

## U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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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 KLADNEY, Commissioner

MICHAEL YAKI, Commissioner\*

VANESSA EISEMANN, Parliamentarian

\* *Present via telephone*

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## 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:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN

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## T-A-B-L-E O-F C-O-N-T-E-N-T-S

I.	Introductory Remarks by Chairman . . . . .	5
II.	<b>Panel I: Perspective of Victim and Accused</b> . . . . .	10
	1. Rachel Natelson, Legal Director, Service Women's Action Network (SWAN)	
	2. Philip D. Cave, Commander, U.S. Navy (Ret.), Law office of Phillip D. Cave (Defense Counsel)	
	3. Nancy Parrish, President, Protect Our Defenders	
	4. Bridget Wilson, Major, California Guard, U.S. Army Reserve, Enlisted (Ret.), Rosenstein, Wilson & Dean, P.L.C. (Defense Counsel)	
	- Speakers' Remarks and Questions from Commissioners	
III.	<b>Panel II: Academic Scholar Panel</b> . . . . .	77
	1. Dwight H. Sullivan, George Washington University Law school	
	2. Elizabeth Hillman, University of California, Hastings, School of Law	
	3. Victor Hansen. New England School of Law	
	4. David Lisak, Ph.D., University of Massachusetts, Boston, Department of Psychology	
	- Speakers' Remarks and Questions from Commissioners	
IV.	<b>Lunch Break</b> . . . . .	150

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## T-A-B-L-E O-F C-O-N-T-E-N-T-S (Cont'd)

V.	Panel III: <b>Military Panel</b> .....	151
	1. Major General Gary Patton, Director, Department of Defense's, Sexual Assault Prevention and Response Office	
	2. Nate Galbreath, MSF, Ph.D., Highly Qualified Expert, Department of Defense's Sexual Assault Prevention and Response Office	
	3. Lieutenant General Richard C. Harding, Judge Advocate General, U.S. Department Air of the Air Force	
	4. Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Department Navy of the Navy	
	5. Lieutenant General Dana K. Chipman, Judge Advocate General, U.S. Department of the Army	
	6. Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps	
	- Speakers' Remarks and Questions from Commissioners	
VI.	<b>Adjourn Briefing</b> .....	222

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

2 (9:31 a.m.)

3 **I. INTRODUCTORY REMARKS BY CHAIRMAN**

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

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

17 Those of you who are not familiar with  
18 the Commission, our agency was born in 1954, sorry,  
19 1957, as part of the Civil Rights Act of 1957.  
20 Congress and President Eisenhower created us at the  
21 fledgling moments of the U.S. civil rights movement  
22 to examine the issues that were being faced in the  
23 United States and to make recommendations to the

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1 President and Congress on how to address those civil  
2 rights issues.

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

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

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

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

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1 exclusively from foreign opponents.

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

8 Yet, if you look at the statistics of  
9 the Department of Defense, by their own estimate, in  
10 2011 there were approximately 3,192 sexual assaults.  
11 They also, in another report, estimate that about  
12 only 14 percent of those assaults are actually  
13 reported, so the numbers could be as high as over  
14 22,000.

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

21 Justice has got to be done, and this is  
22 not just a partisan issue or a political ideology  
23 issue. This is an issue that affects all Americans.  
24 So I hope that today, as a result of the information  
25 that we gather from our witnesses, and from the

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1 materials that we received today and in advance of  
2 this briefing, as well as from public comments 30  
3 days after this, that we will prepare a report on a  
4 bipartisan basis to the President and Congress with  
5 findings and recommendations that will hopefully  
6 thoughtfully contribute to addressing this issue.

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

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

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

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

24 We have, however, time periods that we  
25 have to allot and abide by, so as Commissioners speak

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1 and as panelists speak, we ask you to remember that  
2 we have to accomplish this in a certain period of  
3 time.

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

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

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

22 So with those bits of housekeeping  
23 aside, I want to now present the panelists in our  
24 first panel. Rachel Natelson is the director of  
25 legal services for the Service Women's Action

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1 Network, also known as SWAN. Our second panelist is  
2 Retired U.S. Navy Commander Philip D. Cave, who is  
3 also defense counsel in the Law Office of Philip D.  
4 Cave. Our third panelist is Nancy Parrish, president  
5 of Protect Our Defenders. Our fourth panelist is  
6 Retired U.S. Army Major Bridget Wilson, who is also  
7 defense counsel with Rosenstein, Wilson & Dean.

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

12 (Whereupon, the panelists were sworn  
13 in.)

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

16 **II. PANEL I: PERSPECTIVE OF VICTIM AND ACCUSED**

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

25 We run a national help line. We engage

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1 directly with stakeholders whose individual  
2 experiences all too often point to larger patterns of  
3 injustice.

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

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

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

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

25 While victims may play only a limited

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

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

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

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

22 While these remedies are available to  
23 defense contractors and civilian employees of the  
24 Department of Defense, not to mention most other  
25 civilian employees, they may not be accessed by

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1 uniformed personnel, an injustice stemming from a  
2 degree of judicial deference prescribed neither by  
3 statute, nor by the Constitution.

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

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

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

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

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1 personnel.

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

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

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

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

23 While every base maintains an equal  
24 opportunity office to review complaints of  
25 discrimination or harassment, the office is not

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1 intended to serve as an advocate for victims, and  
2 generally has a greater responsibility to the  
3 military than to the complainant.

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

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

18 Since IGs may determine at the outset  
19 whether or not a complaint merits further attention,  
20 remarkably few full investigations occur. According  
21 to a recent GAO study, the IG fully investigated only  
22 29 percent of all reprisal complaints over the past  
23 five years, and substantiated only a fifth of those  
24 investigated.

25 This means that only six percent of all

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1 complainants during this time period ultimately  
2 obtain the findings necessary to petition the board  
3 for a remedy.

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

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

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

23 Reprisals meanwhile remain widespread  
24 among victims who file reports of sexual harassment  
25 and assault. Service members suffering the

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1 psychological wounds of military sexual trauma  
2 routinely contact SWAN for assistance in challenging  
3 improper administrative separations alleged in either  
4 misconduct or behavioral disorders.

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

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

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

25 If service members have a right to be

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1 free from sexual violence and discrimination, we can  
2 no longer deny them the remedies that go along with  
3 it.

4 CHAIRMAN CASTRO: Commander Cave, you  
5 may proceed.

6 COMMISSIONER GAZIANO: Mr. Chairman,  
7 just --

8 CHAIRMAN CASTRO: I'm sorry.

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

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

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

24 The two Marines accused were arrested,  
25 placed in the brig for pre-trial confinement, and

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1 were pending court-martial. They denied the rape.  
2 Their defense was to be consent. Consent, by the  
3 way, is the most frequent defense offered in court-  
4 martial cases.

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

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

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

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

25 When they were asked, "Why did you make

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1 this false complaint?" this is what they told the  
2 investigators: "We were sitting outside the barracks,  
3 smoking, when the two Marines," the two men walked  
4 out past them.

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

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

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

20 These two Marines were lucky because  
21 there was a witness. If that case happened today, in  
22 2011, and there were no witness, it's quite likely  
23 that they would still be in the brig, and they would  
24 have a 50-50 chance of being convicted at court-  
25 martial, and ultimately having to register as a sex

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1 offender for the crime of rape.

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

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

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

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

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

24 But keep in mind, the military justice  
25 system already had the perception that when you are

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1 accused, you are guilty, and that you are facing the  
2 full resources of the government against you, and in  
3 military sexual assault trials, that concern is  
4 heightened because of the politics.

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

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

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

25 The problem is that when the belief of

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1 the victim gets into the investigative process and  
2 the prosecution process, we end up, as I have again  
3 discussed at more length in my written remarks, this  
4 whole issue of confirmation bias.

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

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

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

17 COMMANDER CAVE: Exactly.

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

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

25 Males are the majority of the one half

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1 million veteran victims. The Department of Defense  
2 has failed to protect the rights of service members.  
3 In fact, it frequently treats victims unjustly and  
4 even overtly retaliates against them.

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

11 Is it working, folks?

12 (Whereupon, a video was played.)

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

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

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

24 THIRD FEMALE VOICE: They had my  
25 clothing where my zipper was broken and his

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1 fingerprints on my articles of clothing. They had  
2 his DNA on my comforter. They found his DNA inside  
3 my rape kit. He was still found not guilty of  
4 anything.

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

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

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

18 (Whereupon, the video clip ended.)

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

23 Sergeant Smith earned stellar  
24 performance reviews on several tours of duty,  
25 including Iraq. For 17 years under a number of

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1 commanders and on several bases, she endured what  
2 thousands of others endure every day: an environment  
3 of hate speech; military traditions of violent,  
4 gender-based, degrading behavior; and sexual assault.

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

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

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

20 For over 25 years, repeated scandals of  
21 sexual violence, cover up, and abuse of authority in  
22 the military have come to light. Military leadership  
23 has repeatedly investigated itself, committed to  
24 change the culture, released reports and touted  
25 supposedly new reforms, all to no avail.

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1 As important as fixing the culture is  
2 fundamentally reforming the broken military justice  
3 system. Every aspect is dysfunctional, from  
4 prevention and victim care to reporting,  
5 investigation, prosecution and adjudication.

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

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

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

24 Although a minority, commanders are also  
25 capable of bad behavior. Forty percent of women

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1 victims report that the perpetrator was of a higher  
2 rank, and 23 percent in their chain of command.

3 2011 brought unprecedented attention to  
4 this issue. In response to each wave of publicity,  
5 the Pentagon churned out mostly recycled or  
6 ineffective reforms, some of which place the burden  
7 on the victim.

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

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

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

24 Victims know they put their career at  
25 risk if they come forward, so 86 percent of them do

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1 not. Perpetrators know the likelihood is they will  
2 continue their career with little risk of being  
3 caught, much less punished.

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

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

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

20 We agree.

21 CHAIRMAN CASTRO: Thank you. Major  
22 Wilson.

23 MAJOR WILSON: Thank you. If we do not  
24 have military solutions to military problems, we will  
25 fail. For example, the mission of the United States

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1 Army is to fight and win America's wars, and  
2 everything that happens in that institution is within  
3 that framework.

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

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

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

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

24 And then the inevitable happens: you are  
25 not getting the results in trial that you would like

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1 to have if what you are looking for is convictions,  
2 because the cases you are sending there lack merit.

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

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

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

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

24 Now the pressure is to have more  
25 convictions, and trust me, they will have more

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1 convictions because that's what the military does.  
2 You give it a mission, it gets it done, regardless of  
3 how that works.

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

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

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

22 In fact at the time of Tailhook, we had  
23 all the tools that we needed in the all-encompassing  
24 military justice system, that has incredibly broad  
25 power to prosecute crimes in a system that has the

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1       incredible ability to carry out investigations, all  
2       the tools we need to deal with sexual assault.

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

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

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

25              At the end of the day, these accused are

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1 entitled to due process and the solution to military  
2 sexual assault is not simply to remove due process,  
3 it is also to take a look at those solutions that are  
4 not simply floating through the criminal courts,  
5 because if that's the only solution, if that's what  
6 we are telling people is the solution, that is what  
7 we will get without the concurrent changes in  
8 culture, the changes in opportunity, the changes in  
9 how the military handles this and having women in its  
10 ranks.

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

17 Right now, we are rejecting the  
18 practical. If I suggest that we take a serious look  
19 at binge drinking, I will be accused of trying to  
20 blame the victim. I'm not trying to blame the  
21 victim. I'm trying to recognize the fact that a  
22 significant percentage of these assaults occur among  
23 the lowest enlisted ranks, the likes of the college  
24 campus syndrome, and that if we start to address  
25 binge drinking among the victims, alleged victims,

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1 and also the alleged perpetrators of these crimes,  
2 maybe we can keep someone from being raped and some  
3 young man from ruining his life.

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

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

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

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

23 CHAIRMAN CASTRO: Now open it up for  
24 questions from Commissioners. Actually Major, I'll  
25 ask you a question. So I want to understand what you

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1 testified to us this morning. You indicated that  
2 military problems need military solutions, and yet  
3 you went on to tell us how the military justice  
4 system is producing results that, in your estimation,  
5 may not be just.

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

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

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

19 And we have the capacity to do that. I  
20 genuinely believe that. You know, the civilians are  
21 lovely people, but when you look at what the  
22 legislative process did with Article 120, the rape  
23 statute that had to be revised last year because in  
24 essence it had a patently unconstitutional provision  
25 in it on shifting burdens for a consent, sometimes

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1 they just don't get it right because they are not  
2 paying attention to the people in that institution.

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

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

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

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

24 MAJOR WILSON: I think we have to have  
25 good cases. These are courts of law. They are not

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1 therapy sessions. I mean, the reality is that the  
2 desire for vengeance and vindication on the part of a  
3 victim, and our ability to convict someone, are not  
4 the same thing, not to mention the fact that perhaps  
5 it got rejected by the D.A. because it wasn't  
6 provable because it didn't happen that way.

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

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

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

22 CHAIRMAN CASTRO: I'll let some of the  
23 other Commissioners ask questions. Commissioner  
24 Gaziano? Commissioner Kladney after that,  
25 Commissioner Achtenberg.

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1                   COMMISSIONER GAZIANO:    Thank you all.  
2                   This is a very complex problem and I am going to try  
3                   to just, in my limited time, focus on one aspect of  
4                   it.  But let me just state at the outset that in my  
5                   sort of crash course to try to learn as much as I can  
6                   before this hearing, I am convinced that the military  
7                   justice system can be improved, and there have been  
8                   some efforts, to me, that make sense, to move in that  
9                   direction.

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

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

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1 and there are a lot of important reasons for that.

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

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

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

21 It seems to me, by the way, that -- I  
22 don't know if it's a good thing that it cuts both  
23 ways. But it clearly can cut both ways. I'm not --  
24 again, I am -- my bias is I don't think that's an  
25 argument against eliminating command influence, but

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1 it might be. So I'll throw that out to all the  
2 panel. Feel free to jump in, any one of you.

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

8 Regarding the facts, I mean the  
9 Department of Defense' own data reports that between  
10 2010 and 2011, commander actions on the grounds of  
11 sexual assault decreased 23 percent.

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

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

22 The fear and the destruction of the  
23 victim's character. They become investigated. They  
24 are put in psych wards, given psychotropic drugs,  
25 released for purposes other than the fact that they

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1 were raped or assaulted.

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

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

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

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

25 I don't -- no one is here being pro-

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1 rape, let's put it that way. Command influence.  
2 Command influence is a proper thing. It's unlawful  
3 command influence we all dislike.

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

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

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

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

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1 problem.

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

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

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

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

23 That's the issue with command influence.

24 UNNAMED PARTICIPANT: How does he put the  
25 thumb?

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1           COMMANDER CAVE: Sure, it's done in many  
2 ways, some of them direct and some of them subtle.  
3 For example, we have cases, reported cases in the  
4 appellate cases, where commanders have told witnesses  
5 they will not cooperate with the defense. They will  
6 not talk to the defense. They cannot assist the  
7 defense as a character witness, and if they do, they  
8 will be punished for something.

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

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

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

24           So, and then you have the more general  
25 but less subtle, the General Amos issue. And from a

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1 commander's perspective, you would think you would  
2 not want to do that.

3 In fact, if I recollect correctly, in  
4 some of his statements he said he knew he was doing  
5 the wrong thing but he was going to do it anyway, and  
6 what he ended up doing was affecting, I think it was,  
7 20 or 21 cases.

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

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

22 That's the way I would approach that.

23 MS. NATELSON: May I add one thing? I  
24 definitely agree this is a problem that goes both  
25 ways. These are bad charging decisions so it's a

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1 problem for the defendant and it's also a problem for  
2 the victim, and I think it's interesting that you  
3 brought up Weiss, because in, you know, among our  
4 closest allies, Great Britain, Canada, Australia, all  
5 of their high courts have actually moved away from a  
6 command-driven system of case disposition towards a  
7 more independent model, out of concern for the rights  
8 of the accused.

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

23           CHAIRMAN CASTRO: Thank you all very  
24 much. The Chair is going to recognize, in the  
25 following order, Commissioner Kladney, Commissioner

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1 Achtenberg, and I understand Commissioner Yaki is on  
2 the phone and he has asked to ask a question. So  
3 Commissioner Kladney, please proceed and let me know  
4 if anyone else wants to ask a question.

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

9 COMMANDER CAVE: Yes sir.

10 COMMISSIONER KLADNEY: Have you seen  
11 that happen?

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

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

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

24 At that point in time, the convening  
25 authority may make a clemency decision. That

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1 clemency decision could be to reduce the sentence, or  
2 in the right case, set aside some or all of the  
3 findings of guilty.

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

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

14 That ends once he or --

15 COMMISSIONER KLADNEY: the Judge?

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

20 If it's a member's case, the Judge has  
21 no influence on it. However, there is a -- there is  
22 a provision within the rules, sometimes followed,  
23 where the Judge, in a member's case, or actually in  
24 his own case, can make a recommendation to the  
25 convening authority as to potential clemency.

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1                   Now the idea is he is not challenging  
2 the sentence he gave himself, or she gave, but he or  
3 she, the Judge is saying look, go take a look at this  
4 and --

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

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

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

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

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

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

24                  COMMANDER CAVE: I apologize if I did,  
25 but I meant to establish that the research indicates

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1 a range, quite frankly, all over the place, and it  
2 depends on who you talk to.

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

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

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

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

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1                   COMMANDER CAVE: You lost me at the  
2 record, sir.

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

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

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

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

24                   So I think we are in agreement, the  
25 numbers --

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1                   COMMISSIONER KLADNEY:    I think that's  
2 why you have a trier of fact.

3                   COMMANDER CAVE:    Say that again sir?

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

6                   COMMANDER CAVE:    That's true.  Yes.

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

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

19                   Have you ever thought of approaching the  
20 military and asking them if you all could get  
21 together and appoint say a non-partisan panel to  
22 audit those cases, to see exactly why they went to  
23 Article 15 or why they went to a field Article 15 or  
24 just other administrative duties, or how those  
25 sentences were -- came about?

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1           Because I mean, because I didn't get  
2           that anywhere in any of the information I was given.

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

7           The bottom line, though, I mean, in  
8           terms of the numbers between 2010 and 2011, you know,  
9           there were 1,025 actions were taken by commanders on  
10          the ground of sexual assault, and in 2011 there were  
11          791, a decrease of 23 percent.

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

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

16          COMMISSIONER KLADNEY: I mean that is --

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

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

20          MS. PARRISH: Right.

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

23          MS. PARRISH: Well, I would say though  
24          that you know, only eight percent of cases were  
25          'quote unquote' convictions, but of those

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1 convictions, so many are often for lesser charges.  
2 You know, rape --

3 COMMISSIONER KLADNEY: Eight percent of  
4 the 500 courts-martial?

5 MS. PARRISH: That -- in -- between 2010  
6 and 2011, the number of initiated court-martial --  
7 well, total court-martials were, are eight percent,  
8 and so the numbers, compared to civilians, are so  
9 low, and of those eight percent, many of them are  
10 often lesser charges.

11 I mean, you know, if you take lieutenant  
12 -- Marine Lieutenant Klay for example, who know, was  
13 -- allegedly was raped by two -- by a Marine and  
14 friend, you know, one of the perpetrators was of the  
15 191, the eight percent listed in the 2011 report that  
16 was convicted, and that three star general reduced  
17 the perpetrator's 45-day sentence, which ended up  
18 being for only adultery and indecent language, to  
19 seven days.

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

25 Now, that's the message and that's why

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1 we are here today, because unpunished sexual assault  
2 in the military is an epidemic, and Secretary Panetta  
3 accepts that notion.

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

6 COMMISSIONER KLADNEY: And so do you  
7 believe an audit would go a long way?

8 MS. PARRISH: I believe an audit would  
9 be a wonderful thing.

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

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

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1 impossibility.

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

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

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

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

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

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1 assault.

2 COMMISSIONER KLADNEY: Well, does the --

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

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

17 And to the extent that, as acknowledged  
18 by the Secretary of Defense, there has developed in  
19 the United States military an epidemic of sexual  
20 harassment and exploitation, that alters profoundly  
21 the ability of particularly women, although not  
22 exclusively, to take advantage of the enormous  
23 benefits that the military confers on a striving  
24 population, an aspiring population, that's a big  
25 problem.

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1           And I am less concerned about the legal  
2           particulars than I am concerned about the aggregate  
3           impact of this phenomenon. So, given that that's my  
4           area of concern, I'd like to ask Ms. Natelson and Ms.  
5           Parrish to express their own views about how this  
6           problem, which everyone acknowledges is a problem,  
7           even Mr. Cave, even Major Wilson --

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

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

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

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

25           MS. NATELSON:    Well, I mean I think you

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

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

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

22 These -- in addition to finding that the  
23 criminal justice system fails them, our clients are,  
24 you know, they are trapped, they can't leave their  
25 job and they have no access to any kind of remedies

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1 or compensation for the injuries that they have  
2 suffered.

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

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

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

21 MS. NATELSON: Right, and I do think  
22 that those remedies, in addition to offering  
23 compensation to individual victims, it's those  
24 remedies that hold those institutions accountable, so  
25 it's those remedies that have the greater potential

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1 to make this problem go away by, you know, by putting  
2 it in the military's financial interest to, you know,  
3 to improve the setting for women, and assuming that  
4 happens then, you know, there's less harm done to  
5 women and it's less likely that they will experience  
6 you know, incidents that will destabilize them and  
7 diminish their economic prospects when they get out  
8 of the military.

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

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

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

25 Sergeant Smith was forcibly carried into

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1 a bar and thrown on top of the counter and forced to  
2 endure a naming ceremony as it's called, which loudly  
3 sings songs of the most graphic descriptions of being  
4 mutilated and sexually violated, these are traditions  
5 embedded in the military and you know, the military  
6 has shown itself effective to address this system in  
7 the past.

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

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

19 They were held accountable, and until  
20 the military faces the traditions of gender bias and  
21 discrimination in the military and holds seniors  
22 accountable, then the problem of this culture of  
23 punishing the victim, of blaming the victim, of  
24 discrimination against women because she is one,  
25 won't end.

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1           And so you know, it's both -- and the  
2 system, I would just say, quickly, that the broken  
3 justice system, where inexperience is rampant, many  
4 judges are -- in the Coast Guard, it's collateral  
5 duty, they are not trained properly on MRE 412 or  
6 513, victims' privacy with the rape shield rule,  
7 there are so many problems in the system and  
8 dysfunction and inexperience and turnover, and  
9 influence by the command, that the Congress must  
10 address modernizing the military uniform code of  
11 justice. They wrote it. They need to fix it.

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

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

18           CHAIRMAN CASTRO:   Loud and clear sir.

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

22           When I worked, when I was the chief of  
23 staff for Nancy Pelosi many years ago, one of the  
24 things that I encountered were complaints made from  
25 discharged women veterans on the unequal treatment

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1 that they had received in discharges and benefits,  
2 and then when we probed further, it became evident  
3 that a lot of this was predicated on rather traumatic  
4 sexual experiences that they had when they were in  
5 the service.

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

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

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1 to end segregation.

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

12 So my question goes along the lines of  
13 Commissioner Achtenberg, but focuses on one aspect of  
14 it, which is punishment. From reading various  
15 panelists' statements, from reading what victims have  
16 written to us in heartrending detail over the past  
17 two weeks as word of this hearing came out, the issue  
18 of discretion and either lack of, or a wide variety  
19 of punishment available are at the discretion of the  
20 military in these sorts of situations, seems to me  
21 one of the common themes, and I just wanted the  
22 panelists to expand on whether there needs to be  
23 something along the lines of what has happened in  
24 civilian courts, which is much more -- heavier  
25 emphasis on the kinds of punishments available and

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1 mandated by statute or by code, including the  
2 addition -- the recent additions in the last 10, 20  
3 years or so, of sexual offender databases of people  
4 who commit these crimes being forced to report as  
5 registered sex offenders, and whether these kinds of  
6 civilian-type punishments would have a salutary  
7 impact on these sorts of offenses when they occur in  
8 the context of the defense department.

9 CHAIRMAN CASTRO: Whoever would like to  
10 answer that?

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

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

25 That's why I keep returning to the civil

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1 justice system, because that's where victims have  
2 more agency. You actually, you know, if a victim  
3 decides to bring a civil claim, they own that claim.  
4 Nobody can tell you we are not going to do this, you  
5 are not allowed to bring this claim.

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

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

22 And as I have said before, judges, you  
23 know, it's collateral duty in the Coast Guard and in  
24 the Navy, you know, sometimes they only have had one  
25 or two tours and they have previously served in non-

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1 military justice roles prior to taking the bench.

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

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

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

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1 lease and get them out of the lease.

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

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

8 CHAIRMAN CASTRO: The Chair recognizes  
9 Vice Chair Thernstrom.

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

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

24 When you join the military, you sign up  
25 for training to kill. How is it possible to

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1 encourage that aggression, needed aggression, on the  
2 part of military members, and to simultaneously  
3 suppress sexual aggression?

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

9 MAJOR WILSON: I really don't know. You  
10 know, sexual assault in the military didn't appear  
11 last year or in this decade. I raised my hand in  
12 1977. It was there in 1977. It was there in 1987.

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

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

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

23 But I think it's important that we  
24 understand that this is the one institution in our  
25 society that has the 24/7, 365-day-a-year control

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1 over their people in a way that will allow them to  
2 make those functional changes.

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

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

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

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

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

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

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1 institution.

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

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

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

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

22 Commissioner Achtenberg, women and men  
23 do join the military for a lot of different reasons.  
24 She is absolutely right. People leave poor  
25 backgrounds. I have met many, many military personnel

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1 who have gotten out of bad circumstances through --  
2 she is absolutely correct.

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

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

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

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

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1 military.

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

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

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

21           So I think, you know, there are other  
22 countries where men and women are able to serve  
23 together without this being a problem, and that -- as  
24 Mr. Cave says, I think it would be an enormous shame  
25 to cut off those economic opportunities, those very

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1 real economic opportunities, to women who want to  
2 serve in the military for various reasons.

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

6 VICE CHAIR THERNSTROM: I just wanted  
7 one sentence.

8 CHAIRMAN CASTRO: Okay, go ahead.

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

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

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

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

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1 broader with the Feres Doctrine?

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

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

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

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

21 MAJOR WILSON: I do do civil tort  
22 litigation, and as a private practitioner, sure, line  
23 them up. If you want to give FTCA, Federal Tort  
24 Claims Act authority for service members to sue, I'll  
25 happily take on those cases.

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1           However, the tradeoff is not that there  
2           is no remedy, and I think that's false. It may be a  
3           poor remedy, or, well, not a well-administered  
4           remedy, but the tradeoff for *Feres* is that we offer  
5           service members the 365-day-a-year, 24/7 ability to  
6           have military disability and veterans' disability  
7           related to their injuries.

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

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

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

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

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1 going to start immediately once the panelists are  
2 seated.

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

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

8 **III. PANEL II: ACADEMIC SCHOLAR PANEL**

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

15 COMMISSIONER YAKI: Mr. Chair can you  
16 hear us?

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

20 COMMISSIONER YAKI: We momentarily just  
21 dropped there.

22 CHAIRMAN CASTRO: Okay, you're there.  
23 We got you. Our first panelist is Dwight H. Sullivan  
24 with the George Washington University School of Law.  
25 Our second panelist is Elizabeth Hillman with the

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1 University of California, Hastings School of Law.

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

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

10 (Whereupon, the panelists were sworn  
11 in.)

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

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

21 Oliver Wendell Holmes of course famously  
22 said that the life of the law has not been logic,  
23 it's been experience. And experience teaches us that  
24 there are certain dangers when attempting to reform  
25 the laws governing sex offenses in the United States

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1 military, and I'd like this morning to concentrate on  
2 some of those dangers.

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

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

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1 the 2006 legislation had an unintended effect.

2 Another way is that the legislation  
3 eliminated a theory of liability for rape of a child.  
4 So one way to prove force of rape of a child before  
5 2006, was parental compulsion, which was recognized  
6 as a form of constructive force.

7 The 2006 legislation did away with that,  
8 and as a result there was a naval case, *Valentin*, in  
9 which a rape conviction was set aside because the  
10 2006 statute did not incorporate that parental  
11 compulsion theory.

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

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

24 So if the objective of the 2006  
25 legislation was to hold more military sex offenders

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1 liable for their actions, a very noble and worthwhile  
2 goal, the legislation was actually counterproductive.

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

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

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

21 That change took effect on June 28th.  
22 Also, I mentioned the problems with the 2006  
23 legislation, well, Congress went back in 2011 and  
24 amended the statute. Those amendments took effect on  
25 June 28th, 2012, and the implementing regulations for

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1 those changes still haven't even been executed yet.

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

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

12 Also, President Obama signed the  
13 National Defense Authorization Act for fiscal year  
14 2013 on the 2nd of January this year. Once again,  
15 substantial changes to the way the military handles  
16 these cases, including setting up special victim  
17 units to investigate, prosecute and provide victim  
18 assistance in these types of cases.

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

23 We shouldn't pre-judge the results of  
24 those changes. It calls for substantial study, and  
25 interestingly, the same legislation, the 2013 bill,

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1 also set up two different commissions to study the  
2 problem of sexual assault in the military, and the  
3 effect of the changes that went into effect on June  
4 28th of 2012.

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

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

23 And we have seen this actually play out.  
24 In fact, there was a Stars and Stripes article on  
25 January 9th, earlier this week, that said that last

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1 year there were 15 cases where civilian authorities  
2 declined to prosecute sex offenses against U.S.  
3 military members where the military then prosecuted  
4 them.

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

8 And it sometimes goes the other way.  
9 For example in 2005, the Marine Corps declined to  
10 prosecute Captain Douglas Dowson for an alleged sex  
11 offense against a Marine Lieutenant.

12 The City of San Diego, or San Diego  
13 state officials stepped in and prosecuted him and won  
14 a conviction in that case.

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

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1 discretion authority.

2 And I only have a few moments left, so  
3 I'll just mention the fourth concern is with the  
4 politicization of the military sex assault issue that  
5 has led to another problem that might be called over-  
6 prosecution, where we have cases that go to Article  
7 32 investigations, the Article 32 IO says there is  
8 not a basis for prosecution, and yet the convening  
9 authority refers the case anyway.

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

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

18 CHAIRMAN CASTRO: Ms. Hillman.

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

25 Sexual assault in the military is

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1 critical for civil rights in the United States. The  
2 United States Armed Forces have been essential in the  
3 epic struggle for equality in our nation's history,  
4 and the histories of many other nations.

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

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

25 Each of these groups, essential to the

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1 effectiveness of the U.S. Armed Forces, would benefit  
2 from improvement and reform in this area of law.

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

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

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

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

21 The United Kingdom, which was already  
22 mentioned today, for example, has a director of  
23 service prosecutions. His name is Bruce Holder. He  
24 is a civil servant. He has been in that job since  
25 2009. His deputy is a Brigadier General.

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1           This is a direction that the United  
2 Kingdom has been heading since 1996. It has -- it  
3 took gradual steps in this direction. It did not  
4 happen all at once.

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

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

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

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

22           Colonel Sullivan, an attorney and  
23 scholar and officer for whom I have the deepest  
24 respect, disagrees, and believes we need to let this  
25 most recent slate of changes take effect before we

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1 remake the system once again.

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

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

18 I also note that I am a legal historian  
19 and a comparative scholar of military law. I am also  
20 a veteran, and I remember as a young Lieutenant, when  
21 I was in Colorado Springs during the aftermath of the  
22 1991 Tailhook Scandal and the training that unfolded  
23 as a result of that, the consequences, intended and  
24 otherwise, that followed from those events.

25 I also was on the faculty of the Air

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1 Force Academy when we decided on the course of action  
2 to one of the many scandals of sexual assault that  
3 have -- have disrupted and compromised the missions  
4 of our national service academies.

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

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

16 It would not disturb the innovative  
17 practices that the Judge Advocate Generals of the  
18 services have described in their submissions. These  
19 include extensive training of military leaders on the  
20 psychology, sociology and consequences of sexual  
21 assault, the creation of a norm of intervention, of  
22 bystander programs, the attempt to ensure a seamless  
23 transition from on duty, active service, service  
24 provision, to services provided to veterans, and the  
25 establishment of expedited transfer processes for

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1 those who report sexual assault within their units.

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

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

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

20 The restricted reporting option for  
21 instance, available to service members who are  
22 victims of assault, deeply undercuts that very  
23 command authority over military discipline that  
24 command only prosecutorial authority is intended to  
25 protect.

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1           Now, let me just close by saying,  
2 allowing a civilian to make a decision to prosecute  
3 will permit commanding officers to focus on adapting  
4 military culture, to the extent possible, to prevent  
5 the full spectrum of wrongful, sexual, sexualized  
6 behavior. All of that behavior corrupts military  
7 discipline. Sexual harassment that is not criminal  
8 to sexual assault that is criminal -- it would remove  
9 that legal precision and questions of prosecution  
10 from command, allow commanders to speak more freely  
11 on these topics and to address the problem more  
12 holistically, conserve resources and perhaps fix this  
13 tenacious and destructive problem. Thank you.

14           CHAIRMAN CASTRO: Mr. Hansen.

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

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

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1 sacrifice that we ask of each of them.

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

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

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

23 Finally, the military -- recognition by  
24 the military that sexual assault cases can be  
25 particularly difficult to effectively prosecute, and

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1 to, as a result, add additional expertise, to hire  
2 civilian expertise, experts to train and assist  
3 military attorneys in the prosecution and defense of  
4 these cases, is I believe an important and  
5 significant development in that it is a recognition  
6 that any efforts to address this issue must not  
7 undermine the basic rule of law protections that are  
8 at the core of our military justice system.

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

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

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

24 None of the reforms that we have  
25 mentioned to date, in my opinion, are sufficiently

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1 designed to address this problem of under-detection  
2 as it relates to the chain of command.

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

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

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

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

20           Now there is often a cultural tendency  
21 within the military, and I should state that this is  
22 broader than just in sexual assault issues, my  
23 experience in the Abu Ghraib Investigations, and my  
24 experience over my time in the military, it is clear  
25 that oftentimes when there are command failings and

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1 leadership shortcomings that contribute to  
2 atmospheres that lead to crimes, and in the case of  
3 sexual assault crimes, when the military does address  
4 these, they often send confused and mixed signals  
5 about the failings of the chain of command.

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

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

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

23 When referring to that, the Commanding  
24 General of the Air Force training command simply  
25 said, "We think we needed a different set of skills."

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1           These comments and this response are not  
2 unique to Lackland or unique to the Air Force. There  
3 exists within the military a culture against fully  
4 investigating and clearly identifying the command  
5 failings which may have contributed to under-  
6 detection of these sexual assault crimes.

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

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

20           Since that time this doctrine has been  
21 codified in a number of international treaties and  
22 military codes throughout the world. As of yet, this  
23 doctrine has not been fully incorporated into U.S.  
24 domestic law within the Uniform Code of Military  
25 Justice.

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1                   Currently, Article 92 addresses  
2                   dereliction of duty and is the primary statutory  
3                   mechanism within the Code to hold commanders  
4                   criminally accountable for their command failings.

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

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

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

21                  I believe that we ought to borrow this  
22                  doctrine that exists under customary international  
23                  law, and incorporate it into Article 92, and  
24                  specifically set forth a clear standard that requires  
25                  commanders to do all that is reasonable and within

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1 their power and authority to investigate, prevent and  
2 suppress these sexual assault crimes within the  
3 ranks.

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

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

21 Finally I don't believe that the  
22 military can continue on one hand to claim the  
23 solution to this problem rests with the chain of  
24 command, while on the other hand failing to  
25 investigate commanders and appropriately hold them

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1 accountable, fully accountable, when their command  
2 failings contribute to these crimes. Thank you.

3 CHAIRMAN CASTRO: Dr. Lisak. Please  
4 proceed.

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

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

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

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

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1 assault.

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

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

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

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

24 I would like to focus now on a few of  
25 the most critical areas in which the military must

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1 improve its response to sexual assault. We are still  
2 fighting long-held misconceptions about who  
3 perpetrates non-stranger rapes.

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

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

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

22 If you have a basic understanding of how  
23 Jerry Sandusky worked, you have a basic understanding  
24 of these non-stranger rapists. Even though these  
25 serial rapists represent a very small percentage of

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1 the men in the military, they are responsible for a  
2 wildly disproportionate level of harm.

3 The vast majority of rapes, upwards of  
4 90 percent, are committed by these serial offenders.  
5 This has enormous implications for how we investigate  
6 and prosecute these cases.

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

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

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

24 Further, the men and women in the  
25 military's investigative agencies in the JAG Corps,

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1 must receive the specialized training that is  
2 required to competently handle non-stranger rape  
3 cases.

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

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

20           Some of this advanced training is  
21 already under way, but it must become more widespread  
22 and crucially, it must be sustained. Successful  
23 prosecution of a much higher proportion of sexual  
24 assault cases is also a crucial component of the  
25 military's long-term prevention efforts.

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1           The prosecution of these cases sends a  
2 strong message that firmly supports the military's  
3 prevention messages, and conversely, when rape cases  
4 are not aggressively pursued and prosecuted, those  
5 prevention messages ring hollow.

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

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

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

22           All four services have launched a  
23 variety of rape prevention programs. These programs  
24 can only be successful if they are continually  
25 evaluated and modified to increase their

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1 effectiveness, if they are sustained as a permanent  
2 part of military culture and crucially, if they  
3 address not only sexual assault but also the climate  
4 in which sexual assault flourishes.

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

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

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

23 The problem of sexual assault is big  
24 enough in the military and beyond the military, that  
25 it will take a long-term commitment to action on many

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1 fronts, only some of which I have identified here.

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

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

18 Now having said that, I have seen the  
19 movie, and I think my colleagues as well have seen  
20 The Invisible War, and heard the testimony of the  
21 victims in that film, and also the complaint that was  
22 filed by them, and the materials that we have  
23 received, including public comments, indicate that  
24 many of these individuals have been so victimized  
25 after reporting, there's been such horrific

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1 retaliation, that it boggles my mind to think that  
2 someone would voluntarily make a false accusation,  
3 knowing that they could be subject to this horrific  
4 conduct in terms of retaliation.

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

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

18 DR. LISAK: So, well, first on false  
19 accusations. You know, I think we have to  
20 acknowledge that is an emotional response to this  
21 issue. Part of it stems from the fact that it is  
22 truly a horrific thought, that you could be falsely  
23 accused of something, especially something like a sex  
24 crime. It's a devastating thing, and that's  
25 absolutely true.

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1           But simultaneously, we also know that  
2 these happen very, very rarely, and one of the  
3 reasons surely is what you just said, that to lodge  
4 it, a formal complaint of a sex crime -- you know,  
5 you get investigated, you get asked a lot of  
6 questions. This is an enormous sort of series of  
7 events that you put in motion, and so the idea that  
8 people would just kind of, for a lark or for minor  
9 motivations, do this... it's really, what it is, is  
10 there's a mythology about false allegations and it's  
11 been around for decades, and I and other people, we  
12 are trying very hard to get the discussion focused on  
13 research, because this is not something we have to  
14 guess about. We have some pretty good research on it,  
15 and like I said, it's clear that this is a very small  
16 percentage of cases, and I wish we could dispense  
17 with that part of it, because it really doesn't get  
18 us anywhere.

19           On the issue of under-detection, I think  
20 that's crucial, and if I understand the sort of the  
21 issue, and just -- it speaks to all these cases,  
22 where we from time to time uncover these events where  
23 individuals, perpetrators have, you know, enormous  
24 numbers of victims, and the *Sandusky* case is a great  
25 example of that.

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1           And that's why, since we know that the  
2 majority of these individuals are serial offenders,  
3 that the moment where a report comes in, regardless  
4 of how difficult the case might appear to be, and you  
5 know, the victim may have been intoxicated, she may  
6 have only a partial recall of what happened; there  
7 are all kinds of complexities and you may look at  
8 this case and say I don't know if we are going to be  
9 able to proceed. We are going to investigate. We  
10 are going to try. But we don't know.

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

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

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1 prosecution.

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

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

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

24 And so part of the -- in my opinion part  
25 of that role is to recognize that within the

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1 military, that is the responsibility and a role that  
2 we give commanders. We have to give them both, in my  
3 opinion, the authority and also the incentive to do  
4 the basic things we expect commanders to do.

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

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

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

21 Because what we have heard this morning  
22 was, you know, what sounded like some -- and albeit  
23 in the past, some horrific kinds of offenses proven  
24 and committed with some very different kinds of  
25 sentencing punishments.

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1 I mean you can convict, as Dr. Lisak  
2 says, a lot of people. But if you are going to do  
3 seven days in the brig, that's not a bad deal.

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

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

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

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

25 COMMISSIONER KLADNEY: I'm not talking

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1 about an injustice. I'm talking about standards. I'm  
2 talking about, is there a book, like sentencing  
3 guidelines, like something like -- I mean, I am  
4 really --

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

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

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

25 I mean I know if I am speeding down the

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1 street, I am going to pay two dollars a mile, three  
2 dollars a mile, something like that. That's my  
3 question.

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

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

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

25 DR. LISAK: I've gotten asked that

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1 specific question by the leadership of all four  
2 services, and unfortunately the answer now and  
3 probably for some time to come is we have no  
4 algorithm that will tell us, if you apply this to all  
5 -- everybody who is applying to the military, we'll  
6 be able to weed out --

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

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

16           COMMISSIONER KLADNEY: Just asking.

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

22           COMMISSIONER GAZIANO: Well Commissioner  
23 --

24           CHAIRMAN CASTRO: Kirsanow, have you  
25 joined the call?

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1                   COMMISSIONER   GAZIANO:       Commissioner  
2   Kirsanow was ejected from the call.   I hope he's  
3   still on.  At one point I received a --

4                   COMMISSIONER KIRSANOW:  I'm back on.

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

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

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

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

23                   And Professor Hillman, you have done  
24  more I think than anyone to convince me it might be  
25  worth the try.  I think you know my bias.  But I want

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1 to ask you to explore that. And maybe if we are not  
2 done, I can -- if you are willing to talk to me about  
3 this a little bit more.

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

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

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

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

22 So that's a big risk. But assuming we  
23 can do that, let's, let's -- maybe you and Professor  
24 Sullivan would like to comment on how likely you  
25 think it is that Congress would get that right and

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1 not render the entire justice system  
2 unconstitutional, when they try to change this.

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

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

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

24 But --

25 (Laughter)

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

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

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

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1 who make decisions about prosecuting.

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

8 COMMISSIONER GAZIANO: Although that may  
9 follow.

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

24 So I don't know that I think that simply  
25 removing that simple decision to prosecute really

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1 from this would --

2 COMMISSIONER GAZIANO: Thanks for that  
3 clarification.

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

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

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

21 The -- and Professor Hillman mentioned  
22 Australia and I was going to go to Australia as well,  
23 because in -- the Australian system was changed in a  
24 way to increase civilianization, and in 2009, the  
25 high court of Australia threw out their military

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1 disciplinary system in a case called *Lane v.*  
2 *Morrison*, and that led to enormous disruption in the  
3 Australian military.

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

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

20 COMMISSIONER GAZIANO: Or a submarine  
21 under sea.

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

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1 prosecute them in Iraq.

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

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

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

25 Those are the stakes we are involved in.

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

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

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

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

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

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1 that effect.

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

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

13 MS. HILLMAN: Yes.

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

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

20 COMMISSIONER ACHTENBERG: The  
21 recommendations that are made there for change in  
22 command, essentially, civilianization of the  
23 prosecution for sexual assault and the like, would  
24 you talk a little bit about the extent to which you  
25 agree with some of the recommendations contained in

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1 H.R. 3435, and some of the extent to which you  
2 disagree, and then I am going to ask a more narrowly  
3 tailored explanation of the same from Mr. Sullivan.

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

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

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

25 It's partly a problem on the ground and

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1 the practical consequences of how things have worked  
2 out, but it's really also a sense of disruption and  
3 whether or not they can do their job at all.

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

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

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

24 So it -- the STOP Act isn't well  
25 tailored to solve the problem. In fact the problem

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1 is adequately addressed under the status quo. It's  
2 just not widely recognized that there is that dual  
3 prosecution authority for offenses that occur in the  
4 United States.

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

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

23 COMMISSIONER ACHTENBERG: But it's the  
24 concurrent jurisdiction issue that you think  
25 adequately addresses the issue, am I understanding

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1 that correctly?

2 MR. SULLIVAN: That's correct. What we  
3 see -- and I realize that Professor Hillman's --  
4 Professor Hillman comes at this in a different way,  
5 and I think, you know, probably frankly in a more  
6 persuasive way than what some other people argue  
7 about command control and command authority to refer  
8 these charges.

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

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

17 And again, we see on occasion, like in  
18 the case from 2005 at San Diego that I mentioned,  
19 military, or civilian prosecutors coming in and  
20 prosecuting a service member for a sexual assault  
21 against another service member, and again, they can  
22 do this for any off-base offenses. Many military  
23 bases have concurrent federal and state jurisdiction.  
24 A state prosecutor could step in in that instance and  
25 charge. If it's a military base that is an

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1 exclusively federal enclave, then there could be a  
2 prosecution in U.S. District Court if for nothing  
3 else, that under the Assimilative Crimes Act, which  
4 brings in state law and allows a prosecution for a  
5 state law offense that occurs in an area of exclusive  
6 federal jurisdiction.

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

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

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

21 COMMISSIONER YAKI: Thank you very much  
22 Mr. Chair. I am still so troubled by what I hear but  
23 I am more troubled by what I have seen in the past  
24 and what I have read, the emails and letters that we  
25 have received from ordinary women service members.

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1           And part of me just thinks that -- and I  
2           want to get the comment of the panelists -- is that I  
3           understand all the need for esprit de corps, unit  
4           cohesion.

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

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

20          And I am just wondering, from your  
21          slightly more elevated standpoint in academia,  
22          although you, as I point out to all of you, have  
23          served, and I thank you for that, isn't it time to do  
24          something that doesn't go around the margins but  
25          makes some wholesale, fundamental, top-to-bottom

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1 change in the way these issues are addressed so that  
2 we are not confronted with this in another 5 or 10  
3 years or another congressional panel, or another,  
4 another special commission or another task force,  
5 isn't going over this again and again and again,  
6 because we seem to be asking the same questions every  
7 5 to 10 years and we keep on hearing that oh, these  
8 changes are being made, those changes are being made,  
9 but they don't really seem to be addressing the core  
10 question, which is violence against -- sexual  
11 violence in the military and how we better protect  
12 our own men and women in the service, who as one of  
13 my other colleagues pointed out, go in there for any  
14 number of good, good, true, noble and career-oriented  
15 reasons, only to come out of it, if they are a victim  
16 of this process, not in any way, shape or form that  
17 dignifies their service to our country?

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

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1 ways.

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

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

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

18 CHAIRMAN CASTRO: Commissioner Kirsanow,  
19 please proceed.

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

25 But I heard at the tail end someone make

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1 some reference to deployments overseas and I'm  
2 wondering if anyone on the panel can address whether  
3 or not there is any comparative data related to the  
4 incidence of sexual assault in deployments overseas  
5 versus domestically, that is state-side personnel,  
6 whether or not the culture of a particular country to  
7 which somebody may be -- in which somebody may be  
8 stationed may have any effect, whether or not combat  
9 deployments have different incidence rates versus  
10 non-combat deployments to say Germany or something  
11 like that, and to what extent the ability of the  
12 military justice system is affected in its ability to  
13 address these issues by virtue of the incidents  
14 occurring overseas versus domestically.

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

22 The practical reality is somewhat  
23 different. There are oftentimes where -- very  
24 complex cases, which these cases can sometimes end up  
25 to be, they are perceived to be such a drain on the

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1 command's resources and time and efforts while they  
2 are otherwise engaged in military operations, that in  
3 the Army in particular, there's a significant  
4 practice of returning many of these cases back to the  
5 United States and dealing with them back in the  
6 United States.

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

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

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

25 I think that environment places

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1 significant stresses on the ability to investigate  
2 these cases in a way that we heard and will hear  
3 later today that the military believes are necessary  
4 to fully develop the facts of these kinds of cases.

5 CHAIRMAN CASTRO: The Chair recognizes  
6 Commissioner Kladney.

7 COMMISSIONER KLADNEY: Thank you. I  
8 would like to address a couple of questions. First  
9 of all --

10 MR. SULLIVAN: Colonel Sullivan.

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

19 MR. SULLIVAN: There is a Memorandum of  
20 Understanding between the military, the Department of  
21 Defense and the DOJ, which governs on-base offenses,  
22 and in certain instances, there is a reporting  
23 requirement and also earlier, when the issue of sex  
24 offense registration arose, in fact these military  
25 offenses are entered in the national databases, so

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1 there -- and sex offense registration is a  
2 requirement that arises from conviction by court-  
3 martial of a sex assault offense, but even before  
4 then, at the investigative stage, it is -- it is  
5 common to have reporting of the investigation in such  
6 a way that that civilian sector has visibility over  
7 it as well.

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

17 MR. SULLIVAN: Well, of course the -- as  
18 part of the newer revisions, that individual has the  
19 option to remove himself or herself from the command.  
20 So the -- there have been a number of comments about  
21 how the system has failed people that report events,  
22 and in the past, our -- the military's dealing with  
23 victims has been quite poor, and of course the  
24 Yokohama incident from a couple of years comes to  
25 mind.

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1           It has been quite poor, but that is an  
2           issue that the services themselves have been  
3           emphasizing and again, as I mentioned, on the 20th of  
4           January, the Air Force is setting up a new system  
5           where any victim of a sexual assault offense, if they  
6           are a member of the U.S. military, or an adult family  
7           member of a U.S. military member, they can get a --  
8           they can get a lawyer assigned to them individually.

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

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

19                    And then the second question I have is,  
20           in your written materials, you wrote, "The more  
21           sexual harassment occurs, the more sexual assault  
22           occurs," and so my question is, is when you have  
23           sexual cadences and all those types of things, does  
24           the military still allow that? You work with them.  
25           Do they still -- does that still go on?

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1 DR. LISAK: Well, certainly and I'm not  
2 an expert on --

3 COMMISSIONER KLADNEY: You said  
4 certainly?

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

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

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

20 And I just think, you know, we have to  
21 do two things simultaneously: one is, treat this with  
22 real urgency; and at the same time understand that  
23 this is not going to happen overnight. It's not  
24 going to happen in the next few years. It's just a  
25 way bigger problem than that.

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1 In terms of the communication question,  
2 I personally -- and I have been involved in a number  
3 of court-martials, consult and so forth, and you  
4 know, I talked to the commander afterwards and said  
5 you know, are people on base going to hear about  
6 this, because these are enormous prevention  
7 opportunities.

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

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

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

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1 that?

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

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

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

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

23 MR. SULLIVAN: It would not, although  
24 let me mention again, that instance in which the  
25 result of the case was use of vulgar language and

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1 adultery, it wasn't the commander that reduced it.  
2 That Marine Corps Captain went to a court-martial and  
3 was acquitted of rape. The only thing he was  
4 convicted of at the court-martial was adultery and  
5 use of vulgar language.

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

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

16 MR. SULLIVAN: It depends upon what that  
17 something less is, because there are many offenses  
18 other than rape where reporting is required. There  
19 is a Department of Defense Directive that says when  
20 someone is released from confinement, if they are  
21 convicted of one of these offenses, and there is an  
22 enormous list of offenses, the confining official  
23 shall notify the law enforcement authority that  
24 maintains the registry in both the state and locality  
25 to which the individual is going.

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1           So it's a very formalized process. It  
2 works. We see it work all the time. And so it's not  
3 just rape. There's any -- basically any offense that  
4 has the word indecent in it, results in automatic  
5 notification, you know, mandatory notification to  
6 both state and local registration officials.

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

9           MR. SULLIVAN: Adultery would not.

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

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

20          MR. SULLIVAN: I'll mention something  
21 very briefly here as well, and that is, I have  
22 mentioned the National Defense Authorization Act for  
23 fiscal year 2013 several times. It also has certain  
24 mandates to the Secretary of Defense, among which is  
25 he has to come up with a plan to reduce sexual

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1 harassment in the United States military, I believe  
2 it's within 180 days.

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

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

11 CHAIRMAN CASTRO: What is SECDEF?

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

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

20 You know, are the service branches  
21 laboratories where there evolve different approaches?  
22 To some extent we have had that. I think that some  
23 standardization in this realm would go a long way  
24 towards promoting public confidence and restoring  
25 faith that we are moving in the right direction.

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1 MR. HANSEN: I think standardization as  
2 well, and one of the things that has been discussed  
3 from a number of panelists, is this question of  
4 minimum sentencing or sentencing guidelines. To me  
5 that might be an avenue where some standardization  
6 across the services might be appropriate and provide  
7 more clear guidance and sufficient notice.

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

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

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

25 COMMISSIONER GAZIANO: I have a follow

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1 up.

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

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

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

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

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

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

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1 real concern.

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

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

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

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

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

22 As someone who really knows the  
23 appointments clause and separation of powers, I'd say  
24 it's 70 percent likely unconstitutional, but I'd have  
25 to read it carefully. It's gotten a two-level

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1 appointment clause problem which Congress is  
2 increasingly attracted to. The first level looks  
3 kind of constitutional. The second level probably is  
4 unconstitutional, and that's where it operates. But  
5 you have to determine -- but it's even worse than  
6 being clearly unconstitutional, and that's what they  
7 do, because it seems to me that this would create a  
8 system that would flail around for five years and  
9 then John Roberts tries to make something  
10 constitutional that isn't. So maybe, maybe you know,  
11 you would get this upheld. But you know, I think  
12 even this, he would strain to do so, but there are  
13 certain things that they just can't make  
14 constitutional, so maybe if I am predicting what the  
15 Supreme Court will do with this unconstitutional law,  
16 maybe there's a 30 percent chance -- I don't know --  
17 that it will be struck down, or 40 or 50.

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

24           COMMISSIONER YAKI: Are they on the  
25 panel, or just give the court a couple more years'

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1 time. [i-n-a-u-d-i-b-l-e]

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

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

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

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

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

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

24 (Laughter)

25 CHAIRMAN CASTRO: Well thank you -

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1 COMMISSIONER GAZIANO: That's assuming  
2 you're in the majority.

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

10 **IV: LUNCH BREAK**

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

13

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19

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

21 (1:19 p.m.)

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

24 COMMISSIONER YAKI: We're here; go  
25 ahead.

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1 CHAIRMAN CASTRO: Great, thank you.  
2 We'll reconvene our briefing on sexual assault in the  
3 military. This is our third and final panel.

4 **V. PANEL III: PERSPECTIVE OF VICTIM AND ACCUSED**

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

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

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

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

24 Our third panelist is Lieutenant General  
25 Richard C. Harding, Judge Advocate General with the

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1 U.S. Department of the Air Force.

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

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

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

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

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

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

25 (Whereupon, the panelists were sworn

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1 in.)

2 CHAIRMAN CASTRO: Put your time back on.  
3 So go ahead. Thank you.

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

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

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

23 I am no stranger to leading culture  
24 change, to include helping destigmatize mental health  
25 care for our combat veterans, more fully integrating

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1 women into the armed forces with the 2012  
2 Department's Women in Se Report, and managing the  
3 Department's repeal of Don't Ask Don't Tell over this  
4 last year.

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

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

14 It is unacceptable that an estimated  
15 19,000 service members experienced some form of  
16 unwanted sexual contact in 2010. Of those we  
17 estimate nearly 11,000 were men, and nearly 9,000  
18 were women.

19 The same year, we received just over  
20 2600 reports from victim service members  
21 demonstrating the significant under-reporting of this  
22 crime. This under-reporting prevents victims from  
23 receiving the care they need and limits our ability  
24 to investigate these crimes, and hold offenders  
25 appropriately accountable.

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1           As experts have shared with you today,  
2 sexual assault is a complex problem and there is no  
3 single, silver bullet solution. Reducing and  
4 eliminating sexual assault requires a multi-prong  
5 approach, one that leverages a wide range of  
6 initiatives and engages every service member.

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

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

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

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1 unsafe behavior.

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

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

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

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

22 In prevention, our goal is to  
23 standardize and deliver effective methods and  
24 programs with the cultural imperatives of mutual  
25 respect and trust, professional values, team

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1 commitment, are reinforced in training and other  
2 places and in other ways to create an environment  
3 where sexual assault is not tolerated.

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

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

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

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

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1 until we eliminate sexual assault from our ranks.

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

6 CHAIRMAN CASTRO: Thank you General.  
7 Dr. Galbreath please proceed.

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

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

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

22 We all want this crime stopped now, but  
23 there is no single solution to this problem. The  
24 societal, interpersonal and individual factors within  
25 America that combine to produce and perpetuate sexual

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1 assault operate far outside the influence of any  
2 military or civilian courtroom.

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

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

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

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

23 While there is no acceptable amount of  
24 sexual assault in the military, we believe the  
25 Department's policies and programs contributed at

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1 least in part to this decrease. Additional  
2 prevention work should hopefully drive the rate of  
3 sexual assault down over time.

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

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

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

23 Third, military research finds that a  
24 history of any kind of assault doubles the risk of  
25 post-traumatic stress symptoms when the victim is

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1 exposed to combat.

2 While we would all like this change to  
3 occur quickly, there are challenges that we must  
4 overcome and these are not unique to the military.  
5 First, no one expects to become the victim of a  
6 sexual assault. This is particularly true for 18- to  
7 25-year-olds who are most at risk.

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

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

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

24 This approach has been incorporated into  
25 training by every service as well as other programs

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1 on obtaining consent, having healthy relationships  
2 and using alcohol responsibly.

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

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

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

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

23           CHAIRMAN CASTRO: General Harding.

24           LIEUTENANT GENERAL HARDING: Yes. Mr.  
25 Chairman and members of the Commission, thank you for

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1 this opportunity today to speak to you about sexual  
2 assault prevention and response within the Air Force.

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

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

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

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

22 I would like to talk next about our  
23 worldwide wing commander meeting and inspection that  
24 we recently concluded. Our core values, as I  
25 mentioned, demand that we maintain and sustain an

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1 environment of mutual respect.

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

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

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

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

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

24 His message was clear: we must redouble  
25 our efforts to combat sexual assault, and we need to

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1 start by ensuring that our work environments reflect  
2 respect for all airmen.

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

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

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

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

23 This new initiative we call the Special  
24 Victims Counsel Program. It is unique among federal  
25 agencies in providing this level and kind of support

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1 to combat sexual assault.

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

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

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

20 Victim care is extremely important in  
21 the United States Air Force. Our special victims  
22 counsel will operate independently of the  
23 prosecution's chain of command, establish attorney-  
24 client relationships, provide zealous advocacy on  
25 their clients' behalf, and thereby protect victims'

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1 privacy and help preclude victims feeling re-  
2 victimized by having to endure, alone, a complex,  
3 exhausting and often confusing criminal justice  
4 process.

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

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

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

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

23 In closing, the men and women who raise  
24 their right hand with pride and volunteer to serve  
25 this great nation became more than just airmen. They

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1 became part of an Air Force family.

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

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

8 CHAIRMAN CASTRO: Thank you General.  
9 Admiral DeRenzi, please proceed.

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

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

23 But when an incident does occur, the  
24 Navy is dedicated to ensuring that victims receive  
25 the full scope and spectrum of timely support, to

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1 include medical treatment, counseling and legal  
2 assistance.

3 The Navy is hiring 66 additional  
4 provincial sexual assault response coordinators, and  
5 66 full time professional and credentialed victim  
6 advocates.

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

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

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

20 In 2007, to improve the overall quality  
21 of court-martial litigation, we established the  
22 military justice litigation career track. JAG Corps  
23 officers apply for designation as military justice  
24 specialists or experts, based on their litigation  
25 experience and aptitude.

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1           Those selected for designation lead  
2 trial and defense departments and provide experience  
3 in the courtroom, personally conducting, overseeing  
4 or adjudicating sexual assault and other complex  
5 cases.

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

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

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

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

25           They have conducted outreach training to

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1 improve efforts between prosecutors, investigators  
2 and other stakeholders in military justice, and they  
3 have served as trial counsel or assistant trial  
4 counsel in several complex cases, to include sexual  
5 assault cases.

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

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

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

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

24 For our part, the JAG Corps is actively  
25 engaged in sexual assault awareness training,

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1 prevention efforts, victim response and  
2 accountability initiatives. Again, thank you for  
3 this opportunity and I look forward to your  
4 questions.

5 CHAIRMAN CASTRO: Thank you, Admiral.  
6 General Chipman.

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

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

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

22 Leadership is the key to change, but  
23 accountability in our ranks remains critical in  
24 creating a command climate in which victims feel safe  
25 and confident in reporting misconduct.

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1           The military justice system constitutes  
2 a modern, criminal justice system. All of the people  
3 in the system are trained practitioners, who pursue  
4 both justice and the maintenance of good order and  
5 discipline in the force.

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

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

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

25           The close coordination between these

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1 two, the special victim prosecutors or SVPs and the  
2 sexual assault investigators, has improved the  
3 investigation, prosecution and victim care aspects of  
4 sexual assault allegations.

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

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

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

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

23 In my view, prosecution and conviction  
24 rates do not alone effectively measure the criminal  
25 justice system's ability to address sexual assault.

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1 If we pursue challenging cases because we believe  
2 that serves both victim interests and community  
3 interests, some defendants will be acquitted.

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

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

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

18           It would be naive to suggest that we can  
19 prosecute our way out of this problem.  
20 Accountability remains critical, but only one aspect  
21 of the Army's comprehensive program to combat sexual  
22 assault and its precursor behavior, sexual  
23 harassment, the Army has invested unprecedented  
24 resources, over \$50 million in each of the past two  
25 years, into prevention and response programs designed

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1 to achieve culture change, the I Am Strong training,  
2 emphasizing Army values and teaching bystander  
3 intervention techniques, saturates soldier training  
4 at every level, beginning with our newest recruits.

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

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

13 CHAIRMAN CASTRO: Thank you General.  
14 General Ary, please proceed.

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

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

25 This plan is a blueprint for

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1 institutional and cultural change within our Corps,  
2 and sets us on a course to improve our ability to  
3 prevent and respond to sexual assaults.

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

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

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

20           The Commandant also traveled around the  
21 world speaking to Marine leaders. In these heritage  
22 briefs, he defined who we are and who we are not.  
23 His goal with these speeches was to change behavior,  
24 with a particular focus on preventing sexual assaults  
25 from occurring.

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1           Regarding our response to sexual assault  
2 when it occurs, we respond to both the victim and the  
3 alleged crime. In terms of victim response, the  
4 Marine Corps is pursuing several victim care  
5 initiatives.

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

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

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

20           This reorganization affected over 49  
21 different commands and over 800 legal billets. This  
22 new organization established four regional legal  
23 service support sections designed to ensure that we  
24 place the right counsel, both trial and defense, with  
25 the appropriate expertise, supervision and staff

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1 support on the right case, regardless of location.

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

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

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

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

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

24 In essence, we now have a smaller group  
25 of senior and experienced officers making disposition

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1 decisions for all sexual offense allegations and any  
2 related collateral misconduct.

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

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

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

17 The Chair recognizes Commissioner  
18 Kladney.

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

22 DR. GALBREATH: Yes sir.

23 COMMISSIONER KLADNEY: And so what do  
24 you think the strengths and the weaknesses are of the  
25 military investigative service when it comes to these

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1 types of offenses?

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

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

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

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

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

25 COMMISSIONER KLADNEY: Okay, so I mean I

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1 was kind of surprised, because in one of the slides,  
2 you stated that victims of sexual assault were many  
3 times more likely to develop PTSD and these types of  
4 problems if they reported the sexual assault. Is  
5 that correct?

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

7 COMMISSIONER KLADNEY: Okay. I must  
8 have misunderstood that.

9 DR. GALBREATH: No.

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

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

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

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

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1 and their relationships and at work.

2 COMMISSIONER KLADNEY: And how are the  
3 service people treated if that occurs?

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

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

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

22 COMMISSIONER GAZIANO: Thank you and I  
23 am -- you have heard me say I was humbled by the  
24 complexity of the issues in the earlier panel, but  
25 I'm more humbled by your all's presence, to have so

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1 many senior flag officers testifying before us, and  
2 also waiting throughout the morning's panels.

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

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

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

21 To the extent I have been able to get up  
22 to speed on some of the issues, I think that the  
23 biggest improvements to me is the kind of career  
24 tracking that I think you all have the lead on in the  
25 Navy, and as those of us who are -- I was a very

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1 brief litigator -- but I know enough about the  
2 prosecutors and other litigators, that you learn to  
3 be a great lawyer by watching the great counsel,  
4 prosecutor or criminal defense, then working side by  
5 side with them, then having them available to counsel  
6 you, and just for the C-SPAN viewers who may not know  
7 why you instituted this, and I'd appreciate it if you  
8 could elaborate and explain, as I have been able to  
9 understand it, there were incentives for those who  
10 entered the JAG Corps to be you know, assigned  
11 prosecutors, defense counsel, but there were higher  
12 incentives maybe then to be stationed elsewhere, and  
13 there wasn't quite the rewards of a career track that  
14 end with, by the way, flag officer for the senior  
15 judge, and now you have created that.

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

20 But that seems to me to be maybe the  
21 most important reform of the past few years. But  
22 it's young, and if my vision of what it takes to  
23 learn at a great lawyer's side, you were a great  
24 lawyer I understand. We may have even been on the  
25 opposite side of an important case at one point.

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1           But how is -- what's the early results?  
2           And the other branches, how much do you think that  
3           will help, has helped, can help and what kind of  
4           patience do we need before we see the effectiveness  
5           of that solution?

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

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

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

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

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

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

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

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

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

24 At that point we tend to structure our  
25 organization as we have grown a cadre of these people

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1 so that they will be department heads for both trial  
2 counsel and defense counsel, and they are trained not  
3 only in litigating but in mentoring the young counsel  
4 and bringing them along, because as you said, it's  
5 not just by doing. It's by watching, it's by  
6 learning and it's done case by case, accused by  
7 accused, victim by victim, argument by argument.

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

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

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

21 That's critically important too.

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

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1 that community.

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

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

11 CHAIRMAN CASTRO: Commissioner  
12 Achtenberg.

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

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

24 Money is being spent, creativity is  
25 being expended. Chances are being taken. People are

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1 focusing enormous energy and attention on what you  
2 admitted in your own testimony is a terrible problem.

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

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

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

19 And so there are some things in place  
20 here that allow us to -- we recognize we have to  
21 continually look at ourselves and what I have  
22 actually been sharing with my colleagues in the  
23 services and so forth is that we have to assess our  
24 programs with an eye towards taking the best  
25 practices and making them common.

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1           And so that's the approach that we are  
2 taking in a number of different areas as we apply the  
3 assessment line of effort to really everything else  
4 we do.

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

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

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

21           So this assessment went on over several  
22 months. We have just collaboratively reviewed the  
23 results of that assessment with all the services, and  
24 I expect that Secretary of Defense Panetta will  
25 publish the results of these -- results of this

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1 assessment here in the, I think the days or the weeks  
2 ahead.

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

10 For example, if there's a dramatic  
11 representation of sexual relationships, it resonates  
12 very strongly with young adults, called sex signals.  
13 Well, this is perfect for initial military training  
14 in the -- but it probably doesn't play that well with  
15 the senior command staff person.

16 So that training is adapted to that  
17 audience. So we have also seen where PowerPoint  
18 training is -- we have thrown that away. Commanders  
19 and senior non-commissioned officers, they thrive on  
20 training where they are put in scenarios, scenario-  
21 based training, ethical decision games is one model  
22 that the Marine Corps uses.

23 The Navy calls it Take the Helm  
24 training. I sat through three hours of Take the Helm  
25 training with the Navy. It was given by a team of

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1 experts and it's a mobile training team. They take  
2 that training to every ship and element within the  
3 Navy, export that training and it was really driven  
4 by a number of scenarios: what are you going to do  
5 now, Captain of the ship, when this happens on your  
6 shift, and then talking through the serious issues  
7 and so forth associated with that.

8 So we have got some really aggressive  
9 assessment programs in place for the training side.  
10 Shifting gears a bit, well, to answer your question  
11 how do then codify that?

12 Well, we standardize it in policy. And  
13 so the core learning objectives that we have  
14 identified that work best, and best practices for all  
15 the services, will be codified in a policy that our  
16 Secretary of Defense is going to promulgate across  
17 the Department.

18 And that will be the standardized core  
19 learning objectives and core competencies for all  
20 pre-commander training.

21 COMMISSIONER ACHTENBERG: So you are  
22 going to be measuring and evaluating each and every  
23 one of the initiatives that these leaders have just  
24 delineated and you are going to be making an  
25 assessment of which are more successful than which

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1 and then putting those forward as a uniform standard  
2 of some kind? Right, I might --

3 MAJOR GENERAL PATTON: No, no, that's  
4 the idea. I really expanded on the training piece  
5 but we are doing the same in other programs as well.  
6 General Harding mentioned the special victims  
7 counsel. That is a program, a pilot program the Air  
8 Force has taken on that we want to take a very close  
9 look at across the department, learn from it, take  
10 the emerging lessons learned, and somewhere down the  
11 road look to see how that can apply to the rest of  
12 the department.

13 The special victims capability is  
14 another area. We have convened a study group. We  
15 are looking at all the things that the services are  
16 currently doing. You heard a lot of them.

17 But we want to standardize that in a  
18 department-wide policy, again capturing the best  
19 elements of that special victims capability, and then  
20 codify that in a policy that will then drive and  
21 standardize over time the way in which we do special  
22 victims capability.

23 COMMISSIONER ACHTENBERG: When Professor  
24 Sullivan urged us not to recommend more changes  
25 because we haven't even figured out yet whether the

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1 changes that are currently under way are going to  
2 take hold and the Congress invariably will make a  
3 mistake, if they, you know, if they try to do too  
4 much, too soon, and all of that admonition that we  
5 take really seriously, it seems to me a very good way  
6 of warding off future meddling in your business,  
7 would be to make a very rigorous assessment of  
8 everything that is being done, and you know, having  
9 it see the light of day, so that the public has  
10 confidence that you really are going to assess what  
11 are the best practices and make those the common  
12 practice as you have just identified. That's just a  
13 piece of advice. I think it would go a long way.

14 My second question, before I lose the  
15 patience of the Chair --

16 CHAIRMAN CASTRO: You will never lose  
17 his patience.

18 COMMISSIONER ACHTENBERG: Thank you so  
19 much, Mr. Chairman. My second question is: has the  
20 Secretary given any thought to assessing cases that  
21 perhaps were mishandled in the past, and if any of  
22 you have seen any of the public comment that we have  
23 received on this topic, my layperson's estimate is  
24 that cases that might have been mishandled in the  
25 past, might number in the many thousands if not tens

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1 of thousands of cases.

2 Have you given any thought to some kind  
3 of systematic address of past injustices, some  
4 opportunity for women and men who might have not been  
5 treated as well by their services as we hope victims  
6 and perpetrators for that matter will be treated  
7 going forward on the basis of all these new programs,  
8 how we might compensate them if at all for the past  
9 failures to address this as a serious issue?

10 MAJOR GENERAL PATTON: I think the best  
11 way I can answer that is by referencing an ongoing  
12 review that the Department of Defense Inspector  
13 General is conducting. This -- I don't have oversight  
14 of that particular agency; however, they keep me  
15 informed on their reviews and their efforts, and I  
16 know they are finishing up a 2012 review of cases  
17 that were handled by the military criminal  
18 investigative offices across all the department.

19 They looked specifically at closed cases  
20 and with those cases that were closed, how did they -  
21 - did they comply with the standards for an  
22 investigation, did they comply with the thoroughness,  
23 the timeliness, and those sorts of things.

24 And I don't have the data on this  
25 because I haven't seen the final report that they are

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1 working on now, but they have returned some number of  
2 cases back to the service military criminal  
3 investigative offices, the CID, the OSI, the NCIS in  
4 the three services, for the purpose of continuing the  
5 investigation.

6 They have also made some -- I know they  
7 are doing some analysis as to whether those  
8 particular investigations were conducted in the  
9 standards of thoroughness, accuracy, timeliness and  
10 so forth... by those investigative officers.

11 So that's one element and I would say  
12 that the Secretary of Defense always has his  
13 Inspector General to do things like that, to review,  
14 in this case, criminal investigative matters.

15 That the IG has already announced that  
16 their next year's -- this current year, 2013 --  
17 oversight review topic will be compliance across the  
18 department with the sex offender registry program,  
19 and have detailed a number of things that they are  
20 going to be looking at there.

21 So there's two years in a row where the  
22 violent crimes division of the Department of Defense  
23 IG is focused on these matters, for the purpose of  
24 giving this I think a very critical look at the  
25 direction of the Secretary.

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1                   COMMISSIONER ACHTENBERG:    But there's no  
2                   specific opportunity for example of women or men who  
3                   think that they were treated unjustly in the past to  
4                   seek some kind of recompense or --

5                   MAJOR GENERAL PATTON:    I know one thing  
6                   that was addressed by a provision in the National  
7                   Defense Authorization Act that was just signed into  
8                   law in 2013, is the direction to reinforce the fact  
9                   that the Board for Correction of Military Records  
10                  that exists in each of the departments, is -- to  
11                  emphasize that and inform our, both our active and  
12                  our retired populations, that they are aware of that  
13                  as a form of -- formal form of redress for wrongdoing  
14                  or that sort of thing.

15                  And that was reinforced in recent law  
16                  and my job will be to, with the services, to really  
17                  put that into place and do that broader information  
18                  campaign that ensures people are aware of that.  So -  
19                  -

20                  COMMISSIONER ACHTENBERG:    And will that  
21                  extend to according people veterans' benefits if they  
22                  were otherwise qualified, or is it only correcting  
23                  the nature of their discharge?

24                  MAJOR GENERAL PATTON:    I believe it  
25                  generally deals with the correcting of the active

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1 military component of their service.

2 COMMISSIONER ACHTENBERG: I will defer  
3 my third question until later, if there is a later.

4 CHAIRMAN CASTRO: Well actually, I am  
5 going to ask a question and then we are going to go  
6 to Commissioner Yaki, then to Commissioner Kladney,  
7 then, who will have the last question.

8 There was a reference I think by you,  
9 Admiral DeRenzi, and I heard it during one of the  
10 earlier panels, to the issue of child sexual abuse.  
11 To what extent are military families being victimized  
12 by predators or by rapists who happen to be service  
13 members, outside of the family? Is that an issue  
14 that is going on here? Because we haven't talked  
15 about it. We've really been focused on service member  
16 to service member.

17 But since child abuse has come up twice  
18 during this hearing, I wanted to find out a little  
19 more about what that is.

20 VICE ADMIRAL DeRENZI: Part of the  
21 reason you see them linked together is because we  
22 have tried to get expertise available to us within  
23 our own organization in the cases that are the most  
24 difficult for us to adjudicate and to litigate, and  
25 child sexual assault and adult sexual assault are

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1 both like that.

2           They have some similarities, some  
3 differences. We are working very hard to have our  
4 litigators understand the behavior that is exhibited  
5 by victims of sexual trauma, adult or child. You see  
6 some of those things happening intra-family, you  
7 know, and the myth out there is you can't rape within  
8 your own family. That, as you know, isn't true.

9           So we are working to ensure that we have  
10 got the skills and that we develop the skills to deal  
11 with both kinds of cases because there are  
12 similarities, but there are critical differences too.

13           As a matter of fact, as you alluded to,  
14 we have looked specifically to find folks with that  
15 kind of experience. One of them is in the room  
16 today, is in our headquarters, and one of the most  
17 valuable things that she does for us is ensure that  
18 we are looking for the cutting edge training so that  
19 we don't just funnel it to one side of the aisle or  
20 the other.

21           And we have benefitted tremendously from  
22 her experience, as have the investigators, and in the  
23 future, the victim advocates that we are bringing  
24 online. I believe we will learn a lot from each  
25 other and we need to continue to do that, and

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1 leverage that experience in the special victim  
2 capability, which would include victims of child  
3 abuse as well.

4 CHAIRMAN CASTRO: Thank you Admiral.  
5 Commissioner Yaki, you have the floor.

6 COMMISSIONER YAKI: Thank you Mr. Chair.  
7 Just briefly, I have one question but I just wanted  
8 to do a quick followup statement on what Commissioner  
9 Achtenberg was talking about.

10 And I think it's really important, the  
11 point that she made. There are -- we receive any  
12 number of different emails and letters from people  
13 who basically were discharged from the service under  
14 less than favorable circumstances because of how  
15 their claims were handled or how they reacted to  
16 their claims being mishandled within the services.

17 And I think it's really important, and  
18 as someone who has worked with, with veterans on  
19 correcting their military records and upgrading their  
20 discharges in the past, I know how exceedingly  
21 difficult it is to do it from their perspective, and  
22 it's a very uphill fight.

23 So I would just urge that in whatever  
24 the Inspector General is doing, that if there's a  
25 way to work on reviewing records of people who

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1 believe that they were wrongfully treated and  
2 wrongfully discharged, I mean those have enormous  
3 consequences to their future ability to receive  
4 healthcare, veterans' benefits, what they disclose on  
5 a job form, and it may be for those people, where the  
6 system failed them because people like yourselves  
7 weren't in charge at the time and hadn't put in the  
8 proper procedures in place, we can't forget about  
9 those who paid a heavy price early on and are still  
10 paying it now.

11 The question I have though is, listening  
12 to all of you, all the different branches and seeing  
13 how many of you, and again, as all of our panelists,  
14 we thank you for your service to our country.

15 But I wonder if you can respond to one  
16 of the proposals brought forth by an earlier --  
17 someone in an earlier panel, which is it's great that  
18 you are all doing these efforts to combat sexual  
19 violence, sexual assault, sexual discrimination  
20 within your branches, but the fact that each of you  
21 is doing it in your own silo, how do you react to a  
22 proposal that would create an independent, unified  
23 branch of investigations or prosecutions for these  
24 types of cases across branch divisions, would address  
25 the issue of promotion and rank, because it would be

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1 an independent civil service career path, rather than  
2 an intra-military path, and create a service-wide  
3 specialty in terms of investigating, prosecuting,  
4 defending and sentencing of sexual assault in the  
5 military?

6 MAJOR GENERAL PATTON: Let me take a  
7 first swing at that, and just take it from a  
8 commander's perspective, and so if the notion is that  
9 the sexual assault cases would be removed from the  
10 chain of command and then provided to this  
11 independent agency, I would just like to make a  
12 comment on that aspect of that, and that is that we  
13 put a lot of responsibility on our commanders.

14 They are responsible for the health and  
15 welfare, accomplishing the mission, the readiness of  
16 their unit. And we also owe them the tools to do the  
17 job. One of those tools is training. Another one of  
18 those tools is the military justice system, a  
19 disciplinary system that allows them to not only put  
20 standards in place but then to enforce the standards  
21 by then applying disciplinary measures to people who  
22 would choose to not comply with the standards, not  
23 meet the standards, violate the standards of conduct  
24 and behavior.

25 And so it's important, in my view, to

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1 retain the commander as a central role in the justice  
2 system, and the Secretary of Defense recognized this  
3 earlier this year when he decided to elevate the  
4 disposition authority for the commander, and  
5 previously that disposition decision as to what  
6 direction a case would take in a sexual assault case,  
7 be it court-martial, be it administrative separation  
8 or so forth, that decision was moved from the O5 rank  
9 to the O6 rank which in the Navy is a captain and in  
10 the Army is an Air Force ranger or colonel.

11 And I served in command at both those  
12 levels and I can tell you, as an O6 commander, I've  
13 got 25 years in the Army versus 20 at that lower  
14 level. I had handled a significant number more cases  
15 including courts martial, and had much more  
16 experience serving and working with trial counsel.

17 And at the O6 level of command, that's  
18 really in the Army, the first level, when you have an  
19 assigned trial counsel at your side, and so again,  
20 mindful of all those elements, Secretary Panetta  
21 decided to elevate that very critical disposition  
22 decision and authority to the O6 level, but to retain  
23 that command disposition decision within the chain of  
24 command.

25 And I'll just close by saying, I mean,

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1 the -- with my commander hat on here, the commanders  
2 own this problem. Commanders are going to have to  
3 fix this problem, and we need to keep commanders  
4 involved in the problem, not less involved.

5 By removing any kind of decision making  
6 with regard to discipline away from the chain of  
7 command, we are not keeping commanders involved in  
8 the problem.

9 The energy in the program and all the  
10 things we just talked about here in our opening  
11 statements and some of our initial questions, that  
12 dissipates when you remove, you know, some of those  
13 key elements of the disciplinary system from the  
14 chain of command.

15 I defer to any of my colleagues here for  
16 other comments on that point.

17 LIEUTENANT GENERAL HARDING: I think --  
18 and thank you Commissioner Yaki for that question --  
19 I think any time you consider taking that valuable  
20 function that commanders perform today and holding  
21 members accountable in making those judgements, when  
22 you take that away from a commander, the second,  
23 third and fourth order of effects are ugly, and you  
24 ought to consider those effects before making such a  
25 recommendation.

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1           First I'd like to address, though, the  
2           idea of taking the investigative responsibilities.  
3           It's awfully important as an investigator that you  
4           understand the nature of the unit that you are  
5           investigating, the people involved, what they do,  
6           where they came from, how they were trained.

7           Growing up inside those services,  
8           wearing that uniform, walking the walk and talking  
9           the talk is awfully important, to understand how  
10          things might have occurred in a particular unit.

11          To find one sizes fits all for all  
12          services would be awfully difficult. Easy to say,  
13          difficult to create, in levels of expertise.

14          As far as pulling the authority from a  
15          commander to hold members accountable and make those  
16          disciplinary decisions, we fight and win the nation's  
17          war and we've got a really good track record doing  
18          that.

19          It's not by accident. It's because we  
20          bring four things to every fight: the best equipment;  
21          the best people; the best training, those are three  
22          legs of a four-legged table; the fourth leg is  
23          discipline.

24          And that ability to hold members  
25          accountable is important for command and control.

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1 This is the art of military science now. So if you  
2 start to pull at that thread, the second, third and  
3 fourth order of effects is awfully important, I think  
4 to all of us.

5 So I think it's important to the nation  
6 to consider the ramifications of looking to someone  
7 else to make those decisions. Thank you.

8 ADM. DeRENZI: If I might, sir, I'd like  
9 to address one, one piece of Commissioner Yaki's  
10 remarks, sir, that you referred to as independent  
11 silos, and I can see how it might appear that way.

12 We are different services. We are  
13 structured differently. Our service cultures are  
14 somewhat different. But believe you me, my peers on  
15 the panel here, we work well and cooperatively  
16 together. Our trial counsel and defense counsel  
17 assistance programs leverage each other's experience.  
18 Our judges train together.

19 We take the best practices that we each  
20 identify in our services, and try to figure out how  
21 best to apply them within the challenges that we  
22 face, and not necessarily uniquely, but perhaps  
23 differently.

24 So it may not appear that we are acting  
25 in a coordinated way, but I can assure you that we

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1 are, particularly when it comes to the challenges of  
2 complex litigation, and the prevention and response  
3 efforts.

4 They are all slightly different, but you  
5 will see that they are all in essential very much the  
6 same in their emphasis on prevention. Once they get  
7 to us, we owe -- we owe the soldiers, sailors, airmen  
8 and Marines a good, efficient, effective and fair  
9 military justice system.

10 Even though that's one of my primary  
11 statutory duties, I would like it if they didn't get  
12 to us and that our prevention efforts succeeded.

13 CHAIRMAN CASTRO: Commissioner Kladney,  
14 you have got the last question.

15 COMMISSIONER KLADNEY: Thank you Mr.  
16 Chairman, I actually have three.

17 CHAIRMAN CASTRO: I suspected you might.

18 COMMISSIONER KLADNEY: I would just like  
19 to tell General Ary that that I have a friend in the  
20 military and apparently you have an extended sexual  
21 assault training program, and they attended it and  
22 they thought it was wonderful. Just to let you know.

23 MAJOR GENERAL ARY: That's great.

24 COMMISSIONER KLADNEY: Since you've been  
25 sitting so quietly. I have asked this question

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1 before, earlier today, so I am sure you have heard  
2 it, especially the justice officers and the generals,  
3 is there any way to have guidelines for commanders,  
4 especially since command and control is so important,  
5 as to how to select a forum for discipline, you know,  
6 there's Article 15 or courts-martial or summary  
7 courts-martial or something like that, and some  
8 sentencing guidelines for these types of offenses, or  
9 is this just a near impossibility?

10 LIEUTENANT GENERAL CHIPMAN: If I could  
11 take first crack at that. I think we have guidelines  
12 already in the sense of this: each of our  
13 commissioned officers, each of our commanders is  
14 trained from their initial officer basic course their  
15 role in military justice, and at each level, as they  
16 assume increasing levels of command, they get  
17 additional training on the execution of their  
18 responsibilities.

19 As we have discussed already, at the  
20 battalion commander and the brigade commander levels,  
21 one in the Army at least has an assigned judge  
22 advocate to help assist in making those disposition  
23 decisions.

24 And so you are going to find, both by  
25 policy and our regulations where we have withheld all

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1 sexual assault-related contact to the battalion  
2 commander level initially, then for the sexual  
3 assault offense itself to brigade commander level,  
4 there is some disposition guidance already operative.

5 And as well, we are talking about judge  
6 advocates at the prosecution level, at the staff  
7 judge advocate level, colonels with 20 years'  
8 experience who are guiding commanders in the  
9 execution of their duties under the system.

10 So from that standpoint, there is  
11 disposition guidance out there. In terms of  
12 sentencing guidelines --

13 CHAIRMAN CASTRO: Speak up a little bit  
14 General, the mic is not picking you up there.

15 LIEUTENANT GENERAL CHIPMAN: In terms of  
16 sentencing guidelines, we think it's appropriate to  
17 consider those factors that underlie any sentencing  
18 system, any mature sentencing system, and we execute  
19 that appropriately with panels for juries, and with  
20 military judges who have served as prosecutors,  
21 defense counsel, administering the system, and then  
22 trained as judges at our common school.

23 COMMISSIONER KLADNEY: So basically you  
24 are saying that this is being carried out already and  
25 there's no need to write some of this now.

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1           LIEUTENANT GENERAL CHIPMAN:  If you are  
2 engaged in a serious criminal offense, you will  
3 receive the appropriate disposition decision and the  
4 appropriate sentence that is in fact unique to the  
5 factors, aggravating and mitigating, of your  
6 particular crime.

7           COMMISSIONER KLADNEY:  And have now, do  
8 you see more supervision over line commanders as to  
9 what gets brought up on charges and discipline for  
10 those commanders that don't bring things up on  
11 charges?  I mean, is that being developed, that type  
12 of supervision from the field level?

13           LIEUTENANT GENERAL CHIPMAN:  I think  
14 it's fair to say that there is in fact a great deal  
15 of interest in all levels of the command in how they  
16 are handling these kinds of issues.

17           So for example, you've got the  
18 disposition elevation initially to the captain or  
19 colonel level supported by a judge advocate, guided  
20 by a judge advocate in that decision.

21           But you've also got other oversight  
22 mechanisms.  You know, we have a civilian appellate  
23 court, the Court of Appeals for the Armed Forces is  
24 the ultimate supervisor.

25           We have got Article 37, which talks

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1 about unlawful command influence in the direction and  
2 control of our system. So there is in fact a level  
3 of interest and a level of ability to influence those  
4 decisions.

5 And if a commander is unhappy about how  
6 a subordinate would propose to handle a certain  
7 issue, that commander can pull it up to his or her  
8 level to dispose of that allegation.

9 COMMISSIONER KLADNEY: Thank you. My  
10 last question, the last question. When the service  
11 person files a restricted or unrestricted claim, do  
12 these documents hit their personnel file? In other  
13 words my concern is, is that -- well, I have lots of  
14 concerns.

15 But one concern is, is that it follows  
16 them from assignment to assignment. And the second  
17 thing is if you file an unrestricted claim and you  
18 decide to make a career in the service, you know, a  
19 lot of other people go from unit to unit to unit and  
20 there's, I guess it's a Navy term, scuttlebutt, that  
21 follows them.

22 And how is all that handled, I mean, to  
23 protect people, because if you don't do that, don't  
24 you discourage those kinds of claims?

25 DR. GALBREATH: Unrestricted report,

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1 first of all, the report itself is documented on a DD  
2 Form 2910, a reporting preference form, and the only  
3 person that gets a copy of that form is the sexual  
4 assault response coordinator that you spoke to and  
5 the victim, and it does not go into a personnel file,  
6 it does not follow someone throughout their career,  
7 whether you report an unrestricted report or you give  
8 a restricted report, either way.

9 We keep a copy of the DD Form 2910 for  
10 unrestricted cases in our defense sexual assault  
11 incident database.

12 COMMISSIONER KLADNEY: Is there any kind  
13 of discipline for people who perpetuate that? I mean  
14 it's very difficult, but if I am in a unit and I go  
15 to another unit and there's somebody there from when  
16 I filed an unrestricted claim and it gets around, and  
17 I can, I guess, get ostracized or --

18 DR. GALBREATH: Well, harassment on any  
19 account is taken very seriously and if the individual  
20 reports that they are being harassed by someone  
21 within the unit for something that occurred  
22 previously, they need to bring it to the attention of  
23 their commander, or to law enforcement, depending on  
24 the level of the harassment.

25 COMMISSIONER KLADNEY: And that's well

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1       communicated to the troops?

2               DR. GALBREATH:   I believe so.   We tell  
3       everyone that you come in and you experience that  
4       kind of recompense and we want to know about it.

5               COMMISSIONER KLADNEY:   Thank you.

6               MAJOR GENERAL PATTON:   If I could answer  
7       the question, recognizing the need for protections  
8       and privacy and confidentiality and victim  
9       preferences, one of the policies that we have put in  
10      place just in the last six months is called the  
11      expedited transfer policy.   It's the policy across  
12      the Department, Secretary of Defense-promulgated,  
13      that allows the victim to make a request for a  
14      transfer from the unit or from the installation and  
15      again, it's at the request of the victim.   There are  
16      some victims that's very important to them, other  
17      victims it may not be and they want to stay within  
18      that team that they have grown up in.

19              And it only applies to unrestricted  
20      reports and we track those very closely.   And to  
21      date, there have been about over 200 of those  
22      requests made.   I might add also that that request is  
23      made to a commander in the chain of command, and if  
24      the victim is not satisfied with the decision by the  
25      commander, they have the right to appeal to the first

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1 general officer in the chain of command.

2 And to date, in the over 200 requests  
3 for transfer, the data I have seen shows that all but  
4 one of those transfers have been approved, and that  
5 one case the victim was being separated from the  
6 service and being transferred wasn't necessary.

7 So we are watching that very closely.  
8 It's one of the data elements that we put into our  
9 incident database because I think that we want to --  
10 getting back to the question about assessment, we  
11 want to -- we are continually looking at ourselves to  
12 assess whether these programs are effective, are we  
13 providing the support to the victims that is intended  
14 by that policy.

15 So it's a six-month-old policy but we  
16 are looking at it very closely.

17 CHAIRMAN CASTRO: Thank you very much.  
18 In fairness and in the interests of bipartisanship I  
19 am granting Commissioner Gaziano the opportunity to  
20 ask a question.

21 [i-n-a-u-d-i-b-l-e]

22 COMMISSIONER GAZIANO: Thank you. I  
23 just wanted to return to a question from the first  
24 panel and maybe the other side of the ledger, which  
25 is that I certainly concur with what one of the

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1 witnesses said, that if it is your mission to get  
2 more convictions, by golly, you will get more  
3 convictions.

4 But maybe that's appropriate. And so  
5 let me ask you this sort of in some context, maybe  
6 you should do better than not only what you have been  
7 doing, but the civilian system -- in the civilian, as  
8 I understand from civilian prosecutors, if there's a  
9 -- two people have been drinking in a bar, a non-  
10 stranger situation, they leave together, then there's  
11 an allegation of rape, you know there's a lot of  
12 civilian prosecutors who will obviously evaluate the  
13 evidence, but need something a little bit more than  
14 the he-said-she-said before they think that they are  
15 willing to make a charging decision and seek proof  
16 beyond reasonable doubt.

17 You know one of the witnesses -- it may  
18 have been this panel but I'm not sure -- said you  
19 know we are not afraid to bring cases that will  
20 result in acquittals. That certainly makes sense.

21 But my -- but particularly to the --  
22 those representing the Judge Advocates General of the  
23 different services, do you think that there ought to  
24 be a different standard, charging standard, than  
25 maybe exists in the civilian system? Should the

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1 services, you know, maybe charge at a -- for a lot of  
2 unique reasons, try to bring a case and try to prove  
3 guilt at a level that would be slightly less evident,  
4 slightly less strong than in the civilian context?

5 Or do you think that the ideal is to  
6 make about the same charging decisions as a good,  
7 civilian prosecutor would?

8 LIEUTENANT GENERAL HARDING: I'll offer  
9 this up as I think an important part of considering  
10 the predicate of your question. We try a lot of  
11 cases that civilian prosecutors waive jurisdiction  
12 on. And when an offense occurs off base for example,  
13 the civilian prosecutor is often the first one to  
14 make a decision whether or not to prefer charges.

15 As a matter of course, the Air Force  
16 routinely requests waivers of jurisdiction, and we  
17 receive waivers of jurisdiction in many cases that  
18 they elect not to try.

19 We try many cases that are testimonial  
20 cases, on- versus-one piece of testimony. I think we  
21 have the right standard in making that determination.  
22 We ask commanders to take an oath before they prefer  
23 a charge, the charging instrument that we use, that  
24 simply asks them that, based on their personal  
25 knowledge or personal investigation of the case, did

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1 they believe, honestly believe that the charges are  
2 true to the best of their knowledge and belief.

3 That's the charging decision, and when  
4 those charges go forward to trial at a later date,  
5 then we use proof beyond a reasonable doubt, the very  
6 same standard that we use everywhere else in the  
7 nation, and it is reasonable that we will see  
8 acquittals and we do.

9 So I have a hard -- when you say the  
10 best example or model of what those -- how those  
11 decisions are made downtown, and put our model  
12 against that, we are every bit as good and in many  
13 cases better than that model.

14 COMMISSIONER GAZIANO: Better, we'll let  
15 other people decide. But it sounds to me, and I'd  
16 like the others to -- that what you are suggesting is  
17 you'll charge more cases, even if the proof beyond a  
18 reasonable doubt standard at the end is the same, you  
19 might charge more cases than a really good civilian  
20 prosecutor would.

21 Is that a fair assessment, and is that  
22 the current goal, that you are -- not that you are --  
23 maybe you will teach the civilian prosecutors  
24 something? Can you all help me with your thoughts?

25 MAJOR GENERAL ARY: I guess I might toss

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1 in a couple of comments sir. I think that from our  
2 perspective, we care about cases being well tried  
3 from both sides, all of us are responsible for both  
4 trial and defense.

5 We also don't have prosecutors running  
6 for reelection on a win-loss record. They are  
7 defined by their duties, and I think one of the  
8 challenges, when you look at a unanimous verdict  
9 downtown beyond a reasonable doubt, and a 12-member  
10 jury panel, in our world, if you have eight votes,  
11 two-thirds majority you can get a conviction beyond a  
12 reasonable doubt.

13 Now a lot of people think that that,  
14 when you have four voting to acquit, that's a hard  
15 thing to get around when you have beyond-reasonable-  
16 doubt standard.

17 It also helps to define why some people  
18 may not understand the sentence that comes out of a  
19 members' panel, because when four people have  
20 reasonable doubt and vote to acquit, they are still  
21 part of that group helping to define the sentence.

22 So there's a lot of factors in our  
23 system. There are also -- the appellate courts in  
24 our system have broad fact-finding review, because of  
25 those issues.

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1           So when you start looking at all of the  
2 different control inputs, certainly that's the thing  
3 that Professor Sullivan was talking about to your  
4 question, each one of these control inputs has  
5 ripples across our system, and it truly is a justice  
6 system, and I think that when we calculate these  
7 things in, and we think about the rights of the  
8 accused, the rights of the victim, the institutional  
9 need for good order and discipline so that we can be  
10 an effective fighting organization, we have to look  
11 at it in its entirety and consider it carefully,  
12 because the justice system is really something that -  
13 - the sanctity of that system, as our Commandant  
14 says, is a moral imperative for all of us.

15           LIEUTENANT GENERAL CHIPMAN:     And if I  
16 may add one perspective to that as well. Anecdotally  
17 and by our data we do know we try more cases of a  
18 given evidence level than our civilian jurisdictional  
19 counterparts. We can show you that case.

20           COMMISSIONER GAZIANO:     If you could  
21 supply that to me or to the Commission, that would be  
22 helpful.

23           LIEUTENANT GENERAL CHIPMAN:     But the  
24 reality is, that that's because in part, America's  
25 moms and dads send us their sons and daughters and

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1 hold us to a higher standard, and we believe strongly  
2 that they have a right to a victim-free, an  
3 environment free from sexual assault and all that it  
4 entails, and it's part of our unique fabric. It's  
5 part of that special, specialized society apart from  
6 America where we have that commitment to good order  
7 and discipline that requires us to make certain  
8 decisions that perhaps you would say in a resource-  
9 constrained environment, you wouldn't make.

10 VICE ADMIRAL DeRENZI: Can I just, sir  
11 if I may --

12 CHAIRMAN CASTRO: Yes. You have the  
13 last word.

14 VICE ADMIRAL DeRENZI: Neither the  
15 Secretary of the Navy nor the Chief of Naval  
16 Operations has told me that my mission is to get more  
17 convictions. My mission is to ensure a fair,  
18 effective and efficient military justice system.

19 And as my peers said, commanding  
20 officers are responsible for the safety, the welfare  
21 and the good order and discipline within their  
22 command. They have difficult leadership decisions to  
23 make and we provide them experienced judge advocates  
24 to advise them in making them, and they make those  
25 decisions case by case, day in and day out, on the

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1 specific facts and circumstances of each case, and  
2 they try to do what's right in each case, not what's  
3 easy, not what's expedient, and not what is a  
4 perception of what's expected of them.

5 CHAIRMAN CASTRO: I want to thank all  
6 the panelists. This concludes our briefing. It has  
7 been extremely informative to all of us, and we  
8 appreciate not only your service, but your  
9 participation today, and I know that there's veterans  
10 out in the back of the audience so we also want to  
11 acknowledge their service and their commitment and  
12 their involvement in today's process as members of  
13 the audience.

14 I also want to personally thank our  
15 Commission staff who put this together. I  
16 particularly want to highlight Vanessa Eisemann from  
17 our Office of the General Counsel, who did a  
18 spectacular job of putting together the panels in  
19 this event today. Thank you.

20 I also want to acknowledge Pamela  
21 Dunston and her staff, who are responsible for all  
22 the logistics of bringing us all together here today.  
23 Their efforts really have contributed to this  
24 spectacular event.

25 Lastly, I want to remind everyone that

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1 there is an opportunity to submit comments for the  
2 record. You can submit materials or public comments  
3 to us in one of two ways, either by mail at the U.S.  
4 Commission on Civil Rights, Office of the General  
5 Counsel, here at 1331 Pennsylvania Avenue, N.W.,  
6 Suite 1150, Washington, D.C. 20425, or you can send  
7 them via email to publiccomments@usccr.gov.

8 We look forward to preparing the report  
9 and sending it -- yes, that's right, you had a motion  
10 you wanted to make.

11 COMMISSIONER ACHTENBERG: I'm wondering  
12 if my colleagues would consider a request that we  
13 keep the record open for an additional 15 days, given  
14 the level of public interest in the topic.

15 CHAIRMAN CASTRO: So, rather than 30  
16 days we would have 45?

17 COMMISSIONER ACHTENBERG: Forty five  
18 days. Is that agreeable?

19 CHAIRMAN CASTRO: Do we agree to that by  
20 unanimous consent? So you actually have, members of  
21 the public, 45 days from today to submit your public  
22 comments and then we do look forward to preparing and  
23 sending our report with findings and recommendations  
24 on what we have learned here today, to the President  
25 and Congress.

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1                   Thank you.     It is now 2:45 and we  
2 adjourn this hearing.

3                   (Whereupon, at 2:45 p.m., the hearing was adjourned  
4                   for the day.)

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