproductive.

And so that's one important lesson that, when trying to reform the military justice system, it's important to do so in a very deliberate fashion that takes account of all the ramifications, all the third order effects of how a change in one area may affect the law in another area.

Another lesson I think we draw in looking at experience, is that it's too soon to judge the newly reformed military justice system's handling of sex offenses.

Over the last year we have seen substantial changes to the way that the military deals with sex offenses. Of course one primary change was the April 2012 change that Secretary of Defense Panetta announced, in reserving discretion to dispose of these charges to a special court-martial convening authority of the rank of Colonel or Navy Captain or higher.

That change took effect on June 28th. Also, I mentioned the problems with the 2006 legislation, well, Congress went back in 2011 and amended the statute. Those amendments took effect on June 28th, 2012, and the implementing regulations for
those changes still haven't even been executed yet.

So the system has changed in fundamental ways. No one knows exactly how those changes are going to play out and those changes aren't even fully implemented.

And there's more change on the horizon. For example, on January 28th of this year, the Air Force is going to have 60 special victim counsel go online who will provide counseling services to victims of sexual assault offenses, another substantial change in the military justice system.

Also, President Obama signed the National Defense Authorization Act for fiscal year 2013 on the 2nd of January this year. Once again, substantial changes to the way the military handles these cases, including setting up special victim units to investigate, prosecute and provide victim assistance in these types of cases.

That, however, that change won't go into effect until the 2nd of January, 2014. So you've already seen substantial revisions and the system is going to be changing even more in the future.

We shouldn't pre-judge the results of those changes. It calls for substantial study, and interestingly, the same legislation, the 2013 bill,
also set up two different commissions to study the
problem of sexual assault in the military, and the
effect of the changes that went into effect on June
28th of 2012.

A third thing that experience teaches us
is that the military does not have exclusive
jurisdiction over sex offenses committed by military
members in the United States.

Now, sometimes when there are proposals
to reform the system, the idea is offered that we
should allow civilians to exercise prosecutorial
discretion. In reality, we already have that system
for any sex offense committed in the United States,
because any sex offense committed by a military
member in the United States can be prosecuted either
by the criminal justice -- military criminal justice
system, or by a state court or in federal district
court, and in the case of state courts, the same case
can actually be prosecuted in both the military
justice system and the state court because you don't
have the double jeopardy bar there with different
sovereigns.

And we have seen this actually play out.
In fact, there was a Stars and Stripes article on
January 9th, earlier this week, that said that last
year there were 15 cases where civilian authorities declined to prosecute sex offenses against U.S. military members where the military then prosecuted them.

The civilians refused to prosecute because they were viewed as unwinnable. The military stepped in and prosecuted them.

And it sometimes goes the other way. For example in 2005, the Marine Corps declined to prosecute Captain Douglas Dowson for an alleged sex offense against a Marine Lieutenant. The City of San Diego, or San Diego state officials stepped in and prosecuted him and won a conviction in that case.

So right now, we have a system where the military serves as a backstop for civilian prosecutions where civilians don't prosecute, and the civilians serve as a backstop for the military where the military doesn't prosecute, and it is almost certainly the case that if we allow military commanders to exercise their prosecutorial discretion while also allowing civilian authorities to exercise their prosecutorial discretion, we end up with a combination of more convictions than we would have if either one of those was the sole prosecutorial
discretion authority.

And I only have a few moments left, so I'll just mention the fourth concern is with the politicization of the military sex assault issue that has led to another problem that might be called over-prosecution, where we have cases that go to Article 32 investigations, the Article 32 IO says there is not a basis for prosecution, and yet the convening authority refers the case anyway.

And it's interesting, in that same Stars and Stripes article, there was a quote from the chief prosecutor of the Air Force, Colonel Don Christensen, who said a commander who is believed to turn a blind eye to sexual assault, his career will be derailed.

And so there is that concern with the politicization leading to over-prosecution. Thank you Mr. Chairman.

CHAIRMAN CASTRO: Ms. Hillman.

MS. HILLMAN: Thank you, Chair Castro, Vice Chair Thernstrom and Commissioners for the opportunity to speak to you today. I'd like to just begin by commenting on how appropriate I think it is that the Commission has taken up this particular issue.

Sexual assault in the military is
critical for civil rights in the United States. The United States Armed Forces have been essential in the epic struggle for equality in our nation's history, and the histories of many other nations.

Sexual assault and rape, their prosecution and investigation have often reflected our society's assumptions, not only our military's assumptions, but our society's assumptions about the differences among us with respect to race, gender, sexual orientation and disability.

From the civil rights perspective then, the current system of prosecution within the military fails to protect the rights of many vulnerable minorities, including survivors of rape and sexual assault who suffer disability as a result of those experiences, women whose professional opportunities are limited by the prevalence of sexual assault, men, especially African American men, who have too often been unfairly singled out for prosecution for these crimes, and gay men and lesbians, historically perceived as sexually deviant and therefore less deserving of protection, whether they have been the targets of or accused of the criminal misconduct themselves.

Each of these groups, essential to the
effectiveness of the U.S. Armed Forces, would benefit from improvement and reform in this area of law.

Now, like all of us who have been paying attention to this issue in recent years, I am humbled by the challenges of trying to address it. I am also humbled by the fact that you gave each of us eight minutes and the TJAGs five minutes.

So let me just suggest I suffer from the same confirmation bias as the rest of us in this, but I would like to make two modest contributions that I mentioned in my written remarks, to what our legal response to military sexual assault ought to be.

First, the United States is an outlier among the nations, among the world's militaries, in placing the discretion to prosecute in the hands of commanding officers rather than civilian authorities.

The clear trend in the militaries of our allies is towards civilian control over a military criminal prosecution, not only in sexual assault, but in all criminal cases.

The United Kingdom, which was already mentioned today, for example, has a director of service prosecutions. His name is Bruce Holder. He is a civil servant. He has been in that job since 2009. His deputy is a Brigadier General.
This is a direction that the United Kingdom has been heading since 1996. It has -- it took gradual steps in this direction. It did not happen all at once.

This has also happened in Canada, in South Africa, Ireland, Australia and New Zealand. They have military justice systems with civilian authority to prosecute.

Now, Bruce Holder, in the UK, has four decades of experience in criminal law. He also has experience in war crimes tribunals. But he is not a military officer.

This affords him independence, both practically and structurally, and insulates the British military to the extent possible from the inescapable political consequences of prosecutorial decisions.

The second point I'd like to make is that both the recent and more distant past suggest to us that our armed forces are unlikely to be able to resolve this problem on their own.

Colonel Sullivan, an attorney and scholar and officer for whom I have the deepest respect, disagrees, and believes we need to let this most recent slate of changes take effect before we...
remake the system once again.

He is right about the potential consequences, but I am less sanguine about the likelihood of success under this latest regime. And I consider the imperative to protect commanders' authority to prosecute a Pyrrhic victory at best, because it leaves commanders liable to the scrutiny of the public, to criticism no matter what they do, and it leaves their troops vulnerable to a problem that so far our military has gained little traction over, despite two decades of what I think are serious and comprehensive efforts to address it.

Now, I note how I offer these observations and how I come to those. I think the appropriate comparison for us here is not to civilian prosecution systems, but to other militaries and their decisions about how to prosecute these.

I also note that I am a legal historian and a comparative scholar of military law. I am also a veteran, and I remember as a young Lieutenant, when I was in Colorado Springs during the aftermath of the 1991 Tailhook Scandal and the training that unfolded as a result of that, the consequences, intended and otherwise, that followed from those events.

I also was on the faculty of the Air
Force Academy when we decided on the course of action to one of the many scandals of sexual assault that have -- have disrupted and compromised the missions of our national service academies.

During my post-Air Force career, I have observed and written about the growing importance of legal counsel in military operations, about the heavy burden carried by our Judge Advocates who face a spectrum of professional demands and conflicts of interest that rival the most complex that any attorneys face.

Now, removing the authority to prosecute from command is a rational way to reallocate resources and protect the core, professional expertise and function of the armed forces.

It would not disturb the innovative practices that the Judge Advocate Generals of the services have described in their submissions. These include extensive training of military leaders on the psychology, sociology and consequences of sexual assault, the creation of a norm of intervention, of bystander programs, the attempt to ensure a seamless transition from on duty, active service, service provision, to services provided to veterans, and the establishment of expedited transfer processes for
those who report sexual assault within their units.

The changes already made in the intra-military structure of criminal prosecution have tinkered at the margins, by bringing in civilian advice, by shifting authority to prosecute to more senior officers within the chain of command.

Those changes have yet to be proven effective or ineffective, but the experience of other militaries suggests a cleaner, more complete, less duplicative solution is the best authority in a civilian.

Each branch of service is now crafting a separate set of regulations and structures to deal with this same problem. Some of the tinkering already in place sends counterproductive messages, undermining the ability of military prosecutors to bring charges and reifying the stigma and shame that has been long associated with being a victim of sexual assault.

The restricted reporting option for instance, available to service members who are victims of assault, deeply undercuts that very command authority over military discipline that command only prosecutorial authority is intended to protect.
Now, let me just close by saying, allowing a civilian to make a decision to prosecute will permit commanding officers to focus on adapting military culture, to the extent possible, to prevent the full spectrum of wrongful, sexual, sexualized behavior. All of that behavior corrupts military discipline. Sexual harassment that is not criminal to sexual assault that is criminal -- it would remove that legal precision and questions of prosecution from command, allow commanders to speak more freely on these topics and to address the problem more holistically, conserve resources and perhaps fix this tenacious and destructive problem. Thank you.

CHAIRMAN CASTRO: Mr. Hansen.

MR. HANSEN: Thank you for the opportunity to speak on this very important issue. This is a critical issue of importance for many reasons, but above all, it is an important issue if we are to ensure good order and discipline within the military, and if we are to retain and continue to recruit an effective fighting force.

Our military has a unique mission, and we ask a great deal of our service members. We have a special and critical obligation to protect them from these crimes in exchange for the selfless
sacrifice that we ask of each of them.

In my opinion the military has moved effectively on many fronts to better address this problem. First, I believe the statutory reforms over the past few years and more specifically with respect to the most recent amendments to Article 120 of the Uniform Code, which Colonel Sullivan just recently spoke about, dealing with sexual assault, I believe these amendments are significant.

They not only have clarified the law in this area but they have given commanders additional tools to more effectively punish a broader range of sexual assault crimes.

I also believe an increased emphasis on tracking reporting of incidents over the past several years is an important and positive development. The attention of senior military and civilian leaders and Congress have placed on how these crimes are reported, investigated and punished, send a powerful and important message that these are serious issues, and that Commanders at all levels are expected to pay attention and to take action when appropriate.

Finally, the military -- recognition by the military that sexual assault cases can be particularly difficult to effectively prosecute, and
to, as a result, add additional expertise, to hire civilian expertise, experts to train and assist military attorneys in the prosecution and defense of these cases, is I believe an important and significant development in that it is a recognition that any efforts to address this issue must not undermine the basic rule of law protections that are at the core of our military justice system.

Now in spite of these positive efforts, I think there remains much to be done and specifically in the area of what I have referred to as under-detection, and specifically with reference to the role of the military commander.

Now, this under-detection problem was most recently seen in cases arising out of Lackland Air Force Base, but this is not -- this is just the latest in a line of cases that stretch back to Aberdeen Proving Ground, to the service academies and to other military bases.

In these under-detection cases, the perpetrators were often able to assault multiple victims over many months without being detected, and without the victims reporting their assaults.

None of the reforms that we have mentioned to date, in my opinion, are sufficiently
designed to address this problem of under-detection as it relates to the chain of command.

There are many reasons for this under-detection but I believe one of the most important, and as of yet unaddressed -- yet unaddressed reasons, is that military commanders lack sufficient cultural and legal incentive to aggressively prevent and suppress this misconduct.

Invariably when these cases come to light, the military and civilian leaderships state that the solution to these problems rests with the military leadership and the chain of command.

I agree. And in order to ensure that the leadership addresses these issues, more must be done to incentivize commanders to prevent and suppress these crimes.

The changes that I believe, or that I propose, involve both a cultural shift within the military as well as clearer statutory guidelines.

Now there is often a cultural tendency within the military, and I should state that this is broader than just in sexual assault issues, my experience in the Abu Ghraib Investigations, and my experience over my time in the military, it is clear that oftentimes when there are command failings and
leadership shortcomings that contribute to atmospheres that lead to crimes, and in the case of sexual assault crimes, when the military does address these, they often send confused and mixed signals about the failings of the chain of command.

The situation at Lackland provides an example. In that situation you had a Lieutenant Colonel Mike Paquette, who is the commander of the 331st Training Squadron where 9 of the 17 accused instructors were assigned, and Colonel Glenn Palmer, who is the commander of the 737th Training Group, were both relieved of command after the allegations came to light.

The Air Force used characteristically cryptic language in announcing these actions, stating only that the leadership had lost confidence in these two commanders.

Similarly, Colonel Eric Axelbank, who was head of the Training Wing at Lackland, was not relieved of command. However he stepped down from his command much earlier than his initial -- initially-assigned change of command.

When referring to that, the Commanding General of the Air Force training command simply said, "We think we needed a different set of skills."
These comments and this response are not unique to Lackland or unique to the Air Force. There exists within the military a culture against fully investigating and clearly identifying the command failings which may have contributed to under-detection of these sexual assault crimes.

Now in addition to these cultural changes, I believe there must be more specific statutory changes to the Uniform Code of Military Justice, to further incentivize commanders to investigate, prevent and suppress these crimes.

There is a doctrine which exists under the customary international law known as command responsibility. This is a doctrine which exists and which we, the United States, played a significant role in developing after World War Two, and it was used to hold military commanders of our enemies accountable for the law of war violations committed by the forces under their command.

Since that time this doctrine has been codified in a number of international treaties and military codes throughout the world. As of yet, this doctrine has not been fully incorporated into U.S. domestic law within the Uniform Code of Military Justice.
Currently, Article 92 addresses dereliction of duty and is the primary statutory mechanism within the Code to hold commanders criminally accountable for their command failings.

As currently formulated, I believe Article 92 is inadequate. Under Article 92, all that is required of a commander is to avoid wilful failures and to achieve a level of competency that is somewhere above simple negligence, or culpable inefficiency.

The commander cannot be held accountable under this provision, even if he did not do everything feasible or even reasonable to investigate, prevent or suppress these crimes.

As long as the commander's failures were not negligent or culpably inefficient or wilful, he is not derelict of his duties. By contract, under international law the commander is required to do everything in his power that is reasonable to prevent, suppress and punish law of war violations.

I believe that we ought to borrow this doctrine that exists under customary international law, and incorporate it into Article 92, and specifically set forth a clear standard that requires commanders to do all that is reasonable and within
their power and authority to investigate, prevent and suppress these sexual assault crimes within the ranks.

This change and clarification of the law will have several benefits. First, I believe it will provide commanders with the needed incentive to make detection and prevention of sexual assault within the ranks a top priority. Commanders are tasked with any number of important responsibilities and duties. At the top of that list should be, must be, the responsibility to establish and maintain a command climate where every service member is valued and protected.

I also believe that this will send a powerful message to commanders that it is their responsibility in this area, more than taking action when they become aware of possible allegations, that they have the affirmative duty to investigate, suppress and punish, and I believe this change will help the cultural shift.

Finally I don't believe that the military can continue on one hand to claim the solution to this problem rests with the chain of command, while on the other hand failing to investigate commanders and appropriately hold them
accountable, fully accountable, when their command failings contribute to these crimes. Thank you.

CHAIRMAN CASTRO: Dr. Lisak. Please proceed.

DR. LISAK: Thank you. Members of the Commission, I am honored to have this opportunity and I thank the Commission and its staff for inviting me to speak today.

I am a clinical psychologist and researcher. I have studied sex offenders for 25 years. For the past 10 years I have been working with all four services of the U.S. military.

I am intimately familiar with the problems that our military services have in confronting sexual violence within their ranks. There should be no surprise that the military has a serious problem of sexual violence.

Every society on this planet has a serious problem with sexual violence, and every major institution within our society has a serious problem. In particular, any community or institution, like the military or any university, that brings together young people in the age range of 18-24, will have an acute problem with sexual violence. That's the age range among adults of maximum risk for sexual
assault.

Since the eruption of sexual assault, the scandal at the Air Force Academy almost 10 years ago, there has been a very harsh, bright light beaming down on the U.S. military, exposing its many problems in dealing with sexual violence.

That bright light, and the pressure, as harsh as it has sometimes been, is a necessary ingredient in forcing the services to sustain their commitment to doing everything possible to improve their response to sexual assault.

But let's be very, very clear about one thing: if that same harsh, bright light were to be focused on our nation's colleges and universities, or on our local district attorney's offices, it would expose precisely the same problems, the same failings, the same lack of adequate response and adequate protection for the members of those communities.

So by all means, let's pressure our military to dramatically improve how it handles sexual assault, but let's not fool ourselves that other sectors of society are doing any better.

I would like to focus now on a few of the most critical areas in which the military must
improve its response to sexual assault. We are still fighting long-held misconceptions about who perpetrates non-stranger rapes.

Few people are confused about rape where the rapist dons a ski mask, wields a knife, ambushes a victim on a dark street corner. But when the rapist has a charming smile and an earnest look on his face, when he targets victims in bars and parties and uses manipulation, alcohol, intimidation and threats instead of a steel blade, suddenly many people get confused.

These types of rapes are often referred to as date rapes, a term that masks a far more brutal reality. I have studied these rapists, as have others. About two-thirds of these rapists are serial offenders, who by their early 20s have raped an average of six women.

Their rapes are premeditated. Like all sex offenders they are adept at identifying vulnerable individuals and then manipulating them and exploiting their vulnerabilities.

If you have a basic understanding of how Jerry Sandusky worked, you have a basic understanding of these non-stranger rapists. Even though these serial rapists represent a very small percentage of
the men in the military, they are responsible for a wildly disproportionate level of harm.

The vast majority of rapes, upwards of 90 percent, are committed by these serial offenders. This has enormous implications for how we investigate and prosecute these cases.

Virtually every assault that is reported should trigger two related but separate investigations: an investigation into the specific, alleged sexual assault; and an investigation into the behavior and background of the alleged rapist to determine whether he is a serial offender.

This dual response is precisely what we do in many other violent crimes. If a soldier reports to OSI or CID or NCIS that a fellow soldier tried to sell them a vial of crack, the investigation would not be strictly limited to that specific attempted drug sale.

It would immediately investigate whether the alleged seller was in fact a drug dealer, a threat to the entire command. We must apply this basic approach with equal diligence to sexual assault cases.

Further, the men and women in the military's investigative agencies in the JAG Corps,
must receive the specialized training that is
required to competently handle non-stranger rape
cases.

These cases are marked by complexities
and challenges unseen in any other type of violent
crime, and these challenges can and very often still
do derail these cases and prevent them from being
successfully prosecuted.

The specialized training should include
interviewing skills that increase trust and
disclosure in victims and that do not intimidate and
shut down victims, skills that incorporate
neuroscience research on the impact of trauma on
memory formation and memory retrieval, recognition of
the unique evidence needed to effectively prosecute
sexual assault cases in which the issue of consent
will be central, in-depth training on victim privacy
issues and ways to safeguard victims from undue
trampling of their privacy rights.

Some of this advanced training is
already under way, but it must become more widespread
and crucially, it must be sustained. Successful
prosecution of a much higher proportion of sexual
assault cases is also a crucial component of the
military's long-term prevention efforts.
The prosecution of these cases sends a strong message that firmly supports the military's prevention messages, and conversely, when rape cases are not aggressively pursued and prosecuted, those prevention messages ring hollow.

Now I want to address quickly, this morning you heard some testimony about false allegations and I think you have more about that in the written materials.

I have analyzed virtually the entire published research on false allegations. I have conducted my own study. The reference earlier made to Eugene Kanin's study, Kanin's study is a very, very flawed piece of research. He violated nearly every rule of research methodology. In fact, basically it's a collection of anecdotes.

There is real research on false allegations and that research puts the proportion of rape reports that are false allegations at somewhere between 2 and 8 percent, if you want to be more generous, 2 and 10 percent.

All four services have launched a variety of rape prevention programs. These programs can only be successful if they are continually evaluated and modified to increase their
effectiveness, if they are sustained as a permanent
part of military culture and crucially, if they
address not only sexual assault but also the climate
in which sexual assault flourishes.

For this is something else we know about
sexual assault: that it thrives in environments in
which sexual harassment is tolerated. One large-
scale study of sexual assault and harassment in the
U.S. military found that, of the female soldiers who
had suffered sexual assaults, 99.7 percent had also
been sexually harassed.

I have sat in a room and talked to sex
offenders for almost three decades and I can tell you
that they don't rape because they see other men
harassing women.

But when they see other men harassing,
degrading and denigrating women, they view their own
behaviors as normal, as simply another way in which
women can be targeted and used, and they assume that
their behavior will not be seen as anything that
deviates from the norm and that they will never be
held accountable.

The problem of sexual assault is big
enough in the military and beyond the military, that
it will take a long-term commitment to action on many
fronts, only some of which I have identified here.

I sincerely hope that this Commission will help the services to achieve what no other sector of our society has yet accomplished: to create prevention programs that reduce the number of sexual assaults that occur in our services; and to respond aggressively and effectively to those assaults that we fail to prevent. Thank you very much.

CHAIRMAN CASTRO: You brought up and it was brought up earlier the issue of these false accusations. I would imagine in every area of law there is always some false accusations and we have to give the accused the opportunity to show that the presumption of innocence is there, at least in the civil system. So we also have to be fair, to provide the accused a forum to ensure that any allegations raised against them have veracity.

Now having said that, I have seen the movie, and I think my colleagues as well have seen The Invisible War, and heard the testimony of the victims in that film, and also the complaint that was filed by them, and the materials that we have received, including public comments, indicate that many of these individuals have been so victimized after reporting, there's been such horrific
retaliation, that it boggles my mind to think that someone would voluntarily make a false accusation, knowing that they could be subject to this horrific conduct in terms of retaliation.

Again, not to say that there are not some false accusations. But it seems to me incongruous that those false accusations would be a sizeable amount.

If you have got an opinion on that, I'd like to hear it. And also in terms of what you said about the profile of these accused, that they tend to be serial rapists, predators, that leads to the problem, I think, of under-detection which Dr. Hillman talks about. You talked a little bit about how to deal with that, but are there some models for dealing with under-detection as well that we might be able to recommend?

DR. LISAK: So, well, first on false accusations. You know, I think we have to acknowledge that is an emotional response to this issue. Part of it stems from the fact that it is truly a horrific thought, that you could be falsely accused of something, especially something like a sex crime. It's a devastating thing, and that's absolutely true.
But simultaneously, we also know that these happen very, very rarely, and one of the reasons surely is what you just said, that to lodge it, a formal complaint of a sex crime -- you know, you get investigated, you get asked a lot of questions. This is an enormous sort of series of events that you put in motion, and so the idea that people would just kind of, for a lark or for minor motivations, do this... it's really, what it is, is there's a mythology about false allegations and it's been around for decades, and I and other people, we are trying very hard to get the discussion focused on research, because this is not something we have to guess about. We have some pretty good research on it, and like I said, it's clear that this is a very small percentage of cases, and I wish we could dispense with that part of it, because it really doesn't get us anywhere.

On the issue of under-detection, I think that's crucial, and if I understand the sort of the issue, and just -- it speaks to all these cases, where we from time to time uncover these events where individuals, perpetrators have, you know, enormous numbers of victims, and the Sandusky case is a great example of that.
And that's why, since we know that the majority of these individuals are serial offenders, that the moment where a report comes in, regardless of how difficult the case might appear to be, and you know, the victim may have been intoxicated, she may have only a partial recall of what happened; there are all kinds of complexities and you may look at this case and say I don't know if we are going to be able to proceed. We are going to investigate. We are going to try. But we don't know.

And that's legitimate. But the other investigation that needs to be launched at that moment, given what we know about the possibility that this is a serial offender, that we go and investigate this guy, and that's just an investigation. That doesn't lead to anything, all right, unless you find evidence.

And what I hear from investigators now, who increasingly, they are -- the CID is getting you know, state of the art training now in these kinds of cases, and we are starting to see agents coming back, finding other victims, and all of a sudden, instead of a case that looked very, very difficult, now when you have two victims or three victims that you are prosecuting, this really changes the complexion of a
prosecution.

And so that's one of the things I think that is crucial and it speaks to this issue of under-detection of cases that are out there.

MR. HANSEN: If I may, just on the issue of under-detection, I'm not an expert on the social sciences of under-detection, but with respect to the role of the commander and the command, we spoke in an earlier panel, you heard in the earlier panel about this question of command influence and improper command influence and improper command influence.

There is no question that the role of the commander properly is to know what's going on in his unit, on his watch, his or her watch. And if you look at the reports that have come out from Lackland, the Air Force court report that was released, and this is very common, when we see widespread failings where these crimes, and not just sexual assault crimes but other types of offenses, when they occur, what we often see is a commander who became lax, who wasn't -- who wasn't aggressive or wasn't taking a -- paying attention to the very simple, basic things we expect commanders to do.

And so part of the -- in my opinion part of that role is to recognize that within the
military, that is the responsibility and a role that we give commanders. We have to give them both, in my opinion, the authority and also the incentive to do the basic things we expect commanders to do.

CHAIRMAN CASTRO: Thank you. The Chair recognizes Commissioner Kladney.

COMMISSIONER KLADNEY: Thank you. First of all, before I begin, I'd like to thank everybody here in the service. I know we are talking about something that is probably very sensitive. But I'd like to thank you all for serving America and hopefully, we can all gain something out of this.

Mr. Hansen, my question is, and no one has really answered this I don't think, is there like standard sentencing guidelines, normal procedures for when you decide when to send something to courts-martial or when you send something to Article 15 or field grade Article 15, or anything like that, when a commander makes that decision, or is that totally within his discretion?

Because what we have heard this morning was, you know, what sounded like some -- and albeit in the past, some horrific kinds of offenses proven and committed with some very different kinds of sentencing punishments.
I mean you can convict, as Dr. Lisak says, a lot of people. But if you are going to do seven days in the brig, that's not a bad deal.

MR. SULLIVAN: Well, I'd like to clarify that seven day in the brig point. The -- that involved a Marine Corps captain. That case involved a Marine Corps captain who was charged with rape and acquitted of rape.

He was acquitted. He was tried, there was a contested trial, the case had gone to an Article 32 investigation. The Article 32 investigating officer had said there isn't enough proof here to get a conviction. It was referred anyway. It went to trial. It resulted in acquittal.

The officer was convicted of two offenses: adultery; and using crude language. You don't get prosecuted for either of those in the civilian world. So if he hadn't been a Marine officer, he would have gotten no confinement.

So the fact that he ended up with seven days' confinement for adultery and use of crude language doesn't seem like an injustice to me. It's only if you draw the hypothesis that he was guilty of rape.

COMMISSIONER KLADNEY: I'm not talking
about an injustice. I'm talking about standards. I'm
talking about, is there a book, like sentencing
guidelines, like something like -- I mean, I am
really --

MR. SULLIVAN: There is not, and so
there are certain military offenses for which there
is a mandatory minimum. They are rare. For the vast
majority of military offenses, the President sets the
maximum punishment that a court-martial may adjudge
for that offense, and the court-martial is free to
impose any sentence from no punishment up to the
maximum.

COMMISSIONER KLANDNEY: So let me ask
you, how is there continuity, when there are so many
commands around the world, where there's O6s making
these decisions regarding specifically these cases,
but also regarding, you know, an O3, a company
commander can make a decision regarding a lot of
other offenses as well.

Where is there the continuity? Where is
it when a soldier or sailor goes from command to
command, they know the penalties, they know what's
going to result in a charge, they know how it's going
to be?

I mean I know if I am speeding down the
street, I am going to pay two dollars a mile, three
dollars a mile, something like that. That's my
question.

MR. SULLIVAN: Right, and of course in
terms of knowing what is expected of them, there is
mandatory training on the Uniform Code of Military
Justice. In terms of knowing, if I commit an
unauthorized absence of three months, what am I
likely to be sentenced to, you could ask -- you could
ask a military lawyer the answer to that question,
and they'd have a pretty good answer to that. But
it's not because that comes from a sentencing
guideline. We don't have them. It's because it
comes from customs and traditions and experience of
what this case is worth.

COMMISSIONER Kladney: And Dr. Lisak, if
I may, the Vice Chair asked a question earlier about
training people to kill and then asking them not to
be so aggressive otherwise.

So I am not going to ask you that
question. The question I am going to ask you, is, are
there some psychological instruments that can weed
some of these people out in a recruitment process,
and are they used?

DR. LISAK: I've gotten asked that
specific question by the leadership of all four services, and unfortunately the answer now and probably for some time to come is we have no algorithm that will tell us, if you apply this to all -- everybody who is applying to the military, we'll be able to weed out --

You know, there are some things that we know about, about rapists, about sex offenders. They are a little bit more of this and little bit more of that and so forth, and I can put together something.

But I can't put together, nobody can put together a profile. What we are going to do is we'll have far more false positives doing that than we will have actually true positives, and it would be unfair and probably illegal, and it's just not useful.

COMMISSIONER KLADNEY: Just asking.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Gaziano, and thereafter Commissioner Achtenberg, and Commissioner Yaki, if you are on the phone there, just holler up when you want to ask a question.

COMMISSIONER GAZIANO: Well Commissioner --

CHAIRMAN CASTRO: Kirsanow, have you joined the call?
COMMISSIONER GAZIANO: Commissioner Kirsanow was ejected from the call. I hope he's still on. At one point I received a --

COMMISSIONER KIRSANOW: I'm back on.

CHAIRMAN CASTRO: Okay, well let us know when you want to ask a question.

COMMISSIONER GAZIANO: We're trying to reserve your place in line.

COMMISSIONER GAZIANO: Thank you Mr. Chairman, and thanks, the panel, again, for highlighting the complexity of this issue. I like the way both Professors Sullivan and Hillman put it and the humility with which they approached the subject.

But I am going to focus on them again, this sort of question that I, again, with the first panel, about the command authority, decoupling it rather than trying to prevent improper command authority, although I really appreciate, Mr. Hansen, your suggestion as well, I think part of the equation is enforcing and investigating proper command responsibility.

And Professor Hillman, you have done more I think than anyone to convince me it might be worth the try. I think you know my bias. But I want
to ask you to explore that. And maybe if we are not done, I can -- if you are willing to talk to me about this a little bit more.

But you said the United States is an outlier. Currently, since 1996, some of our common allies are moving away from it. But we are now an outlier in our Constitution too.

So that's one additional perhaps problem that needs to be taken into account. And again, because of my experience in the Weiss case, I believe it can be done, by the way.

But I don't have an extreme amount of confidence that Congress is comfortable and aware in this area, that they would know what it would take to have this pass constitutional muster.

And in Weiss, as you know, it was a three, or it was a two-one-two decision where the entire military justice system was just seemingly close to being declared unconstitutional, and some of what you suggest might render the entire justice system unconstitutional.

So that's a big risk. But assuming we can do that, let's, let's -- maybe you and Professor Sullivan would like to comment on how likely you think it is that Congress would get that right and
not render the entire justice system unconstitutional, when they try to change this.

I am also interested in the unintended consequences of this dramatic change. There seem to be a lot of changes that can be made that maybe have unintended consequences but don't impose the risk.

And the risk, the non-constitutional, unintended consequence, is to decouple a part of the requirement to enforce good order and discipline, and only part of it I can see, and what that tends to do, that responsibility of course has evolved over centuries -- we inherited it from the British -- and it would potentially decrease the accountability that commanders -- you made some wonderful arguments as to why they would really like that, and love that, people like to have less responsibility and less accountability.

I think that's the flip side to what you were saying, and given the unique justice system that evolved over many, many centuries, can you all either pro, con, or whatever, try -- I'm glad I'm not going to make that decision; I'm just going to issue a report that someone will ignore.

But --

(Laughter)
Anyway, help -- help explain to the decision makers who might actually try to put this into law, why you think, in your case, the risks are on balance worth the effort that it won't disrupt the responsibility, and if you have a contrary view I'd appreciate hearing that.

MS. HILLMAN: Thank you sir. Let me go first, and then Colonel Sullivan can rebut my arguments, since I got a chance to do that in our initial order of proceedings here.

I think that the change that we are talking about need not be perceived as disrupting the fabric of a system that has evolved over time. But let me say, I don't find that system so engraved as what -- the idea that it has evolved over centuries and has built up, sort of initially evokes in one's mind, because the military justice system, as I think Chair Castro pointed this out, and as did Commissioner Kladney's questions, it is very disparate and it is subject to a lot of change, a lot of tinkering, things change all the time, as Colonel Sullivan's comments made clear. The regulations are different in each of the services. The way the things are implemented is different in the services. We have -- we have dozens, hundreds of authorities
who make decisions about prosecuting.

I don't think that that's a system that was built on the British Articles of War that have since been jettisoned by the UK. So I'm not sure that actually making a change that would shift simply that decision to prosecute, and not all the rest of the system necessarily, and I don't think that --

COMMISSIONER GAZIANO: Although that may follow.

MS. HILLMAN: It might. If we handle this the way Australia did, then we are in trouble. But there is no reason to think that we would do it that way. And in fact I would say that the repeal of Don't Ask Don't Tell is a sign of how Congress and the President and the military can work together, not in a way that met my own personal timetable for how things ought to go, and not in the way that I think demonstrates the appropriate degree of civilian oversight of the military with respect to civil rights, but in a way that respected the needs of the military for control over personnel decisions and operational changes, and was deliberate, consultative and sequenced in a way that worked.

So I don't know that I think that simply removing that simple decision to prosecute really
from this would --

COMMISSIONER GAZIANO: Thanks for that clarification.

MS. HILLMAN: undermine the accountability of commanders in the ways that Professor Hansen wants to enhance, because I -- you said that we all want less responsibility. You all aren't sitting here because you want less responsibility. You want more responsibility, you want to make things right.

And that's what the officers, from top to bottom, of the military legal corps want to do as well, as well as commanding officers. I think they will maintain responsibility for this issue, but turn over what is a legal and political and politicized decision to a civilian.

MR. SULLIVAN: And I'll mention that Professor Hillman and I are actually co-authors. This is about as respectful a disagreement as you are ever going to get. But I do disagree.

The -- and Professor Hillman mentioned Australia and I was going to go to Australia as well, because in -- the Australian system was changed in a way to increase civilianization, and in 2009, the high court of Australia threw out their military
disciplinary system in a case called *Lane v. Morrison*, and that led to enormous disruption in the Australian military.

And if there were a comparable disruption in the United States military, it would be catastrophic. And one enormous difference between the United States military and any other military in the world, and the United States military is unique, is that we routinely have far more service members stationed abroad than I believe any other military in the world.

And so one very important aspect of any United States, American military justice system, is portability. And so we have to be able to have the same military justice system here in the United States and be ready to take it with us to Afghanistan, to Iraq, when we are sending the unit to Colombia, wherever our units go, when we are sending the ship over the horizon, that ship --

COMMISSIONER GAZIANO: Or a submarine

MR. SULLIVAN: Exactly. They take the military justice system with it. And we prosecute courts-martial aboard vessels under way, we do, we prosecute courts-martial in Afghanistan. We
prosecute them in Iraq.

And so the United States military system is unique and what may work for the United Kingdom or what may not work for Australia, as we saw the catastrophic failure of their system, once again, the doctrine of unintended consequences, doesn't mean it is well suited to the United States military.

And then I will mention just two other concepts, and one is military commanders are focused on mission accomplishment and unit readiness, and to have those, you need to have the esprit de corps, you need to have morale and you need to have good order and discipline.

And we can't demand that of our commanders while we take away their tools to promote that. And the military justice system is a tool to promote that. If you look at the preamble of the manual for courts-martial, it talks about the purposes of the military justice system, and it is not only to dispense justice, but that is a necessary part of it, but it's not only to dispense justice, but also to maintain an effective fighting force to, as the manual says, protect the national security of the United States.

Those are the stakes we are involved in.
And the final thing I will mention, if I may, I hope I am not straining your patience, but Professor Hansen's writings in this area have actually been very influential in my thinking about this, and Professor Hansen has looked at cases like *Yamashita* and said look, we impose criminal liability on commanders to control their forces. When we have them, you know, in a foreign land, armed, with a civilian population at their mercy, we demand that the military commander control them, and the way that the military commander does that is in part through the use of the court-martial system.

So how can it be that we impose the requirement, as a criminal law matter, on a commander to control his or her subordinates, but not give them the tools that they need to do it?

MR. HANSEN: So he articulated that better than I ever did. Thank you.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Achtenberg and thereafter, Commissioner Yaki.

COMMISSIONER ACHTENBERG: This is addressed to Dr. Hillman. So Professor Sullivan counsels against adoption of further reforms without further study, and makes a pretty persuasive case to
that effect.

You, on the other hand, recommend some significant and I would assert kind of paradigm-shifting reforms, and that they be undertaken as soon as possible.

Given that the track record isn't so good in terms of how much time it will take before reforms actually take hold, and represent meaningful change, I am wondering, Dr. Hillman, are you familiar with H.R. 3435, the Sexual Assault Training Oversight and Prevention Act, or the STOP Act, that's been introduced into the Congress?

MS. HILLMAN: Yes.

COMMISSIONER ACHTENBERG: There are recommendations in that Act and Mr. Chairman, I don't know that this is already a part of our record, but I would ask that it be made a part of the record.

CHAIRMAN CASTRO: I'll accept it into the record. Thank you.

COMMISSIONER ACHTENBERG: The recommendations that are made there for change in command, essentially, civilianization of the prosecution for sexual assault and the like, would you talk a little bit about the extent to which you agree with some of the recommendations contained in
H.R. 3435, and some of the extent to which you disagree, and then I am going to ask a more narrowly tailored explanation of the same from Mr. Sullivan.

MS. HILLMAN: Thank you for the opportunity to comment on the STOP Act, because that has garnered tremendous attention and has been the signal effort from the Congress to address this issue, so it certainly belongs in the discussion that we are having.

I think that the shared intent that we all have is also the intent of the drafters of the STOP Act, and I agree with some of what it's trying to do. I don't think it's possible to decide to remove the authority to prosecute only for sexual assault from the military, from military commanders, and not all the other offenses that occur.

I -- and it would be a more dramatic, perhaps, paradigm-shifting change that has again, I'll just reiterate, been adopted by our allies already without significant consequences for the most part. Australia is a bad situation and when you talk to the Judge Advocates from Australia, they have been thrown into a state of demoralization and frustration.

It's partly a problem on the ground and
the practical consequences of how things have worked out, but it's really also a sense of disruption and whether or not they can do their job at all.

And I agree, we would not, we should not, and I would not recommend we do that to our Judge Advocates and commanding officers who face all the demands that we place upon them.

But I think that shifting the authority to prosecute away from command, avoiding the problem of command influence and freeing up resources would make sense, and to that extent, I embrace the STOP Act.

MR. SULLIVAN: Continuing our point, counterpoint, I believe that the portion of the STOP Act that would remove the authority to make prosecutorial decisions from command is both unwise and unnecessary, and unnecessary in the standpoint from what I discussed before, which is we already have civilian prosecutors making a prosecutorial decision about every single military sex act that occurs in the United States because any one of them could be tried in U.S. District Court or in a state court instead.

So it -- the STOP Act isn't well tailored to solve the problem. In fact the problem
is adequately addressed under the status quo. It's just not widely recognized that there is that dual prosecution authority for offenses that occur in the United States.

And then for the same reasons that I previously discussed about undermining the authority of the commander and undermining the ability of the commander to maintain good order and discipline in her or his unit, to me counsels against that.

And I'll mention one other thing if I may, I mentioned that under the National Defense Authorization Act for fiscal year 2013, Congress set up two study groups. One of them was to study the overall issue about sex assaults in the military, and then the other to specifically zero in on the effects of the 28 June, 2012 changes, the first study group that is directed to study that issue of whether prosecutorial discretion should be removed from commanders. So that's something that Congress has already established a study to investigate and again, I think it would be unwise to move before we have the results of that study.

COMMISSIONER ACHTENBERG: But it's the concurrent jurisdiction issue that you think adequately addresses the issue, am I understanding
MR. SULLIVAN: That's correct. What we see -- and I realize that Professor Hillman's -- Professor Hillman comes at this in a different way, and I think, you know, probably frankly in a more persuasive way than what some other people argue about command control and command authority to refer these charges.

But what some people argue is that essentially, in fact this is in Ms. Parrish's written statement, that commanders sweep these problems under the rug.

There is no doubt that that occurs on occasion. I have no doubt that that is not a widespread phenomenon. But it does happen on occasion.

And again, we see on occasion, like in the case from 2005 at San Diego that I mentioned, military, or civilian prosecutors coming in and prosecuting a service member for a sexual assault against another service member, and again, they can do this for any off-base offenses. Many military bases have concurrent federal and state jurisdiction. A state prosecutor could step in in that instance and charge. If it's a military base that is an
exclusively federal enclave, then there could be a prosecution in U.S. District Court if for nothing else, that under the Assimilative Crimes Act, which brings in state law and allows a prosecution for a state law offense that occurs in an area of exclusive federal jurisdiction.

So if someone is dissatisfied with a military commander's failure to prosecute, they can go to a state prosecutorial authority, or they can go to a federal prosecutorial authority, depending upon the location of the alleged offense, and get a second look at that now, under existing law.

And so perhaps if that -- if that were more widely known that would be recognized as a backstop against the problem that some people are trying to cure by taking away the prosecutorial discretion from the convening authority.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Yaki, Kirsanow and then Commissioner Kladney.

COMMISSIONER YAKI: Thank you very much Mr. Chair. I am still so troubled by what I hear but I am more troubled by what I have seen in the past and what I have read, the emails and letters that we have received from ordinary women service members.
And part of me just thinks that -- and I want to get the comment of the panelists -- is that I understand all the need for esprit de corps, unit cohesion.

But it seems to me those are the very same things that would militate towards the military having better access to get things done and to address this problem.

But it's been a generation at least since this became a very, very, very big issue and it was probably a big issue before then. But nothing really has changed. There have been reforms around the margins, but you still have these -- it's not simply just the prosecutions. It's the retaliation, it's the disclosure on forms of whether or not you received counseling for sexual assault, it's a whole panoply of issues that continue to intimidate, degrade and subordinate complainants in the military on issues of sexual assault.

And I am just wondering, from your slightly more elevated standpoint in academia, although you, as I point out to all of you, have served, and I thank you for that, isn't it time to do something that doesn't go around the margins but makes some wholesale, fundamental, top-to-bottom
change in the way these issues are addressed so that
we are not confronted with this in another 5 or 10
years or another congressional panel, or another,
another special commission or another task force,
Isn't going over this again and again and again,
because we seem to be asking the same questions every
5 to 10 years and we keep on hearing that oh, these
changes are being made, those changes are being made,
but they don't really seem to be addressing the core
question, which is violence against -- sexual
violence in the military and how we better protect
our own men and women in the service, who as one of
my other colleagues pointed out, go in there for any
number of good, good, true, noble and career-oriented
reasons, only to come out of it, if they are a victim
of this process, not in any way, shape or form that
dignifies their service to our country?

MS. HILLMAN: I applaud your sense of
urgency about the issue, and I largely agree, that a
change that strikes at this problem rather than
tinkering at the margins, which is a phrase that I
used, notwithstanding what I think are actually very
extensive resources, I mean truly perhaps too
extensive resources on some of the efforts that we
have undertaken, and I think duplicative in some
ways.

But the consequences of this problem are profound and they deserve our attention and they deserve our resources. I think that it would be, I think that making a change is important.

I would say I don't think whatever change we make or don't make will mean we won't face this again in 5 or 10 years. I don't think this is a military problem. I think this is a human rights problem that the world is facing, not just the world's militaries but the world.

You can point to any one of recent incidents to portray that. India is what comes to mind right now for me. But there are many instances and I think that we will continue to have to face this and evolve better ways to reckon with it as it works into a different problem in the future.

CHAIRMAN CASTRO: Commissioner Kirsanow, please proceed.

COMMISSIONER KIRSANOW: Thank you Mr. Chairman. I apologize because I was off the line for a period of time because the line went dead, so this may have been addressed or there may have been a question related to it.

But I heard at the tail end someone make
some reference to deployments overseas and I'm wondering if anyone on the panel can address whether or not there is any comparative data related to the incidence of sexual assault in deployments overseas versus domestically, that is state-side personnel, whether or not the culture of a particular country to which somebody may be -- in which somebody may be stationed may have any effect, whether or not combat deployments have different incidence rates versus non-combat deployments to say Germany or something like that, and to what extent the ability of the military justice system is affected in its ability to address these issues by virtue of the incidents occurring overseas versus domestically.

MR. HANSEN: I can address just briefly the military justice component of that in addressing these issues that occur overseas. As Professor Sullivan noted, the Uniform Code of Military Justice is designed to be worldwide deployable and to affect, to be effective regardless of where we find ourselves in the world.

The practical reality is somewhat different. There are oftentimes where -- very complex cases, which these cases can sometimes end up to be, they are perceived to be such a drain on the
command's resources and time and efforts while they are otherwise engaged in military operations, that in the Army in particular, there's a significant practice of returning many of these cases back to the United States and dealing with them back in the United States.

But I think that gets to a more interesting issue that is outside of just the sexual harassment context, which -- or a sexual assault context, which is a broader question of do we really have a uniform code that is worldwide deployable when we see that virtually most complex cases that arise overseas are not dealt with overseas?

And in fact there's a Department of Defense-directed Commission that is looking into that issue because it raises other concerns about our ability to work with host nation support and the like.

But I think that can be a particular issue in these cases as well, in terms of developing the evidence and having the resources necessary to do the kind of effective job of investigating these claims if they arise in a, particularly in a deployed environment.

I think that environment places
significant stresses on the ability to investigate these cases in a way that we heard and will hear later today that the military believes are necessary to fully develop the facts of these kinds of cases.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Kladney.

COMMISSIONER KLANDNEY: Thank you. I would like to address a couple of questions. First of all --

MR. SULLIVAN: Colonel Sullivan.

COMMISSIONER KLANDNEY: Sullivan, I'm sorry. When you were saying there's co-jurisdictions, at the very end of your comment you said, "And if someone doesn't feel they get satisfaction, they can go to civil authorities." In other words, the military, one, doesn't report these matters on base to civil authorities as a matter of regularity, is that correct?

MR. SULLIVAN: There is a Memorandum of Understanding between the military, the Department of Defense and the DOJ, which governs on-base offenses, and in certain instances, there is a reporting requirement and also earlier, when the issue of sex offense registration arose, in fact these military offenses are entered in the national databases, so
there -- and sex offense registration is a requirement that arises from conviction by court-martial of a sex assault offense, but even before then, at the investigative stage, it is -- it is common to have reporting of the investigation in such a way that that civilian sector has visibility over it as well.

COMMISSIONER KLADNEY: Right, so in other words the soldier or sailor would not have to go to the criminal, or civil criminal authorities themselves to instigate it? If they got no satisfaction in the military, they would have to go -- if their commander didn't do what they wanted it to do, then what would that do to their career? How would they perform under that commander after doing something like that?

MR. SULLIVAN: Well, of course the -- as part of the newer revisions, that individual has the option to remove himself or herself from the command. So the -- there have been a number of comments about how the system has failed people that report events, and in the past, our -- the military's dealing with victims has been quite poor, and of course the Yokohama incident from a couple of years comes to mind.
It has been quite poor, but that is an issue that the services themselves have been emphasizing and again, as I mentioned, on the 20th of January, the Air Force is setting up a new system where any victim of a sexual assault offense, if they are a member of the U.S. military, or an adult family member of a U.S. military member, they can get a -- they can get a lawyer assigned to them individually.

So one task that that person might have would be to liaise with the state officials or the U.S. attorney's office.

COMMISSIONER KLADNEY: Dr. Lisak, right? I got that right? A couple of questions for you. One was, we talked about sentencing -- you talked about strong sentencing sending a message, but you didn't really talk about the communication part of that, so that the rest of the ranks would hear, and I was wondering what your ideas were on that.

And then the second question I have is, in your written materials, you wrote, "The more sexual harassment occurs, the more sexual assault occurs," and so my question is, is when you have sexual cadences and all those types of things, does the military still allow that? You work with them. Do they still -- does that still go on?
DR. LISAK: Well, certainly and I'm not an expert on --

COMMISSIONER Kladney: You said certainly?

DR. LISAK: Certainly it does. I mean, I know that anecdotally. You can read any, you know, any number cases and so forth, and it's clear that that is, you know, one of those so-called climate issues that has to be addressed and it has to be addressed more effectively.

And it's going to take a long time. We are talking about a massive culture change, and you know, a number of people have rightfully brought up the comparison to racial segregation, desegregation, and how the military led the way there.

And I actually think that this is going to be harder and bigger, that gender and sexuality are actually going to be tougher to work on, you know, discrimination and the biases.

And I just think, you know, we have to do two things simultaneously: one is, treat this with real urgency; and at the same time understand that this is not going to happen overnight. It's not going to happen in the next few years. It's just a way bigger problem than that.
In terms of the communication question, I personally -- and I have been involved in a number of court-martials, consult and so forth, and you know, I talked to the commander afterwards and said you know, are people on base going to hear about this, because these are enormous prevention opportunities.

And it still seems to be a kind of a -- a completely idiosyncratic thing, and so some commanders right away understand that this is a message that I am going to get across to my troops, and other commanders, you know, it doesn't even occur to them.

So it's something that yes, it has to be sort of more broadly sort of inculcated and sort of part of the training for commanders, that you know, a court-martial, an outcome, whatever the result is, you know, even if it's acquittal, you communicate this to your service members.

COMMISSIONER KLADNEY: So, if Mr. Hansen's idea of, of disciplining, I think it was commanders who don't perform, but to get rid of the sexual cadences and to get rid of this -- to start going down on this type of culture, then those commanders should be disciplined if they don't do
that?

MR. HANSEN: That's exactly right. I think that that's -- that's a significant component to it. And to be clear, it's not to say that they are not now disciplined. The military does take action.

But oftentimes the messaging is very inconsistent and there is a cultural unwillingness to broadcast those consequences in a clear way so that the soldiers, the service members understand, and so that other commanders understand specifically what it is -- were the command failings, and there's a huge cultural resistance within the military to do that, and I think that needs to change.

CHAIRMAN CASTRO: I have a question for Colonel Sullivan. You mentioned that if there is a resulting conviction in a court-martial, that that conviction will make it to the list of sex predators.

What if that court-martial conviction is ultimately reduced by command to, as we have heard today, adultery or inappropriate language? Will that still make it to the sex registry?

MR. SULLIVAN: It would not, although let me mention again, that instance in which the result of the case was use of vulgar language and
adultery, it wasn't the commander that reduced it. That Marine Corps Captain went to a court-martial and was acquitted of rape. The only thing he was convicted of at the court-martial was adultery and use of vulgar language.

He was sentenced to 45 days' confinement and the convening authority knocked down the 45 days' confinement to 7 days' confinement. So, so he --

CHAIRMAN CASTRO: Okay, well I probably have got the facts confused. But in a case where there would be a court-martial conviction on rape that subsequently gets reduced to something less, that something less would not then result in the sex offender list being revised to add that person as a sex offender?

MR. SULLIVAN: It depends upon what that something less is, because there are many offenses other than rape where reporting is required. There is a Department of Defense Directive that says when someone is released from confinement, if they are convicted of one of these offenses, and there is an enormous list of offenses, the confining official shall notify the law enforcement authority that maintains the registry in both the state and locality to which the individual is going.
So it's a very formalized process. It works. We see it work all the time. And so it's not just rape. There's any -- basically any offense that has the word indecent in it, results in automatic notification, you know, mandatory notification to both state and local registration officials.

CHAIRMAN CASTRO: Adultery, though, wouldn't count?

MR. SULLIVAN: Adultery would not.

CHAIRMAN CASTRO: And earlier, there was some mention, and I forget which of our panelists talked about the fact that each of the services is working independently to come up with some processes and some potential ways to deal with this.

It sounds like that's happening in a silo. Is that a good thing or is there some way that the branches can actually collaborate and coordinate on dealing with this issue that affects all of them? Anybody who wants to answer this question.

MR. SULLIVAN: I'll mention something very briefly here as well, and that is, I have mentioned the National Defense Authorization Act for fiscal year 2013 several times. It also has certain mandates to the Secretary of Defense, among which is he has to come up with a plan to reduce sexual
harassment in the United States military, I believe it's within 180 days.

So Congress is stepping in, and I think recognizing what the Chairman is pointing to, that you know, we have, as Professor Hillman said, we have a Uniform Code of Military Justice, you know, it ought to be uniform.

And so we have Congress stepping in and directing SECDEF to take certain steps, and I think Congress is attempting to get --

CHAIRMAN CASTRO: What is SECDEF?

MR. SULLIVAN: I'm sorry. Secretary of Defense. So I think Congress is stepping in to try to get a more uniform response.

MS. HILLMAN: I think this afternoon's witnesses can speak more directly to the coordination that is happening. So, and as to whether it's good to develop in a silo or not, that's the question of the states as laboratories.

You know, are the service branches laboratories where there evolve different approaches? To some extent we have had that. I think that some standardization in this realm would go a long way towards promoting public confidence and restoring faith that we are moving in the right direction.
MR. HANSEN: I think standardization as well, and one of the things that has been discussed from a number of panelists, is this question of minimum sentencing or sentencing guidelines. To me that might be an avenue where some standardization across the services might be appropriate and provide more clear guidance and sufficient notice.

DR. LISAK: Just some things I have observed personally. I think both are happening. I think, you know the individual services initiate certain things and sometimes you see exactly that. They come up with creative ways of solving the problem.

And then the problem is, who recognizes that there is a good way, and now all the other services have to sort of, you know, take note of this, and that's where it kind of falls apart as far as I can see, is there's no mechanism really to ensure that the services are really pooling these creative ideas and then enacting the ones that really do seem to work well.

CHAIRMAN CASTRO: I don't know if any of my colleagues have additional questions. I have one more --

COMMISSIONER GAZIANO: I have a follow
CHAIRMAN CASTRO: Okay, let me ask one and then I'll have you. There was a reference earlier and also in some of the materials as it relates to the imbalance between defense and prosecution in terms of resources.

Could you speak to that and what's being done to address that?

MR. SULLIVAN: That's an enormous problem. The sexual assault prevention legislation has earmarked funds for the prosecution of these offenses, and so we are pumping more money into the prosecution side.

As I mentioned, by statute there is a requirement to set up special victim prosecution units linking investigators, prosecutors and VWAP victim witness assistance program specialists.

And you don't have a mirror image on the defense side, and the whole idea of the military justice system enshrined in Article 46 in the Uniform Code of Military Justice, is that there is supposed to be an equality of resources on both sides.

And again I think because of the politicization of this issue, you see earmarks going exclusively to the prosecution side. It's a very
real concern.

Mr. Cave mentioned the fact that the defense counsel don't even have investigators. I mean, literally something that would be taken for granted in most public defender's office, military -- military defense counsel don't have.

So I would very much encourage the Commission, when it studies this issue, to look at what can be done to ensure equality of resources on both sides.

CHAIRMAN CASTRO: Commissioner Gaziano, you have the last question.

COMMISSIONER GAZIANO: I wanted to thank Commissioner Achtenberg for making a copy of the STOP Act available, and I know there was one, I think, series of questions on it.

I have just skimmed it so I haven't -- and as I am listening to all of this, without missing a word, so I may have missed something in it. But it provides the exact example I think of what I was most worried about.

As someone who really knows the appointments clause and separation of powers, I'd say it's 70 percent likely unconstitutional, but I'd have to read it carefully. It's gotten a two-level
appointment clause problem which Congress is increasingly attracted to. The first level looks kind of constitutional. The second level probably is unconstitutional, and that's where it operates. But you have to determine -- but it's even worse than being clearly unconstitutional, and that's what they do, because it seems to me that this would create a system that would flail around for five years and then John Roberts tries to make something constitutional that isn't. So maybe, maybe you know, you would get this upheld. But you know, I think even this, he would strain to do so, but there are certain things that they just can't make constitutional, so maybe if I am predicting what the Supreme Court will do with this unconstitutional law, maybe there's a 30 percent chance -- I don't know -- that it will be struck down, or 40 or 50.

Anyone on the panel, for example Professor Hillman, do you -- you studied this Act and are comfortable enough with the appointments clause that you are going to give odds of how likely it would be upheld constitutional, or is it just in theory that you support it?

COMMISSIONER YAKI: Are they on the panel, or just give the court a couple more years'
time. [i-n-a-u-d-i-b-l-e]

MS. HILLMAN: I embrace the idea in the Act and I am an academic, and I said --

CHAIRMAN CASTRO: Commissioner Yaki, if you could use your --

MS. HILLMAN: Look, I'll just say that I think that the idea of a civilian director of military prosecutions is a potentially conceivable, legitimate way, within the constitutional boundaries that exist, and if the service branches got on board with that idea the way they did eventually with for instance the Don't Ask Don't Tell repeal, there's no reason we couldn't alter the STOP Act in ways that it would then at least possibly sustain, you know, withstand constitutional --

COMMISSIONER GAZIANO: Oh, it's possible. It's possible.

COMMISSIONER ACHTENBERG: It's never even gotten out of committee yet.

CHAIRMAN CASTRO: Well thank you, but I'll tell you what I can predict, that we have seen an executive summary of Commissioner Gaziano's dissenting opinion. So --

(Laughter)

CHAIRMAN CASTRO: Well thank you --
COMMISSIONER GAZIANO: That's assuming you're in the majority.

CHAIRMAN CASTRO: That's true. So thank you all. I appreciate the information you shared with us, very helpful. The panel, panel 2 is concluded. We are now going to take a break for lunch. We will be back at 1:15. We ask all panelists and Commissioners to be ready to go at 1:15 sharp. Thank you.

IV: LUNCH BREAK

(Whereupon, the briefing was in lunch recess from 12:35 p.m. to 1:19 p.m.)

A-F-T-E-R-N-O-O-N  S-E-S-S-I-O-N

(1:19 p.m.)

CHAIRMAN CASTRO: Commissioners Yaki and Kirsanow, if you’re there, let us know.

COMMISSIONER YAKI: We’re here; go ahead.
CHAIRMAN CASTRO: Great, thank you. We'll reconvene our briefing on sexual assault in the military. This is our third and final panel.

V. PANEL III: PERSPECTIVE OF VICTIM AND ACCUSED

CHAIRMAN CASTRO: I trust all the panelists were here earlier this morning, but if not, I will just remind folks or let you know in the first instance that we have a series of warning lights here that will give you the timing for your remarks.

You each have five minutes and you will see at the -- a yellow light come on, that means begin to wrap up. When the red light comes on, we would ask that you conclude your remarks. There will be opportunity to elaborate when we as the Commission begin to ask you some questions, okay?

So let me introduce the panelists briefly. Our first panelist is Major General Gary Patton, director of the Department of Defense's Sexual Assault Prevention and Response Office.

Our second panelist is Dr. Nate Galbreath, who is a highly qualified expert with the Department of Defense's Sexual Assault Prevention and Response Office.

Our third panelist is Lieutenant General Richard C. Harding, Judge Advocate General with the
U.S. Department of the Air Force.

Our fourth panelist is Vice Admiral Nanette M. DeRenzi, Judge Advocate General with the U.S. Department of the Navy.

Our fifth panelist is Lieutenant General Dana K. Chipman, Judge Advocate General with the U.S. Department of the Army.

And our sixth panelist is Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps.

Welcome. Thank you for being here. General Patton, please proceed.

MAJOR GENERAL PATTON: Thank you. Chairman Castro, members of the Commission, on behalf of the Secretary of Defense, Leon Panetta, it is my honor to share with you the Department's --

CHAIRMAN CASTRO: Actually General, if I might interrupt, I have to swear you all in. I trust the uniform but our proper procedure does require that we ask you all to please swear or affirm that the information that you are about to receive, provide to us and we are about to receive from you, is true and accurate to the best of your knowledge, information and belief. Is that correct?

(Whereupon, the panelists were sworn
CHAIRMAN CASTRO: Put your time back on.
So go ahead. Thank you.

MAJOR GENERAL PATTON: Thank you sir, and Chairman Castro, members of the Commission, on behalf of Secretary of Defense Leon Panetta, it is my honor to share with you the Department's approach in combating sexual assault in the armed forces.

Let me just first state that the Secretary of Defense is committed to eradicating this crime in the Department of Defense. Our Department-wide mission is to prevent and to respond to this crime in order to enable military readiness and to reduce, with the goal to eliminate, sexual assault from our military.

I'd like to begin by saying that it has been my honor to serve our nation as an Army officer for over 33 years. It has been a great privilege to have served 9 of those years as a commanding officer or deputy commanding general, and I have served a total of 45 months in combat with the best soldiers, sailors, airmen and Marines in the world.

I am no stranger to leading culture change, to include helping destigmatize mental health care for our combat veterans, more fully integrating
women into the armed forces with the 2012 Department's Women in Se Report, and managing the Department's repeal of Don't Ask Don't Tell over this last year.

The common denominator in all these endeavors has been a clear understanding of the challenges that we have confronted, an unequivocal commitment to mission success, readiness of force and the welfare of our men and women in uniform.

The Department of Defense recognizes sexual assault is a terrible crime. It has no place in the United States military, and it is an affront to the values that we defend.

It is unacceptable that an estimated 19,000 service members experienced some form of unwanted sexual contact in 2010. Of those we estimate nearly 11,000 were men, and nearly 9,000 were women.

The same year, we received just over 2600 reports from victim service members demonstrating the significant under-reporting of this crime. This under-reporting prevents victims from receiving the care they need and limits our ability to investigate these crimes, and hold offenders appropriately accountable.
As experts have shared with you today, sexual assault is a complex problem and there is no single, silver bullet solution. Reducing and eliminating sexual assault requires a multi-prong approach, one that leverages a wide range of initiatives and engages every service member.

The Department's strategy is organized along five lines of effort: prevention; investigation; accountability; victim advocacy; and assessment. The underpinning in all these efforts is the focus on leaders and the responsibility to foster an environment where sexist behavior, sexual harassment and sexual assault are not tolerated, condoned or ignored.

To gain victims' trust, we must have a climate of dignity and respect, where a victim's report is taken seriously, their privacy is protected and they are provided the resources to manage their care and treatment.

Commanders and leaders across the armed forces play an essential role in establishing this climate, where victims are supported and they do not fear retaliation, where offenders know they will be found and held appropriately accountable, and where bystanders are motivated to intervene to prevent
unsafe behavior.

Our troops take care of each other on the battlefield better than any other military in the world. This same ethos of care must extend to combating sexual assault within our ranks.

Commanders are responsible and accountable for the good order and discipline of the forces assigned under them. This critical aspect of command is essential to military readiness and mission success.

Removing commanders from the administration of military justice would undercut their ability, their ability to establish good order and discipline in their units, and undercut their authority especially in combat, where the Uniform Code of Military Justice is most tested by the stresses of war.

The Department has undertaken and implemented a variety of initiatives to fundamentally change and strengthen -- strengthen our efforts along all five lines of effort.

In prevention, our goal is to standardize and deliver effective methods and programs with the cultural imperatives of mutual respect and trust, professional values, team
commitment, are reinforced in training and other places and in other ways to create an environment where sexual assault is not tolerated.

Widespread efforts are under way now to reinforce these elements of culture, from initial military training, to multiple levels of professional military education across our forces, to include training for men and women who are about to assume command and serve in key leader and non-commissioned officer positions.

Victim care is central to our approach. We implemented a new policy that provides victims the option for an expedited transfer from their command or base to a different location.

We have established a certification program for sexual assault victim advocates and we have expanded the DoD's self help line to help transitioning service members who have experienced sexual assault.

As I conclude, I want the Commission to know that I have not come here today to minimize the problem of sexual assault in the military. We recognize we have a serious problem, and will continue to confront the brutal realities of this problem and remain persistent in all our efforts
until we eliminate sexual assault from our ranks.

I detailed the specifics of some of the other programs and initiatives in my submitted written statement. I thank you for your attention and look forward to your questions.

CHAIRMAN CASTRO: Thank you General.

Dr. Galbreath please proceed.

DR. GALBREATH: Members of the Commission, thank you for this opportunity to talk about the problem of sexual assault in the military. We remain committed to our goal, and that is a military free from sexual assault.

Given our policy initiatives and recent legislation, I believe we have set the right actions in motion that will move us toward that vision. My experience on this issue comes as both a criminal investigator and also as a clinical psychologist.

I have treated both victims and perpetrators. I have published research, provided training to military and civilian police, and I have served as an expert witness in court.

We all want this crime stopped now, but there is no single solution to this problem. The societal, interpersonal and individual factors within America that combine to produce and perpetuate sexual
assault operate far outside the influence of any military or civilian courtroom.

Without a substantive change to American culture, most sexual assaults will never be reported to police, and even fewer will go to trial. Because of this, justice-focused solutions alone cannot bring about the societal and cultural changes needed to combat this crime in the long run.

Any effective strategy to combat sexual assault must include prevention. This crime is vastly under-reported in the United States, and in the military, meaning that reports to law enforcement fall short of the amount of crime estimated to occur annually.

A 2010 DoD study found that 4.4 percent of military women and 0.9 percent of military men experienced unwanted sexual contact in the year before the survey.

However, the study also found that a 35 percent decrease in sexual assaults against women and a 50 percent decrease in sexual assaults against men had occurred since 2006.

While there is no acceptable amount of sexual assault in the military, we believe the Department's policies and programs contributed at
least in part to this decrease. Additional prevention work should hopefully drive the rate of sexual assault down over time.

Contrary to longstanding societal myths, research suggests that most sexual assaults occur between people that know each other. These non-stranger sexual assaults account for the vast majority of crimes that occur each year in both civilian and military sectors.

However there are other factors that complicate the experience of sexual assault in the military. First, sexual assault typically occurs where a victim lives and works. Some victims are concerned that making a report will cause them to lose their privacy, subject them to unwanted scrutiny, and mistakenly mark them as weak.

Secondly, when a perpetrator resides in the same unit as the victim, sexual assault can set up a potentially damaging dynamic that can rip units apart. If news of the sexual assault gets out, unit members can take sides, causing all to lose focus of the mission.

Third, military research finds that a history of any kind of assault doubles the risk of post-traumatic stress symptoms when the victim is
exposed to combat.

While we would all like this change to occur quickly, there are challenges that we must overcome and these are not unique to the military. First, no one expects to become the victim of a sexual assault. This is particularly true for 18- to 25-year-olds who are most at risk.

Second, most sex offenders do not believe that their behavior is criminal. Nearly all sex offenders use cognitive distortions to justify and rationalize their behavior. Consequently, messages about accountability do not register with them or motivate change.

Third, with no — with so many competing messages in the environment, important information on preventing and reporting sexual assault fades into the background, especially if you don't think that you are going to become a victim.

The most promising methods of prevention encourage people to intervene safely when they see situations at risk for sexual assault. Active bystander intervention empowers men and women to act when they see risky situations.

This approach has been incorporated into training by every service as well as other programs.
on obtaining consent, having healthy relationships and using alcohol responsibly.

Simply put, prevention works. There are a number of interventions that demonstrate short- and long-term improvements in knowledge, skills, behavioral intention, confidence about intervening, and victim empathy, and we are using them throughout the Department.

We are on track to creating a shift in military culture where sexual assault prevention is one more way of looking out for your comrades in arms.

In conclusion, there is no single solution to the problem of sexual assault. Rather, the solutions come from working this problem at every level of military and civilian society, from policies that improve the functions of our institutions, all the way down to the prevention skills that empower our individual service members.

Justice-focused solutions alone cannot bring about these changes needed to combat this crime. Thank you.

CHAIRMAN CASTRO: General Harding.

LIEUTENANT GENERAL HARDING: Yes. Mr. Chairman and members of the Commission, thank you for
this opportunity today to speak to you about sexual assault prevention and response within the Air Force.

   We are fully committed to supporting victims of sexual assault, while we do everything humanly possible to eradicate this crime from our ranks.

   Our Secretary, The Honorable Michael Donley, and our Chief of Staff, General Mark Welsh, are fully committed to eliminating sexual assault. They have made their position clear.

   They and other senior leaders in the United States Air Force have zero tolerance for this offense. Our goal is to drive the rate of sexual assault in the Air Force to zero.

   One sexual assault is one too many. We believe that our sexual assault challenge, like all challenges we have faced in the past and those we will face in the future, will be overcome by staying rooted to our core values — integrity first, service before self, and excellence in all we do, and acting on those values.

   I would like to talk next about our worldwide wing commander meeting and inspection that we recently concluded. Our core values, as I mentioned, demand that we maintain and sustain an
environment of mutual respect.

The Air Force succeeds because of the professionalism and discipline of our airmen. Every airman is critically important and everyone deserves to be treated with respect.

Anything less marginalizes great airmen, degrades our mission effectiveness, and hurts unit morale and discipline.

In November our chief of staff brought together the Air Force wing commanders worldwide, more than 160 senior colonels or one star generals, for an unprecedented, day-long, face-to-face conversation about leadership.

One of the primary topics he discussed at length was sexual assault prevention and response. As far as I am aware, this is the first time all wing commanders have met in a single place at a single time with the Chief of Staff of the Air Force on any topic.

It was an extremely candid discussion. The chief stressed to them that as wing commanders, as leaders, they must directly and aggressively address this issue.

His message was clear: we must redouble our efforts to combat sexual assault, and we need to
start by ensuring that our work environments reflect respect for all airmen.

As part of this meeting the chief announced a health and welfare inspection across the United States Air Force, to reinforce expectations of the workplace environment, to correct deficiencies, to remove inappropriate materials, and to deter conditions that may be detrimental to good order and discipline.

Stated another way, it was a reset of sorts, to ensure that the Air Force workplace was free of offensive materials that might breed a lack of respect for airmen.

Next I'd like to talk about our Special Victims Counsel Program. We recently initiated a program that I believe will make a positive and profound change in the way we approach sexual assault cases.

Effective the 28th of this month, we will begin a pilot program to provide airmen who report that they are victims of sexual assault with a personal attorney, at Air Force expense.

This new initiative we call the Special Victims Counsel Program. It is unique among federal agencies in providing this level and kind of support...
to combat sexual assault.

It will greatly improve the quality of support we provide to victims of sexual assault. In the last full year of sexual assault statistics, we noted that 96 victims who originally agreed to participate in prosecution of their alleged offender, changed their mind before trial, and declined to cooperate with law enforcement personnel and with the prosecution.

These 96 victims represented 29 percent of our victims of sexual assault who had filed an unrestricted report of sexual assault. I believe, had these victims been represented by their own attorney, many of them would not have declined to cooperate and hold the alleged offender accountable.

While our pilot program will likely increase prosecutions for sexual assault, make no mistake: its purpose is to give the best care to our people.

Victim care is extremely important in the United States Air Force. Our special victims counsel will operate independently of the prosecution's chain of command, establish attorney-client relationships, provide zealous advocacy on their clients' behalf, and thereby protect victims'
privacy and help preclude victims feeling re-victimized by having to endure, alone, a complex, exhausting and often confusing criminal justice process.

We are in the early stages of this program, and we are very excited about what the future holds. Last month, we trained our first cadre of 60 military attorneys as special victims counsel.

Over the course of three days these attorneys received in-depth training from experts in military justice, professional responsibility, legal ethics and victims' rights.

The training featured a recognized civilian expert on counsel for victims, Professor Meg Garvin, the Executive Director of the National Crime Victim Law Institute and clinical professor of law, and crime victim litigation at Louis & Clark Law School.

Professor Garvin taught our JAGs lessons that she has learned over a decade of representing victims, providing valuable insights, recommendations and practical tips to our counsel.

In closing, the men and women who raise their right hand with pride and volunteer to serve this great nation became more than just airmen. They
became part of an Air Force family.

Therefore we strongly believe we have a sacred obligation to provide a work environment and counsel for victims, to protect our fellow family members and represent them well.

I look forward to answering your questions and I thank you for this opportunity.

CHAIRMAN CASTRO: Thank you General.

Admiral DeRenzi, please proceed.

VICE ADMIRAL DeRENZI: Thank you. Good afternoon and thank you for the opportunity to talk with you today about the Navy's commitment to fighting sexual assault and specifically, about the Navy's accountability initiatives.

Let me state right up front: this is not just a legal issue. It's primarily a leadership issue, and in recognition of this, the Secretary of the Navy and the Chief of Naval Operations implemented a multifaceted approach to combat sexual assault, including a comprehensive training and awareness program that emphasizes active, involved leadership and encourages bystander intervention.

But when an incident does occur, the Navy is dedicated to ensuring that victims receive the full scope and spectrum of timely support, to
include medical treatment, counseling and legal assistance.

The Navy is hiring 66 additional provincial sexual assault response coordinators, and 66 full time professional and credentialed victim advocates.

They will augment the more than 3,000 command victim advocates that we have already trained, and we will work with specifically trained NCIS investigators and JAG Corps prosecutors to form the core of our special victim capability.

The JAG Corps is intensely focused on upholding the special trust that is placed in us, to provide a fair, effective and efficient military justice system.

We have implemented several key initiatives to ensure that our clients, both the government and the accused, receive the highest level of advocacy.

In 2007, to improve the overall quality of court-martial litigation, we established the military justice litigation career track. JAG Corps officers apply for designation as military justice specialists or experts, based on their litigation experience and aptitude.
Those selected for designation lead trial and defense departments and provide experience in the courtroom, personally conducting, overseeing or adjudicating sexual assault and other complex cases.

This program leverages trial counsel, defense counsel and judicial experience, to enhance the effectiveness of our courts-martial practice for complex cases.

Almost four years ago, the Navy hired two civilian experts with extensive prosecution experience in sexual assault and child sexual abuse. In this past year, we hired two highly qualified experts, and we are in the process of hiring two more.

They are channeling significant sexual assault litigation experience into enhanced litigation skills and practices for prosecution and defense teams across the spectrum and in the field.

In 2010 we stood up our trial counsel and defense counsel assistance programs, TCAP and DCAP respectively, led by experts in military justice. TCAP has delivered trial advocacy training and prosecution process assessments worldwide.

They have conducted outreach training to
improve efforts between prosecutors, investigators and other stakeholders in military justice, and they have served as trial counsel or assistant trial counsel in several complex cases, to include sexual assault cases.

DCAP was created to support and enhance the defense bar, provide technical expertise for case collaboration and standardize resources for defense counsel.

The office leads training efforts and consults with detailed counsel through every phase of the court-martial process worldwide.

We have also established an externship program, and in 2012 we assigned two mid-level career officers to work in a sex crime unit in two civilian prosecution offices.

What I hope is clear from these and other initiatives described more fully in my written statement, is that the Secretary of the Navy Ray Mabus, the CNO Admiral Jonathan Greenert, and the entire Navy leadership team remain steadfastly committed to getting in front of this problem and eliminating sexual assault from our ranks.

For our part, the JAG Corps is actively engaged in sexual assault awareness training,
prevention efforts, victim response and accountability initiatives. Again, thank you for this opportunity and I look forward to your questions.

CHAIRMAN CASTRO: Thank you, Admiral.

General Chipman.

LIEUTENANT GENERAL CHIPMAN: Thank you. Chairman Castro, members of the Commission, on behalf of Army Secretary John McHugh and Chief of Staff General Ray Odierno, thank you for the opportunity to discuss our efforts to combat sexual assault in the Army.

Sexual assault, as you know, is not just a military problem. It's a nationwide problem, one of the most under-reported crimes, and one of the most difficult to prosecute anywhere, sexual assault affects every sector of our society.

In the Army, sexual assault erodes readiness, destroys unit cohesion and morale, and can devastate the lives of victims. It undercuts the trust that is so critical to mission accomplishment.

Leadership is the key to change, but accountability in our ranks remains critical in creating a command climate in which victims feel safe and confident in reporting misconduct.
The military justice system constitutes a modern, criminal justice system. All of the people in the system are trained practitioners, who pursue both justice and the maintenance of good order and discipline in the force.

Our system is well equipped to meet the challenge of sexual assault. The unique role of the commander, the wide range of disposition options and our modern, comprehensive statutes, provide the tools necessary to hold offenders accountable, protect due process rights of accused soldiers, and provide support and justice for victims.

The Army has focused our accountability efforts on the special victim capability now directed in the National Defense Authorization Act of 2013. Every unrestricted report of a sexual assault, from an unwanted touch over the clothing, to forcible rape, is referred to specially selected and trained criminal assault investigators.

The sexual assault investigators from our criminal investigation command and the special victim prosecutors from the Judge Advocate General’s corps worked hand in hand from the initial report through the post-trial process.

The close coordination between these
two, the special victim prosecutors or SVPs and the sexual assault investigators, has improved the investigation, prosecution and victim care aspects of sexual assault allegations.

This expertise enables commanders to make evidentiary-based disposition decisions in these often complex cases. The SVPs are selected and assigned based on demonstrated court-martial trial experience, and the ability to work with victims.

Before assuming their responsibilities we provide SVPs with additional training, including on-the-job training with a civilian special victim unit in a large metropolitan area.

In addition we employ civilian, highly qualified experts or HQEs, who bring decades of civilian practice experience in the investigation and prosecution of these difficult offenses.

SVPs and HQEs have yielded great results, and as we look to the future, we will expand and formalize the concept, adding additional resources and personnel to establish a premier special victim capability.

In my view, prosecution and conviction rates do not alone effectively measure the criminal justice system's ability to address sexual assault.
If we pursue challenging cases because we believe that serves both victim interests and community interests, some defendants will be acquitted.

Nevertheless our system and outcomes are transparent and our focus on accountability has produced measurable results and benefits. We stand by our statistics on the rate of prosecution, knowing that we prosecute difficult cases.

Not as easy to measure, but perhaps more illustrative of our success, are the testimonials of victims and their families attesting to the dedicated, compassionate assistance provided by our SVPs.

One trial counselor prosecutor was described by a victim's mother as "a member of the family" who fought for her daughter, but most of all showed her the Army does the right thing.

It would be naive to suggest that we can prosecute our way out of this problem. Accountability remains critical, but only one aspect of the Army's comprehensive program to combat sexual assault and its precursor behavior, sexual harassment, the Army has invested unprecedented resources, over $50 million in each of the past two years, into prevention and response programs designed
to achieve culture change, the I Am Strong training, emphasizing Army values and teaching bystander intervention techniques, saturates soldier training at every level, beginning with our newest recruits.

A senior leader priority, this is an ongoing, monumental, institutional effort. You will find details of the Army's SHARP prevention and response program along with descriptions of policies adopted to address the unique needs of military victims in my written submission.

With that, I stand ready to answer any questions you may have. Thank you.

CHAIRMAN CASTRO: Thank you General.

General Ary, please proceed.

MAJOR GENERAL ARY: Chairman Castro, members of the Commission, thank you for the opportunity to address you today. I must begin by assuring you that Secretary Mabus and General Amos continue to make elimination of sexual assault a top priority in the Department.

Within the Marine Corps, our Commandant is personally leading this fight; in June, 2012, the Commandant issued his sexual assault prevention and response campaign plan.

This plan is a blueprint for
institutional and cultural change within our Corps, and sets us on a course to improve our ability to prevent and respond to sexual assaults.

When we talk about preventing sexual assault, the Commandant uses the phrase, "Get to the left of the problem." That means more than simply emphasizing the importance of the issue: it means taking action at all levels and focusing our training, policy and other initiatives to help us stop sexual assault before it takes place.

To reinforce the importance of top-down leadership, the Commandant began the campaign plan by directing every Marine general officer to attend a two-day, staff or general officer symposium.

He also directed three focused training initiatives: command team training for commanders and their senior staff; Take a Stand training for all non-commissioned officers; and All Hands training for all Marines and attached Navy personnel.

The Commandant also traveled around the world speaking to Marine leaders. In these heritage briefs, he defined who we are and who we are not. His goal with these speeches was to change behavior, with a particular focus on preventing sexual assaults from occurring.
Regarding our response to sexual assault when it occurs, we respond to both the victim and the alleged crime. In terms of victim response, the Marine Corps is pursuing several victim care initiatives.

Our first major initiative involves hiring trained and certified civilian professionals to serve as sexual assault response coordinators and victim advocates.

We are also implementing regional sexual assault response teams to provide a comprehensive and coordinated approach to victim care that extends beyond the boundaries of any one response service, such as medical, legal or counseling.

To improve our legal response capability, we established a defense service organization in the fall of 2011. In this past year, the Commandant directed a complete reorganization of our legal community.

This reorganization affected over 49 different commands and over 800 legal billets. This new organization established four regional legal service support sections designed to ensure that we place the right counsel, both trial and defense, with the appropriate expertise, supervision and staff.
support on the right case, regardless of location.

Each region has a regional trial counsel office that gives us a special victim capability. The centerpiece of these offices is a complex trial team composed of experienced senior prosecutors.

These regional offices also contain criminal investigators, a legal administrative officer, paralegal support, and highly qualified experts.

Our highly qualified experts are civilian, experienced prosecutors who will provide training, mentoring and advice on trial strategy and tactics to all military prosecutors in the region.

All of these legal system improvements continue to ensure that we protect the interests of the victims, while ensuring the accused receives the due process rights guaranteed by the Constitution.

Within the Marine Corps, the Commandant has also expanded the scope of Secretary Panetta's policy on the disposition authority for sexual offenses, to cover not only penetration offenses, but also all contact sex offenses, all child sex offenses, and attempts to commit such offenses.

In essence, we now have a smaller group of senior and experienced officers making disposition
decisions for all sexual offense allegations and any related collateral misconduct.

Sexual assault remains a serious challenge for our corps. But the Commandant's leadership and commitment is making a difference. By using a top down, comprehensive approach, and by attacking on all fronts, from prevention to prosecution, I truly believe we are making a positive change in the culture of our Corps.

Again I thank you for the opportunity to address you today and I look forward to answering your questions.

CHAIRMAN CASTRO: General, I would ask the Commissioners who are on the phone, if you would mute your line, unless you are going to ask a question. We are getting a little feedback. Okay?

The Chair recognizes Commissioner Kladney.

COMMISSIONER KLASTNEY: Thank you Mr. Chairman. Dr. Galbreath, gosh, I have got a ton of questions. You were an investigator.

DR. GALBREATH: Yes sir.

COMMISSIONER KLASTNEY: And so what do you think the strengths and the weaknesses are of the military investigative service when it comes to these
types of offenses?

DR. GALBREATH: I think turnover is a prime challenge, is that we have a constant influx of new investigators and keeping a highly-trained corps is a challenge.

And the reason I say that is that we get very, very good training. As a matter of fact, next week I am going out to Fort Leonard Wood to help the Army with a task selection course to help them improve their course that is out there.

The challenge that we have is that you cannot build in experience and the -- you can train them all day long, but how I usually explain it to the folks when I teach investigations is, a good investigator can identify the evidence that is present in a crime scene or a case, but a really good experience can also identify what is not there.

COMMISSIONER KLADNEY: Well, I actually had the opportunity to go through two of your PowerPoint presentations that you made in '08. Do you still think those statistics are relevant?

DR. GALBREATH: I don't think so because at that time we didn't have access to the kind of data that we have now.

COMMISSIONER KLADNEY: Okay, so I mean I
was kind of surprised, because in one of the slides, you stated that victims of sexual assault were many times more likely to develop PTSD and these types of problems if they reported the sexual assault. Is that correct?

DR. GALBREATH: No, that's not correct.

COMMISSIONER KLADNEY: Okay. I must have misunderstood that.

DR. GALBREATH: No.

COMMISSIONER KLADNEY: But victims do develop PTSD, you did have a slide that said a military sexual trauma at a higher rate than people under intense combat, is that correct?

DR. GALBREATH: As a matter of fact, that's data that is out there in the civilian research and also that the VA has found as well.

COMMISSIONER KLADNEY: And does job performance, what happens in the military when job performance falls as a result of having PTSD or depression or these types of maladies?

DR. GALBREATH: You said it exactly. Job performance falls. It's very difficult for some of our folks to maintain the high levels of performance that they need to, when they are also trying to overcome these problems in their daily life.
and their relationships and at work.

COMMISSIONER KLADNEY: And how are the

service people treated if that occurs?

DR. GALBREATH: I think that it's a -- I
don't know if I can paint with a broad brush. But I
think that any time, at least in my experience in
providing treatment and care, one of the things that
I do when a commander used to contact me as a
clinical psychologist and say I'm having problems
with one of my troops, I would try and educate them
on some of the information and how a person who is
suffering from PTSD might comport themselves, and the
challenges that they would have specifically.

And by providing that education to
commanders and also their first sergeants that were - -
that had enlisted person in the unit, they were
able to understand and maybe take a different vector
towards helping the person.

CHAIRMAN CASTRO: Commissioner Kladney,
I'm going to go on to Commissioner Gaziano. You have
the floor.

COMMISSIONER GAZIANO: Thank you and I
am -- you have heard me say I was humbled by the
complexity of the issues in the earlier panel, but
I'm more humbled by your all's presence, to have so
many senior flag officers testifying before us, and also waiting throughout the morning's panels.

We used to have a practice at the Commission that the government witnesses would be on the first panel and then they could leave, and I objected to that, in appropriate cases.

But the reason I am pointing it out, besides thanking you, is to -- well, I'll mention one other thing. The past few times we have invited someone from the Department of Justice, the federal law mandates that all federal agencies shall cooperate fully with the Commission. They won't send a line attorney to, to testify at any time in the past couple of years.

So it kind of belies at least one false myth, and that false myth is that the military doesn't take this issue very seriously. So after trying to compliment you, I did want to -- I think to Vice Admiral DeRenzi, I have a particular question, but others may comment.

To the extent I have been able to get up to speed on some of the issues, I think that the biggest improvements to me is the kind of career tracking that I think you all have the lead on in the Navy, and as those of us who are -- I was a very
brief litigator -- but I know enough about the
prosecutors and other litigators, that you learn to
be a great lawyer by watching the great counsel,
prosecutor or criminal defense, then working side by
side with them, then having them available to counsel
you, and just for the C-SPAN viewers who may not know
why you instituted this, and I'd appreciate it if you
could elaborate and explain, as I have been able to
understand it, there were incentives for those who
entered the JAG Corps to be you know, assigned
prosecutors, defense counsel, but there were higher
incentives maybe then to be stationed elsewhere, and
there wasn't quite the rewards of a career track that
end with, by the way, flag officer for the senior
judge, and now you have created that.

And it seems to me that both victims and
the accused, whether falsely or rightly accused, we
want a justice system that convicts someone even if
they did the crime, in a fair manner.

But that seems to me to be maybe the
most important reform of the past few years. But
it's young, and if my vision of what it takes to
learn at a great lawyer's side, you were a great
lawyer I understand. We may have even been on the
opposite side of an important case at one point.
But how is -- what's the early results? And the other branches, how much do you think that will help, has helped, can help and what kind of patience do we need before we see the effectiveness of that solution?

VICE ADMIRAL DeRENZI: Well, thank you. I appreciate your question and frankly you have done as good or better a job of describing our military litigation career path and track than many who I expect to be more familiar with it.

We instituted it because we felt that we wanted to: a) incentivize people to stay in military justice; and in particular, incentivize people to take judicial positions.

You described the phenomenon, and it wasn't that military justice wasn't valued. Repeated assignments in it just weren't viewed to be as competitive as officers who went and served with the operational line community, taking jobs that on their face, and perhaps in practice, required a greater degree of personal sacrifice with the operational forces day in and day out.

And the uninitiated might look and say if you've stayed in a courtroom you are not working as hard. I disagree with that fundamentally as a

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premise, and we determined that the best way to keep
good litigators in the courtroom was to bring them
into what line officers would call the equivalent of
a restricted community.

    They compete among each other for
promotion. So they are not competing against people
who work for three- and four-star officers, say in a
combatant command.

    They are competing against other
litigators, trial, defense and judicial. We
instituted it in 2007. I will tell you that it takes
persistent leadership and attention to identify and
groom the right people. There's a numeric factor --
how many cases that we have.

    But just like we have said with
everything else, numbers aren't everything. There
are the intangible factors and who has what it takes
to be a good litigator.

    We look for those people. We groom them
and at the four-year point, they have an opportunity
to apply to specialize, and boards pick them, and the
boards are made up of military justice practitioners
and JAG Corps leaders.

    At that point we tend to structure our
organization as we have grown a cadre of these people
so that they will be department heads for both trial
counsel and defense counsel, and they are trained not
only in litigating but in mentoring the young counsel
and bringing them along, because as you said, it's
not just by doing. It's by watching, it's by
learning and it's done case by case, accused by
accused, victim by victim, argument by argument.

We are committed to continuing to do
that and it's starting to bear fruit, as we have seen
the promotion prospects improve. Our military
justice career practitioners are promoting at a rate
equivalent to the rest of us.

That's critically important because
there is no substitute for seniority, longevity and
experience when it comes to prosecuting complex cases
and leading litigators.

The chief judge position in particular,
as you said, not only incentivizes it, but
incentivizes people to be good -- to be judges, and
to take more than one tour as a judge.

That's critically important too.

You say how long will it take to bear
fruit. I think it's already borne fruit in the
leaders that it's produced for us, and in the fact
that our junior personnel are anxious to be a part of
that community.

One thing I would say though, you can't just stay in the courtroom your entire career. You have to work among the fleet to appreciate how the conduct resonates in the fleet, and to appreciate the perspective of the sailor and the convening authority.

Some of our best military justice practitioners today are at sea as lawyers for our nuclear aircraft carriers.

CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Thank you Mr. Chairman. General Patton, I have three questions of you, but the others who have given such excellent presentations, should feel free to chime in if you have anything to add.

The -- General, the testimony that we have just heard I think is very, very exciting, to see the level of commitment being evinced by the various leaders of the various services, the fact that numerous experiments are about to take place which we imagine will bear fruit.

Money is being spent, creativity is being expended. Chances are being taken. People are
focusing enormous energy and attention on what you admitted in your own testimony is a terrible problem.

I am wondering how these experiments will be evaluated, how the learnings will be shared, how the public will be informed, whether or not all these excellent inputs actually yield results and how soon.

So I am wondering what the plan for disseminating best practices, if any of these things turn out to be, if not the magic bullet, then part of the arsenal that becomes the way we combat sexual violence in the military. Pardon the military allusion.

MAJOR GENERAL PATTON: Well, thank you for that question ma'am. One of our lines of effort is really the one that you are really I think commenting and focusing on and that is the line of effort of assessment.

And so there are some things in place here that allow us to -- we recognize we have to continually look at ourselves and what I have actually been sharing with my colleagues in the services and so forth is that we have to assess our programs with an eye towards taking the best practices and making them common.
And so that's the approach that we are taking in a number of different areas as we apply the assessment line of effort to really everything else we do.

So you know, one example is in training. We are -- we have launched a very comprehensive assessment program in the area of training. This will go on for several years.

The first element of training that we assessed, and we have just completed the assessment, I am going to get to the results. But we have just completed the assessment on all the training that commanders get before they take command, as well as training that the senior non-commissioned officers get before they take senior leadership positions.

The reason we focused on commanders and senior non-commissioned officers first in the entire training regimen is because of really the centerpiece and the key role that they have in any sexual assault prevention response program.

So this assessment went on over several months. We have just collaboratively reviewed the results of that assessment with all the services, and I expect that Secretary of Defense Panetta will publish the results of these -- results of this
assessment here in the, I think the days or the weeks ahead.

And it's taken, what we saw in the area of training is that all the services were doing something, but that we saw best practices in some services that we want to be the common practice in the others, like interactive training, adult learning going on, the training tailored to the specific audience.

For example, if there's a dramatic representation of sexual relationships, it resonates very strongly with young adults, called sex signals. Well, this is perfect for initial military training in the -- but it probably doesn't play that well with the senior command staff person.

So that training is adapted to that audience. So we have also seen where PowerPoint training is -- we have thrown that away. Commanders and senior non-commissioned officers, they thrive on training where they are put in scenarios, scenario-based training, ethical decision games is one model that the Marine Corps uses.

The Navy calls it Take the Helm training. I sat through three hours of Take the Helm training with the Navy. It was given by a team of
experts and it's a mobile training team. They take that training to every ship and element within the Navy, export that training and it was really driven by a number of scenarios: what are you going to do now, Captain of the ship, when this happens on your shift, and then talking through the serious issues and so forth associated with that.

So we have got some really aggressive assessment programs in place for the training side. Shifting gears a bit, well, to answer your question how do then codify that?

Well, we standardize it in policy. And so the core learning objectives that we have identified that work best, and best practices for all the services, will be codified in a policy that our Secretary of Defense is going to promulgate across the Department.

And that will be the standardized core learning objectives and core competencies for all pre-commander training.

COMMISSIONER ACHTENBERG: So you are going to be measuring and evaluating each and every one of the initiatives that these leaders have just delineated and you are going to be making an assessment of which are more successful than which
and then putting those forward as a uniform standard of some kind? Right, I might --

MAJOR GENERAL PATTON: No, no, that's the idea. I really expanded on the training piece but we are doing the same in other programs as well. General Harding mentioned the special victims counsel. That is a program, a pilot program the Air Force has taken on that we want to take a very close look at across the department, learn from it, take the emerging lessons learned, and somewhere down the road look to see how that can apply to the rest of the department.

The special victims capability is another area. We have convened a study group. We are looking at all the things that the services are currently doing. You heard a lot of them.

But we want to standardize that in a department-wide policy, again capturing the best elements of that special victims capability, and then codify that in a policy that will then drive and standardize over time the way in which we do special victims capability.

COMMISSIONER ACHTENBERG: When Professor Sullivan urged us not to recommend more changes because we haven't even figured out yet whether the
changes that are currently under way are going to take hold and the Congress invariably will make a mistake, if they, you know, if they try to do too much, too soon, and all of that admonition that we take really seriously, it seems to me a very good way of warding off future meddling in your business, would be to make a very rigorous assessment of everything that is being done, and you know, having it see the light of day, so that the public has confidence that you really are going to assess what are the best practices and make those the common practice as you have just identified. That's just a piece of advice. I think it would go a long way.

My second question, before I lose the patience of the Chair --

CHAIRMEN CASTRO: You will never lose his patience.

COMMISSIONER ACHTENBERG: Thank you so much, Mr. Chairman. My second question is: has the Secretary given any thought to assessing cases that perhaps were mishandled in the past, and if any of you have seen any of the public comment that we have received on this topic, my layperson's estimate is that cases that might have been mishandled in the past, might number in the many thousands if not tens
of thousands of cases.

Have you given any thought to some kind of systematic address of past injustices, some opportunity for women and men who might have not been treated as well by their services as we hope victims and perpetrators for that matter will be treated going forward on the basis of all these new programs, how we might compensate them if at all for the past failures to address this as a serious issue?

MAJOR GENERAL PATTON: I think the best way I can answer that is by referencing an ongoing review that the Department of Defense Inspector General is conducting. This -- I don't have oversight of that particular agency; however, they keep me informed on their reviews and their efforts, and I know they are finishing up a 2012 review of cases that were handled by the military criminal investigative offices across all the department.

They looked specifically at closed cases and with those cases that were closed, how did they -- did they comply with the standards for an investigation, did they comply with the thoroughness, the timeliness, and those sorts of things.

And I don't have the data on this because I haven't seen the final report that they are
working on now, but they have returned some number of cases back to the service military criminal investigative offices, the CID, the OSI, the NCIS in the three services, for the purpose of continuing the investigation.

They have also made some -- I know they are doing some analysis as to whether those particular investigations were conducted in the standards of thoroughness, accuracy, timeliness and so forth... by those investigative officers.

So that's one element and I would say that the Secretary of Defense always has his Inspector General to do things like that, to review, in this case, criminal investigative matters.

That the IG has already announced that their next year's -- this current year, 2013 -- oversight review topic will be compliance across the department with the sex offender registry program, and have detailed a number of things that they are going to be looking at there.

So there's two years in a row where the violent crimes division of the Department of Defense IG is focused on these matters, for the purpose of giving this I think a very critical look at the direction of the Secretary.
COMMISSIONER ACHTENBERG: But there's no specific opportunity for example of women or men who think that they were treated unjustly in the past to seek some kind of recompense or --

MAJOR GENERAL PATTON: I know one thing that was addressed by a provision in the National Defense Authorization Act that was just signed into law in 2013, is the direction to reinforce the fact that the Board for Correction of Military Records that exists in each of the departments, is -- to emphasize that and inform our, both our active and our retired populations, that they are aware of that as a form of -- formal form of redress for wrongdoing or that sort of thing.

And that was reinforced in recent law and my job will be to, with the services, to really put that into place and do that broader information campaign that ensures people are aware of that. So --

COMMISSIONER ACHTENBERG: And will that extend to according people veterans' benefits if they were otherwise qualified, or is it only correcting the nature of their discharge?

MAJOR GENERAL PATTON: I believe it generally deals with the correcting of the active
military component of their service.

COMMISSIONER ACHTENBERG: I will defer my third question until later, if there is a later.

CHAIRMAN CASTRO: Well actually, I am going to ask a question and then we are going to go to Commissioner Yaki, then to Commissioner Kladney, then, who will have the last question.

There was a reference I think by you, Admiral DeRenzi, and I heard it during one of the earlier panels, to the issue of child sexual abuse. To what extent are military families being victimized by predators or by rapists who happen to be service members, outside of the family? Is that an issue that is going on here? Because we haven't talked about it. We've really been focused on service member to service member.

But since child abuse has come up twice during this hearing, I wanted to find out a little more about what that is.

VICE ADMIRAL DeRENZI: Part of the reason you see them linked together is because we have tried to get expertise available to us within our own organization in the cases that are the most difficult for us to adjudicate and to litigate, and child sexual assault and adult sexual assault are
They have some similarities, some differences. We are working very hard to have our litigators understand the behavior that is exhibited by victims of sexual trauma, adult or child. You see some of those things happening intra-family, you know, and the myth out there is you can't rape within your own family. That, as you know, isn't true.

So we are working to ensure that we have got the skills and that we develop the skills to deal with both kinds of cases because there are similarities, but there are critical differences too.

As a matter of fact, as you alluded to, we have looked specifically to find folks with that kind of experience. One of them is in the room today, is in our headquarters, and one of the most valuable things that she does for us is ensure that we are looking for the cutting edge training so that we don't just funnel it to one side of the aisle or the other.

And we have benefitted tremendously from her experience, as have the investigators, and in the future, the victim advocates that we are bringing online. I believe we will learn a lot from each other and we need to continue to do that, and
leverage that experience in the special victim
capability, which would include victims of child
abuse as well.

CHAIRMAN CASTRO: Thank you Admiral.

Commissioner Yaki, you have the floor.

COMMISSIONER YAKI: Thank you Mr. Chair.

Just briefly, I have one question but I just wanted
to do a quick followup statement on what Commissioner
Achtenberg was talking about.

And I think it's really important, the
point that she made. There are -- we receive any
number of different emails and letters from people
who basically were discharged from the service under
less than favorable circumstances because of how
their claims were handled or how they reacted to
their claims being mishandled within the services.

And I think it's really important, and
as someone who has worked with, with veterans on
correcting their military records and upgrading their
discharges in the past, I know how exceedingly
difficult it is to do it from their perspective, and
it's a very uphill fight.

So I would just urge that in whatever
the Inspector General is doing, that if there's a
way to work on reviewing records of people who
believe that they were wrongfully treated and
wrongfully discharged, I mean those have enormous
consequences to their future ability to receive
healthcare, veterans' benefits, what they disclose on
a job form, and it may be for those people, where the
system failed them because people like yourselves
weren't in charge at the time and hadn't put in the
proper procedures in place, we can't forget about
those who paid a heavy price early on and are still
paying it now.

The question I have though is, listening
to all of your, all the different branches and seeing
how many of you, and again, as all of our panelists,
we thank you for your service to our country.

But I wonder if you can respond to one
of the proposals brought forth by an earlier --
someone in an earlier panel, which is it's great that
you are all doing these efforts to combat sexual
violence, sexual assault, sexual discrimination
within your branches, but the fact that each of you
is doing it in your own silo, how do you react to a
proposal that would create an independent, unified
branch of investigations or prosecutions for these
types of cases across branch divisions, would address
the issue of promotion and rank, because it would be
an independent civil service career path, rather than an intra-military path, and create a service-wide specialty in terms of investigating, prosecuting, defending and sentencing of sexual assault in the military?

MAJOR GENERAL PATTON: Let me take a first swing at that, and just take it from a commander's perspective, and so if the notion is that the sexual assault cases would be removed from the chain of command and then provided to this independent agency, I would just like to make a comment on that aspect of that, and that is that we put a lot of responsibility on our commanders.

They are responsible for the health and welfare, accomplishing the mission, the readiness of their unit. And we also owe them the tools to do the job. One of those tools is training. Another one of those tools is the military justice system, a disciplinary system that allows them to not only put standards in place but then to enforce the standards by then applying disciplinary measures to people who would choose to not comply with the standards, not meet the standards, violate the standards of conduct and behavior.

And so it's important, in my view, to
retain the commander as a central role in the justice system, and the Secretary of Defense recognized this earlier this year when he decided to elevate the disposition authority for the commander, and previously that disposition decision as to what direction a case would take in a sexual assault case, be it court-martial, be it administrative separation or so forth, that decision was moved from the O5 rank to the O6 rank which in the Navy is a captain and in the Army is an Air Force ranger or colonel.

And I served in command at both those levels and I can tell you, as an O6 commander, I've got 25 years in the Army versus 20 at that lower level. I had handled a significant number more cases including courts martial, and had much more experience serving and working with trial counsel.

And at the O6 level of command, that's really in the Army, the first level, when you have an assigned trial counsel at your side, and so again, mindful of all those elements, Secretary Panetta decided to elevate that very critical disposition decision and authority to the O6 level, but to retain that command disposition decision within the chain of command.

And I'll just close by saying, I mean,
the -- with my commander hat on here, the commanders own this problem. Commanders are going to have to fix this problem, and we need to keep commanders involved in the problem, not less involved.

By removing any kind of decision making with regard to discipline away from the chain of command, we are not keeping commanders involved in the problem.

The energy in the program and all the things we just talked about here in our opening statements and some of our initial questions, that dissipates when you remove, you know, some of those key elements of the disciplinary system from the chain of command.

I defer to any of my colleagues here for other comments on that point.

LIEUTENANT GENERAL HARDING: I think -- and thank you Commissioner Yaki for that question -- I think any time you consider taking that valuable function that commanders perform today and holding members accountable in making those judgements, when you take that away from a commander, the second, third and fourth order of effects are ugly, and you ought to consider those effects before making such a recommendation.
First I'd like to address, though, the idea of taking the investigative responsibilities. It's awfully important as an investigator that you understand the nature of the unit that you are investigating, the people involved, what they do, where they came from, how they were trained.

Growing up inside those services, wearing that uniform, walking the walk and talking the talk is awfully important, to understand how things might have occurred in a particular unit.

To find one sizes fits all for all services would be awfully difficult. Easy to say, difficult to create, in levels of expertise.

As far as pulling the authority from a commander to hold members accountable and make those disciplinary decisions, we fight and win the nation's war and we've got a really good track record doing that.

It's not by accident. It's because we bring four things to every fight: the best equipment; the best people; the best training, those are three legs of a four-legged table; the fourth leg is discipline.

And that ability to hold members accountable is important for command and control.
This is the art of military science now. So if you start to pull at that thread, the second, third and fourth order of effects is awfully important, I think to all of us.

So I think it's important to the nation to consider the ramifications of looking to someone else to make those decisions. Thank you.

ADM. DeRENZI: If I might, sir, I'd like to address one, one piece of Commissioner Yaki's remarks, sir, that you referred to as independent silos, and I can see how it might appear that way.

We are different services. We are structured differently. Our service cultures are somewhat different. But believe you me, my peers on the panel here, we work well and cooperatively together. Our trial counsel and defense counsel assistance programs leverage each other's experience. Our judges train together.

We take the best practices that we each identify in our services, and try to figure out how best to apply them within the challenges that we face, and not necessarily uniquely, but perhaps differently.

So it may not appear that we are acting in a coordinated way, but I can assure you that we
are, particularly when it comes to the challenges of complex litigation, and the prevention and response efforts.

They are all slightly different, but you will see that they are all in essential very much the same in their emphasis on prevention. Once they get to us, we owe -- we owe the soldiers, sailors, airmen and Marines a good, efficient, effective and fair military justice system.

Even though that's one of my primary statutory duties, I would like it if they didn't get to us and that our prevention efforts succeeded.

CHAIRMAN CASTRO: Commissioner Kladney, you have got the last question.

COMMISSIONER KLADNEY: Thank you Mr. Chairman, I actually have three.

CHAIRMAN CASTRO: I suspected you might.

COMMISSIONER KLADNEY: I would just like to tell General Ary that that I have a friend in the military and apparently you have an extended sexual assault training program, and they attended it and they thought it was wonderful. Just to let you know.

MAJOR GENERAL ARY: That's great.

COMMISSIONER KLADNEY: Since you've been sitting so quietly. I have asked this question
before, earlier today, so I am sure you have heard
it, especially the justice officers and the generals,
is there any way to have guidelines for commanders,
especially since command and control is so important,
as to how to select a forum for discipline, you know,

there's Article 15 or courts-martial or summary
courts-martial or something like that, and some
sentencing guidelines for these types of offenses, or

is this just a near impossibility?

LIEUTENANT GENERAL CHIPMAN: If I could
take first crack at that. I think we have guidelines
already in the sense of this: each of our
commissioned officers, each of our commanders is
trained from their initial officer basic course their
role in military justice, and at each level, as they
assume increasing levels of command, they get
additional training on the execution of their
responsibilities.

As we have discussed already, at the
battalion commander and the brigade commander levels,
one in the Army at least has an assigned judge
advocate to help assist in making those disposition
decisions.

And so you are going to find, both by
policy and our regulations where we have withheld all
sexual assault-related contact to the battalion
commander level initially, then for the sexual
assault offense itself to brigade commander level,
there is some disposition guidance already operative.

And as well, we are talking about judge
advocates at the prosecution level, at the staff
director advocate level, colonels with 20 years'
experience who are guiding commanders in the
execution of their duties under the system.

So from that standpoint, there is
disposition guidance out there. In terms of
sentencing guidelines --

CHAIRMAN CASTRO: Speak up a little bit

General, the mic is not picking you up there.

LIEUTENANT GENERAL CHIPMAN: In terms of
sentencing guidelines, we think it's appropriate to
consider those factors that underlie any sentencing
system, any mature sentencing system, and we execute
that appropriately with panels for juries, and with
military judges who have served as prosecutors,
defense counsel, administering the system, and then
trained as judges at our common school.

COMMISSIONER KLANDENY: So basically you
are saying that this is being carried out already and
there's no need to write some of this now.
LIEUTENANT GENERAL CHIPMAN: If you are engaged in a serious criminal offense, you will receive the appropriate disposition decision and the appropriate sentence that is in fact unique to the factors, aggravating and mitigating, of your particular crime.

COMMISSIONER KLASSEY: And have now, do you see more supervision over line commanders as to what gets brought up on charges and discipline for those commanders that don't bring things up on charges? I mean, is that being developed, that type of supervision from the field level?

LIEUTENANT GENERAL CHIPMAN: I think it's fair to say that there is in fact a great deal of interest in all levels of the command in how they are handling these kinds of issues.

So for example, you've got the disposition elevation initially to the captain or colonel level supported by a judge advocate, guided by a judge advocate in that decision.

But you've also got other oversight mechanisms. You know, we have a civilian appellate court, the Court of Appeals for the Armed Forces is the ultimate supervisor.

We have got Article 37, which talks
about unlawful command influence in the direction and control of our system. So there is in fact a level of interest and a level of ability to influence those decisions.

And if a commander is unhappy about how a subordinate would propose to handle a certain issue, that commander can pull it up to his or her level to dispose of that allegation.

COMMISSIONER KLANDNEY: Thank you. My last question, the last question. When the service person files a restricted or unrestricted claim, do these documents hit their personnel file? In other words my concern is, is that -- well, I have lots of concerns.

But one concern is, is that it follows them from assignment to assignment. And the second thing is if you file an unrestricted claim and you decide to make a career in the service, you know, a lot of other people go from unit to unit to unit and there's, I guess it's a Navy term, scuttlebutt, that follows them.

And how is all that handled, I mean, to protect people, because if you don't do that, don't you discourage those kinds of claims?

DR. GALBREATH: Unrestricted report,
first of all, the report itself is documented on a DD Form 2910, a reporting preference form, and the only person that gets a copy of that form is the sexual assault response coordinator that you spoke to and the victim, and it does not go into a personnel file, it does not follow someone throughout their career, whether you report an unrestricted report or you give a restricted report, either way.

We keep a copy of the DD Form 2910 for unrestricted cases in our defense sexual assault incident database.

COMMISSIONER KLADNEY: Is there any kind of discipline for people who perpetuate that? I mean it's very difficult, but if I am in a unit and I go to another unit and there's somebody there from when I filed an unrestricted claim and it gets around, and I can, I guess, get ostracized or --

DR. GALBREATH: Well, harassment on any account is taken very seriously and if the individual reports that they are being harassed by someone within the unit for something that occurred previously, they need to bring it to the attention of their commander, or to law enforcement, depending on the level of the harassment.

COMMISSIONER KLADNEY: And that's well
communicated to the troops?

DR. GALBREATH: I believe so. We tell everyone that you come in and you experience that kind of recompense and we want to know about it.

COMMISSIONER KLADNEY: Thank you.

MAJOR GENERAL PATTON: If I could answer the question, recognizing the need for protections and privacy and confidentiality and victim preferences, one of the policies that we have put in place just in the last six months is called the expedited transfer policy. It's the policy across the Department, Secretary of Defense-promulgated, that allows the victim to make a request for a transfer from the unit or from the installation and again, it's at the request of the victim. There are some victims that's very important to them, other victims it may not be and they want to stay within that team that they have grown up in.

And it only applies to unrestricted reports and we track those very closely. And to date, there have been about over 200 of those requests made. I might add also that that request is made to a commander in the chain of command, and if the victim is not satisfied with the decision by the commander, they have the right to appeal to the first
general officer in the chain of command.

And to date, in the over 200 requests for transfer, the data I have seen shows that all but one of those transfers have been approved, and that one case the victim was being separated from the service and being transferred wasn't necessary.

So we are watching that very closely. It's one of the data elements that we put into our incident database because I think that we want to -- getting back to the question about assessment, we want to -- we are continually looking at ourselves to assess whether these programs are effective, are we providing the support to the victims that is intended by that policy.

So it's a six-month-old policy but we are looking at it very closely.

CHAIRMAN CASTRO: Thank you very much. In fairness and in the interests of bipartisanship I am granting Commissioner Gaziano the opportunity to ask a question.

COMMISSIONER GAZIANO: Thank you. I just wanted to return to a question from the first panel and maybe the other side of the ledger, which is that I certainly concur with what one of the
witnesses said, that if it is your mission to get
more convictions, by golly, you will get more
convictions.

But maybe that's appropriate. And so
let me ask you this sort of in some context, maybe
you should do better than not only what you have been
doing, but the civilian system -- in the civilian, as
I understand from civilian prosecutors, if there's a
-- two people have been drinking in a bar, a non-
stranger situation, they leave together, then there's
an allegation of rape, you know there's a lot of
civilian prosecutors who will obviously evaluate the
evidence, but need something a little bit more than
the he-said-she-said before they think that they are
willing to make a charging decision and seek proof
beyond reasonable doubt.

You know one of the witnesses -- it may
have been this panel but I'm not sure -- said you
know we are not afraid to bring cases that will
result in acquittals. That certainly makes sense.

But my -- but particularly to the --
those representing the Judge Advocates General of the
different services, do you think that there ought to
be a different standard, charging standard, than
maybe exists in the civilian system? Should the
services, you know, maybe charge at a -- for a lot of
unique reasons, try to bring a case and try to prove
guilt at a level that would be slightly less evident,
slightly less strong than in the civilian context?

Or do you think that the ideal is to
make about the same charging decisions as a good,
civilian prosecutor would?

LIEUTENANT GENERAL HARDING: I'll offer
this up as I think an important part of considering
the predicate of your question. We try a lot of
cases that civilian prosecutors waive jurisdiction
on. And when an offense occurs off base for example,
the civilian prosecutor is often the first one to
make a decision whether or not to prefer charges.

As a matter of course, the Air Force
routinely requests waivers of jurisdiction, and we
receive waivers of jurisdiction in many cases that
they elect not to try.

We try many cases that are testimonial
cases, on- versus-one piece of testimony. I think we
have the right standard in making that determination.
We ask commanders to take an oath before they prefer
a charge, the charging instrument that we use, that
simply asks them that, based on their personal
knowledge or personal investigation of the case, did
they believe, honestly believe that the charges are true to the best of their knowledge and belief.

That's the charging decision, and when those charges go forward to trial at a later date, then we use proof beyond a reasonable doubt, the very same standard that we use everywhere else in the nation, and it is reasonable that we will see acquittals and we do.

So I have a hard -- when you say the best example or model of what those -- how those decisions are made downtown, and put our model against that, we are every bit as good and in many cases better than that model.

COMMISSIONER GAZIANO: Better, we'll let other people decide. But it sounds to me, and I'd like the others to -- that what you are suggesting is you'll charge more cases, even if the proof beyond a reasonable doubt standard at the end is the same, you might charge more cases than a really good civilian prosecutor would.

Is that a fair assessment, and is that the current goal, that you are -- not that you are -- maybe you will teach the civilian prosecutors something? Can you all help me with your thoughts?

MAJOR GENERAL ARY: I guess I might toss
in a couple of comments sir. I think that from our perspective, we care about cases being well tried from both sides, all of us are responsible for both trial and defense.

We also don't have prosecutors running for reelection on a win-loss record. They are defined by their duties, and I think one of the challenges, when you look at a unanimous verdict downtown beyond a reasonable doubt, and a 12-member jury panel, in our world, if you have eight votes, two-thirds majority you can get a conviction beyond a reasonable doubt.

Now a lot of people think that that, when you have four voting to acquit, that's a hard thing to get around when you have beyond-reasonable-doubt standard.

It also helps to define why some people may not understand the sentence that comes out of a members' panel, because when four people have reasonable doubt and vote to acquit, they are still part of that group helping to define the sentence.

So there's a lot of factors in our system. There are also -- the appellate courts in our system have broad fact-finding review, because of those issues.
So when you start looking at all of the different control inputs, certainly that's the thing that Professor Sullivan was talking about to your question, each one of these control inputs has ripples across our system, and it truly is a justice system, and I think that when we calculate these things in, and we think about the rights of the accused, the rights of the victim, the institutional need for good order and discipline so that we can be an effective fighting organization, we have to look at it in its entirety and consider it carefully, because the justice system is really something that — the sanctity of that system, as our Commandant says, is a moral imperative for all of us.

LIEUTENANT GENERAL CHIPMAN: And if I may add one perspective to that as well. Anecdotally and by our data we do know we try more cases of a given evidence level than our civilian jurisdictional counterparts. We can show you that case.

COMMISSIONER GAZIANO: If you could supply that to me or to the Commission, that would be helpful.

LIEUTENANT GENERAL CHIPMAN: But the reality is, that that's because in part, America's moms and dads send us their sons and daughters and
hold us to a higher standard, and we believe strongly that they have a right to a victim-free, an environment free from sexual assault and all that it entails, and it's part of our unique fabric. It's part of that special, specialized society apart from America where we have that commitment to good order and discipline that requires us to make certain decisions that perhaps you would say in a resource-constrained environment, you wouldn't make.

VICE ADMIRAL DeRENZI: Can I just, sir if I may --

CHAIRMAN CASTRO: Yes. You have the last word.

VICE ADMIRAL DeRENZI: Neither the Secretary of the Navy nor the Chief of Naval Operations has told me that my mission is to get more convictions. My mission is to ensure a fair, effective and efficient military justice system.

And as my peers said, commanding officers are responsible for the safety, the welfare and the good order and discipline within their command. They have difficult leadership decisions to make and we provide them experienced judge advocates to advise them in making them, and they make those decisions case by case, day in and day out, on the
specific facts and circumstances of each case, and
they try to do what's right in each case, not what's
easy, not what's expedient, and not what is a
perception of what's expected of them.

CHAIRMAN CASTRO: I want to thank all
the panelists. This concludes our briefing. It has
been extremely informative to all of us, and we
appreciate not only your service, but your
participation today, and I know that there's veterans
out in the back of the audience so we also want to
acknowledge their service and their commitment and
their involvement in today's process as members of
the audience.

I also want to personally thank our
Commission staff who put this together. I
particularly want to highlight Vanessa Eisemann from
our Office of the General Counsel, who did a
spectacular job of putting together the panels in
this event today. Thank you.

I also want to acknowledge Pamela
Dunston and her staff, who are responsible for all
the logistics of bringing us all together here today.
Their efforts really have contributed to this
spectacular event.

Lastly, I want to remind everyone that
there is an opportunity to submit comments for the record. You can submit materials or public comments to us in one of two ways, either by mail at the U.S. Commission on Civil Rights, Office of the General Counsel, here at 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425, or you can send them via email to publiccomments@usccr.gov.

We look forward to preparing the report and sending it -- yes, that's right, you had a motion you wanted to make.

COMMISSIONER ACHTENBERG: I'm wondering if my colleagues would consider a request that we keep the record open for an additional 15 days, given the level of public interest in the topic.

CHAIRMAN CASTRO: So, rather than 30 days we would have 45?

COMMISSIONER ACHTENBERG: Forty five days. Is that agreeable?

CHAIRMAN CASTRO: Do we agree to that by unanimous consent? So you actually have, members of the public, 45 days from today to submit your public comments and then we do look forward to preparing and sending our report with findings and recommendations on what we have learned here today, to the President and Congress.
Thank you. It is now 2:45 and we adjourn this hearing.

(Whereupon, at 2:45 p.m., the hearing was adjourned for the day.)