

1 | RESPONSE SYSTEMS TO ADULT SEXUAL
2 | ASSAULT CRIMES PANEL

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6 | ROLE OF THE COMMANDER
7 | SUBCOMMITTEE MEETING

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10 |
11 | Wednesday,
12 | November 13, 2013

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17 |
18 | One Liberty Center
19 | 875 North Randolph Street, Suite 150
20 | Arlington, Virginia 22203

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22 |
| Alderson Court Reporting
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1 PANEL MEMBERS PRESENT:

2

3 HONORABLE BARBARA JONES

4 HONORABLE ELIZABETH HOLTZMAN

5 VICE ADMIRAL (RET.) JAMES HOUCK, USN

6 PROFESSOR ELIZABETH HILLMAN

7 MAJOR GENERAL (RET.) JOHN D. ALTENBURG, JR., USA

8 GENERAL (RET.) CARTER F. HAM, USA

9 COLONEL LISA TURNER, USAF

10 PROFESSOR GEOFFREY CORN, USA

11 JOYE FROST

12 MARIA FRIED, Designated Federal Official to the
13 Response Systems Panel

14 COLONEL PATRICIA HAM, USA, Staff Director

15 LIEUTENANT COLONEL KYLE GREEN, USAF, Staff Counsel

16 SHANNON GREEN, Legislative Analyst

17

18 ALSO PRESENT:

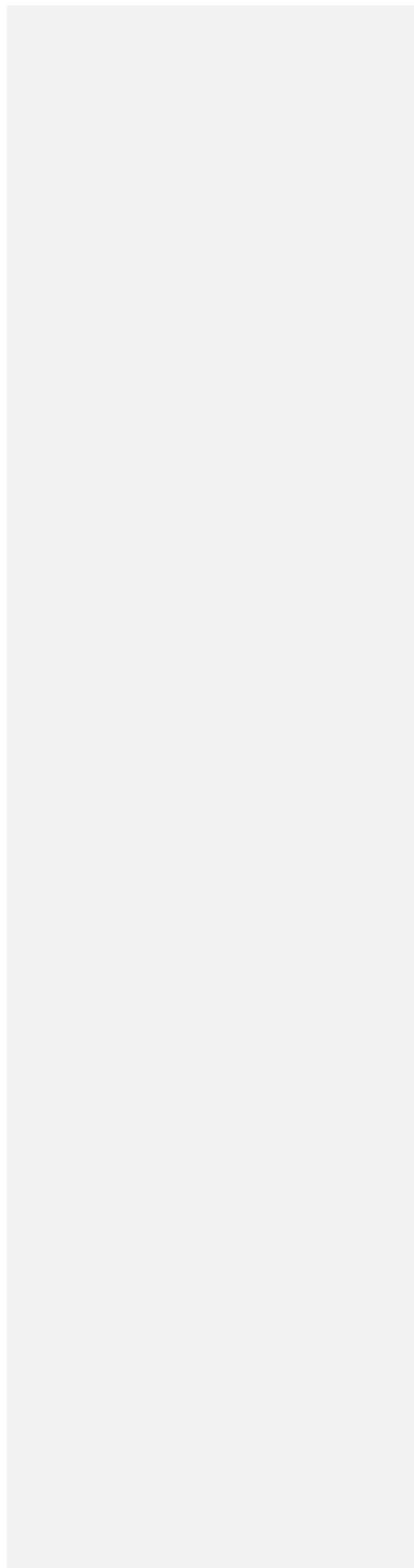
19 BRIGADIER GENERAL CHARLES PEDE, Chief Judge, Army
20 Court of Criminal Appeals

21 HONORABLE CLAIRE MCCASKILL, U.S. Senator, State of
22 Missouri

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1 consideration.

2 Just a note for those of you who are on
3 the phone, we're still working with the Senators'
4 staffs, but schedules change. And we've been
5 informed that Senator Gillibrand is not going to be
6 able to join us this morning, so we're trying to
7 figure out with the sessions that will start at
8 11:00 what'll happen, whether someone from her
9 staff will be here, and whether Senator McCaskill
10 will be able to join us as well. So we'll get
11 those worked out and let you know as we approach.

12 Are there any other questions? Can
13 everybody on the phones hear okay? Are we good?

14 PROFESSOR HILLMAN: All good here. Thank
15 you.

16 COLONEL GREEN: Okay. And did everybody
17 -- I sent a lot of materials yesterday. Was
18 everybody able to receive those materials?

19 SPEAKER: Yes.

20 COLONEL GREEN: Okay. If not, please let
21 us know and we can send them -- copies to you this
22 morning as well. So with that, I'll turn it over

1 to Judge Jones.

2 CONGRESSWOMAN HOLTZMAN: Could you put the
3 name card -- her name card in front of us, please?
4 Thank you.

5 MS. FRIED: Good morning, everyone. I'm
6 Maria Fried. I just want to note for the record
7 that the Designated Federal Official is present and
8 that the meeting is open.

9 CHAIRWOMAN JONES: All right. Thank you,
10 Maria. I think we'll hear from Ms. Green now with
11 respect to, as Kyle put it, the landscape of the
12 legislation.

13 MS. GREEN: Good morning. My name is
14 Shannon Green. I just wanted to take a few minutes
15 this morning, ladies and gentlemen, and just kind
16 of talk about the 2013 legislative cycle, and how
17 the Role of the Commander has become such an issue.

18 In the House of Representatives in March,
19 Representative Jackie Speier introduced this STOP
20 Act, which she has introduced the last -- every
21 year since 2011, which would take sexual assault
22 outside the chain of command, just sexual assault,

1 sex-related crimes. Her proposal did not make it
2 into the House NDAA -- the House-passed NDAA, but
3 as of this year she had 148 co-sponsors, so she's
4 generated quite a bit of support within the House
5 on that issue.

6 In the Senate, the sort of opposing
7 similar bill in the Senate is Senator Kirsten
8 Gillibrand and her proposal, S. 967, that was
9 introduced in May of this year. That proposal had
10 38 co-sponsors, but she's got an amendment that
11 she's floating around, and she claims to have 46
12 co-sponsors. And we expect -- she's indicated
13 she'll introduce that as soon as the Senate starts
14 debating the NDAA, which could be today, but most
15 certainly by tomorrow from what everyone has said.

16 There are a number of bipartisan and
17 bicameral provisions that have made it into both
18 the House and Senate versions of the NDAA related
19 to the Role of the Commander. The main one is
20 limiting the commander's discretion on findings of
21 a court martial. You're also aware probably
22 Senator Boxer introduced an Article 32 reform

1 amendment, which has support on -- you know,
2 Republican and Democratic support. It has support
3 of Senator Gillibrand and Senator McCaskill. So
4 that's very likely to make it into the Senate's
5 NDAA once it's up for debate later this week. And
6 let's see.

7 So today, I guess, we're going to
8 basically dig down into Senator Gillibrand's bill.
9 Some of the provisions in her original bill made it
10 into the Senate-passed NDAA. There are some
11 parallels between her and Senator McCaskill's
12 proposals. But if you have any questions, feel
13 free to let me know. I have a brief analysis of
14 the Boxer Article 32. It's pretty straightforward.

15 CHAIRWOMAN JONES: Thanks.

16 VICE ADMIRAL (RET.) HOUCK: I would like
17 to raise, I guess, just as a placeholder issue, not
18 to discuss it now and not to derail the agenda for
19 this morning. But hearing the discussion about
20 Senator Boxer's Article 32 amendment, and I believe
21 it was distributed to us last week. We did hear a
22 lot of testimony from particularly the defense

1 group last week about that, and at some point we
2 may want to have a more detailed discussion about
3 that. Thank you. This is Jim Houck. Thanks.

4 CHAIRWOMAN JONES: I think you're right,
5 Jim. Thanks for bringing that up and reminding us.

6 CONGRESSWOMAN HOLTZMAN: Before you
7 proceed, could you just be a little bit more
8 specific about what exactly the bill does with
9 regard to sentences? Is what you -- the
10 commander's role with regard to sentences?

11 MS. GREEN: You mean the provision that's
12 in the Senate and House version of the NDAA?

13 CONGRESSWOMAN HOLTZMAN: Yes.

14 MS. GREEN: It limits the commander's
15 discretion to alter the findings of a court martial
16 or to change it to a lesser included offense for
17 certain offenses. And if he or she does change the
18 findings, then a written statement of explanation
19 is required, which goes into the court martial
20 record.

21 CONGRESSWOMAN HOLTZMAN: Well, wait a
22 minute. You can't change the findings, but you can

1 change the findings? What do you mean?

2 MS. GREEN: You can for certain offenses.

3 CONGRESSWOMAN HOLTZMAN: Oh, okay. So
4 where you are allowed to change the findings, you
5 have to explain it.

6 MS. GREEN: Yes, ma'am. And the provision
7 in the House and Senate are slightly nuanced, but
8 essentially that's what they both do.

9 CHAIRWOMAN JONES: Is this the Article 60
10 issue?

11 MS. GREEN: Right.

12 CHAIRWOMAN JONES: Okay. And at what
13 stage does the commander now have the right to
14 change the findings?

15 MS. GREEN: I think I've highlighted it on
16 there --

17 CHAIRWOMAN JONES: Okay.

18 MS. GREEN: -- on the second page the two
19 provisions.

20 CHAIRWOMAN JONES: I guess really I'm only
21 asking is it post-appeal, pre-appeal, or both?

22 MAJOR GENERAL (RET.) ALTENBURG: Post-

1 trial.

2 MS. GREEN: Post-trial.

3 CHAIRWOMAN JONES: It's post-trial? And
4 then another -- and then again -- you can do it
5 again after appeal?

6 MS. GREEN: I don't think so, ma'am.

7 MAJOR GENERAL (RET.) ALTENBURG: What
8 happens is when the trial is complete, the record
9 of trial is prepared verbatim. It's reviewed by
10 the staff judge advocate, and all defense counsel
11 matters are submitted at that time and further
12 mitigation from what they submitted at the trial.
13 So that's the defense's opportunity to present to
14 the convening authority a basis for taking some
15 type of clemency action, whether it's disapproving
16 the findings, or whether it's reducing the
17 sentence, or whatever.

18 All of those materials are then considered
19 by the convening authority. The convening
20 authority takes his or her action. In most cases,
21 the action is to approve the findings and sentence.
22 Subsequent to that, it goes to appeal before the

1 courts here in D.C.

2 CHAIRWOMAN JONES: And there's no further
3 clemency power after appeal, or is there?

4 MAJOR GENERAL (RET.) ALTENBURG: After
5 appeal, there is.

6 CHAIRWOMAN JONES: There is.

7 MAJOR GENERAL (RET.) ALTENBURG: There are
8 clemency points[?] in all of the services, yes.
9 After the person is imprisoned, yes.

10 GENERAL (RET.) HAM: But not by the
11 convening authority.

12 MAJOR GENERAL (RET.) ALTENBURG: Not by
13 the convening authority.

14 CHAIRWOMAN JONES: Okay.

15 MAJOR GENERAL (RET.) ALTENBURG: When a
16 convening authority signs the action after
17 considering all the defense matters and makes his
18 decision to approve or disapprove and finally
19 consents, the convening authority role is ended.

20 CONGRESSWOMAN HOLTZMAN: Now, what about
21 the role with regard to sentences? I see that the
22 commander is prohibited from interfering with

1 findings of fact. What about sentences? Can a
2 commander overturn sentences under both the House
3 -- in either one of those bills?

4 MS. GREEN: Sentences aren't addressed in
5 these provisions.

6 COLONEL HAM: Yes. That's how plea
7 bargaining works, ma'am. The convening authority
8 will act to enforce a plea bargain, and he will --
9 he may limit a sentence to have it conform to a
10 plea bargain.

11 CONGRESSWOMAN HOLTZMAN: Maybe I'm not
12 phrasing my question properly. I'm just trying to
13 understand. Somebody is convicted of murder and
14 sentenced to 100 years in prison. Can the
15 convening authority reduce that to 22 under this
16 bill, or does this bill take away the power of the
17 convening authority to affect the sentence --

18 MS. GREEN: Okay. So under the --

19 CONGRESSWOMAN HOLTZMAN: -- under either
20 one of the bills, the House and Senate bills.

21 MS. GREEN: It prohibits the convening
22 authority from modifying the finding or changing it

1 to a lesser offense --

2 CONGRESSWOMAN HOLTZMAN: Okay. Is a
3 finding --

4 MS. GREEN: -- except for qualified
5 offenses.

6 CONGRESSWOMAN HOLTZMAN: Okay. Is a
7 finding the same as a sentence?

8 COLONEL GREEN: No.

9 CONGRESSWOMAN HOLTZMAN: So does the
10 convening -- where does the sentence get imposed?
11 Who imposes the sentence? Is that the court
12 martial, the judge there?

13 MS. GREEN: Either a judge --

14 CONGRESSWOMAN HOLTZMAN: Well, suppose the
15 sentence -- can the convening authority after this
16 bill -- these bills are passed which do something
17 about the findings, can the convening authority
18 still reduce the sentence?

19 COLONEL GREEN: Yes.

20 MS. GREEN: Presumably, yes, because
21 that's not addressed in the bill.

22 GENERAL (RET.) HAM: Well, it seems that

1 it is, though, with some exceptions.

2 CONGRESSWOMAN HOLTZMAN: That's what I'm
3 trying to understand.

4 GENERAL (RET.) HAM: It says except for
5 qualifying offenses, which are in the House version
6 those offenses where the maximum sentence for the
7 offense does not exceed two years. And there's a
8 similar restriction in the Senate version.

9 MS. GREEN: In the Senate, it doesn't
10 state one year, yeah.

11 GENERAL (RET.) HAM: So it seems that
12 there is a constraint placed on the convening
13 authority's present authority to modify sentencing,
14 unless I misreading at that. That's what it seems
15 -- that's what it says to me is that, again, for
16 certain offenses, and given that the maximum
17 sentence is two years, that's most offenses that
18 would go to a general court martial, I believe.
19 The convening authority could not modify those
20 sentences, if I'm reading this correctly.

21 CONGRESSWOMAN HOLTZMAN: Okay.

22 MS. GREEN: Could not modify the findings

1 and sentence.

2 GENERAL (RET.) HAM: Right.

3 MS. GREEN: Or change it to a lesser
4 offense.

5 GENERAL (RET.) HAM: So I guess the other
6 way to say that is that these two -- both the
7 Senate and House versions very significantly alter
8 the role of the convening authority post-trial. Is
9 that fair to say that?

10 MS. GREEN: Yes, sir.

11 CONGRESSWOMAN HOLTZMAN: I understand. I
12 was just trying to get a little bit more
13 specificity about that, but, okay. It's still not
14 clear to me.

15 CHAIRWOMAN JONES: And I think they're
16 consistent. They're just phrased differently.
17 Okay.

18 MS. GREEN: The qualifying offense
19 definition is slightly different.

20 GENERAL (RET.) HAM: Two years versus one
21 year.

22 CHAIRWOMAN JONES: Right.

1 MS. GREEN: So they'll probably work out,
2 you know, the differences and have some version of
3 that in the final. I highlighted four provisions
4 in there that are in both bills that, you know,
5 like the role of the commander.

6 GENERAL (RET.) HAM: And again -- this is
7 General Ham. Just for a point of clarification,
8 both versions exclude offenses under Article 120.
9 So the convening -- for offenses -- for violations
10 of Article 120, the convening authority may not
11 adjust either finding or sentence.

12 MS. GREEN: Right.

13 CONGRESSWOMAN HOLTZMAN: Where are you
14 reading from, sir?

15 CHAIRWOMAN JONES: Right here.

16 GENERAL (RET.) HAM: In the House version
17 -- in the highlighted House version and Senate
18 version.

19 MS. GREEN: Yeah. In the Senate version,
20 qualified offenses do not include any offense under
21 Article 120.

22 GENERAL (RET.) HAM: And the same for the

1 Senate version. So I think that's -- again, if I'm
2 reading that correctly, Article 120 violations, the
3 convening authority --

4 MS. GREEN: No discretion.

5 GENERAL (RET.) HAM: Basically all the
6 convening authority can do -- and, I guess, maybe
7 -- again, maybe I'm overstating this. But it seems
8 to me that the only option for the convening
9 authority for Article 120 violations is to approve
10 the finding and sentence. He has no -- the
11 convening authority, he or she has no other choice.

12 MS. GREEN: That's how I would read it.

13 CHAIRWOMAN JONES: I don't want to
14 complicate things, but what does that do for plea
15 bargaining, or is that a separate issue, or do we
16 know?

17 GENERAL (RET.) HAM: I think it
18 complicates it significantly.

19 CHAIRWOMAN JONES: Well, we're doing --

20 MAJOR GENERAL (RET.) ALTENBURG: This is
21 Altenburg. I agree that the bill as written would
22 complicate pretrial negotiations just in terms of

1 the mechanics of how you could do that and how you
2 could affect -- bring about a pre-trial agreement.

3 SPEAKER: How would it affect the --

4 PROFESSOR HILLMAN: Judge Jones?

5 CHAIRWOMAN JONES: Yes, Beth?

6 PROFESSOR HILLMAN: Sorry, Judge Jones.

7 This is Beth. I just had -- I think this is
8 actually a really important thing I don't fully
9 understand. And I'm not sure, do we have somebody
10 who -- I'm not sure who can explain this, if
11 Shannon could explain it to us. But there's two
12 parts that sort of arc through the system that I
13 don't fully understand with what this change would
14 do. One of them has to do with the pre-trial
15 agreement and how that would happen. The other has
16 to do with the accused's right under non-judicial
17 punishment, under Article 15, and how that
18 intersects with this. Could anybody speak to how
19 those two pieces would work as this would move
20 through the system?

21 CHAIRWOMAN JONES: When you say "move
22 through the system," are you talking about, for

1 instance, the issue that if the commander offers
2 somebody non-judicial punishment that the person
3 refuses, or are you talking about something else?

4 PROFESSOR HILLMAN: That and the
5 negotiations prior to trial -- the pre-trial
6 agreement.

7 CHAIRWOMAN JONES: The plea bargaining.
8 The plea bargaining angle, right.

9 PROFESSOR HILLMAN: Correct.

10 CONGRESSWOMAN HOLTZMAN: Are you talking
11 about the Gillibrand bill?

12 PROFESSOR HILLMAN: Yes, although I'm not
13 -- I don't have the highlighted version, and I'm
14 not sure I understand totally the differences. I'm
15 looking primarily at the Gillibrand bill, so I'm
16 not looking at the House version.

17 CHAIRWOMAN JONES: I don't know if anybody
18 here understands how the House or Senate bill
19 provisions that we were just talking about, which
20 limits the authority of the commander under Article
21 60, how that would implicate plea bargaining or
22 complicate it. It's a big question, it seems to

1 me, because it looks like they may not have plea
2 bargaining authority, if you read it literally.

3 MAJOR GENERAL (RET.) ALTENBURG: I think a
4 bigger problem is that the people that drafted it
5 don't know that either.

6 CHAIRWOMAN JONES: Yeah. Well, they
7 probably have no idea that it implicates plea
8 bargaining possibly. I don't -- is this Senate
9 version of this Senator Gillibrand's, or is this
10 just a piece of S. 1197?

11 MS. GREEN: That's the Senate version --

12 CHAIRWOMAN JONES: Right.

13 MS. GREEN: -- the SASC-passed NDAA.

14 CHAIRWOMAN JONES: Right.

15 MS. GREEN: The column to the right of
16 that has provisions from Senator Gillibrand's bill
17 that are also part of the SASC --

18 CHAIRWOMAN JONES: Oh, I see. There's
19 another column, right. Okay.

20 MS. GREEN: Professor Hillman, I should've
21 sent you the spreadsheet that we're looking at
22 because we were actually looking at a particular

1 provision in the House and Senate bills relating to
2 the limitation of the convening authority to modify
3 findings from a court martial.

4 PROFESSOR HILLMAN: Understand.

5 GENERAL (RET.) HAM: Okay. Maybe it would
6 -- this is Carter Ham. Maybe it would make sense
7 for those that are in by phone simply to read --
8 would it make sense to just read the House and
9 Senate versions so they know what it is that we're
10 talking about?

11 MS. GREEN: Sure. Yes, sir.

12 CHAIRWOMAN JONES: Yeah. And I guess, so
13 we don't have answers to your questions, Professor
14 Hillman, about --

15 PROFESSOR HILLMAN: What?

16 (Laughter.)

17 CHAIRWOMAN JONES: I know. It's amazing.
18 But Shannon has highlighted four of these, and the
19 first one was the one that we were just talking
20 about. Shannon, do you want to go to the second
21 one?

22 MS. GREEN: Sure. And we don't

1 necessarily -- there are others that we could point
2 to, but --

3 VICE ADMIRAL (RET.) HOUCK: Well, I will
4 interrupt -- this is Jim Houck -- to just ask one
5 question before we leave that topic. So we have
6 the Joint Service Committee on Military Justice,
7 which is the kind of cumulative wisdom of military
8 justice within the Department of Defense. Have
9 they done an analysis of these provisions? I mean,
10 we are struggling here with them to some extent,
11 and I'm just wondering if the Joint Service
12 Committee has already done an analysis of this
13 stuff.

14 COLONEL HAM: I don't know the answer to
15 that, sir. This is Colonel Ham.

16 VICE ADMIRAL (RET.) HOUCK: Yeah. It may
17 be worth asking because it's really kind of
18 alarming to, you know, the discussion in the sense
19 that they're drafting these bills. These bills are
20 going forward. They're getting serious
21 consideration, and they may not have even realized
22 what they may be doing to plea bargaining. And I

1 just -- that's the big question for me is have the
2 military justice people looked at this. So if it's
3 possible to find that out, that would be helpful, I
4 think.

5 CHAIRWOMAN JONES: This is the provision
6 where DoD submitted its own legislative proposal.
7 And as I look at the synopsis, it doesn't talk
8 about plea bargaining either. So we do need to ask
9 that.

10 MAJOR GENERAL (RET.) ALTENBURG: As I
11 understand it, the Joint Service Committee has done
12 that analysis. And if we ask for it, they would --
13 I assume they would provide it to us.

14 CHAIRWOMAN JONES: All right. Well,
15 that's something we'll do.

16 MS. GREEN: That makes sense in light of
17 the fact that DoD submitted a similar legislative
18 proposal to the Congress.

19 COLONEL TURNER: This is Colonel Turner.
20 In addition to asking about the pre-trial
21 agreements, the other factor would be their
22 thoughts on reducing a sentence to forfeitures, or

1 total forfeitures, or some portion of forfeitures
2 that can then be given back to the family. In
3 other words, if a spouse is raped by her husband,
4 he's convicted, he's punished to the reduction of
5 all his money. Is there any now authority left to
6 be able to reduce that sentence to total
7 forfeitures and give the family the money? Thank
8 you.

9 CHAIRWOMAN JONES: All right. I don't see
10 anything about that here, but it's another question
11 then that needs to be answered. All right,
12 Shannon, do you want to go the next provision?

13 MS. GREEN: Section 533 in the House bill
14 and 554 in the Senate both require a mandatory
15 discharge or dismissal for a conviction of sex-
16 related offenses. I highlighted on the next page
17 the top column, the provision related to the
18 authority or guidance to commanders regarding
19 reassignment of the accused just because that came
20 up in the public meeting last week. And I would
21 just point out that it's very discretionary. The
22 Senate version, each service Secretary may provide

1 guidance for commanders regarding their authority
2 to make a timely determination related to temporary
3 reassignment of an accused, not as a disciplinary
4 measure.

5 MAJOR GENERAL (RET.) ALTENBURG: And I
6 think the Secretary of Defense has already done
7 that.

8 MS. GREEN: Yeah, and I think so, too.

9 GENERAL (RET.) HAM: Well, I think what we
10 heard at the Panel last week was that the Secretary
11 had -- the Secretary of Defense has directed the
12 services to make recommendations with regard to
13 transfer of the accused.

14 MS. GREEN: Right, in the August memo.

15 PROFESSOR CORN: This is Professor Corn.
16 Are we talking about the transfer requirement or
17 the mandatory discharge requirement?

18 CHAIRWOMAN JONES: We sort of skipped from
19 the mandatory discharge to the transfer. Just to
20 go back for a minute to the mandatory discharge, we
21 really haven't discussed it. It is in both bills,
22 and it says we're supposed to assess it in one of

1 the bills. So it's something that we'll have to
2 get up to speed on. It's basically --

3 PROFESSOR CORN: Well, I certainly think
4 that --

5 CHAIRWOMAN JONES: It basically calls upon
6 us to assess the appropriateness of statutory
7 mandatory minimum sentencing provisions.

8 PROFESSOR CORN: Right. I think that it
9 is worth at least probing how comprehensive the
10 assessment was of the relationship between that
11 provision and other provisions of the Code and
12 principles of military sentencing. You know, I
13 think one of the most admirable aspects of the
14 military criminal justice system is that it has
15 retained as a central purpose of criminal
16 punishment rehabilitation of the accused. And I
17 think those who have been involved in cases in
18 military courts know that it's not particularly
19 common, but there are cases where an accused might
20 actually ask the sentencing authority, the military
21 panel or the military judge, to substitute a more
22 -- a longer period of confinement in lieu of a

1 certain level of discharge because of the permanent
2 stigma and consequence resulting from a discharge.

3 And I think that the mandatory discharge
4 provision in some ways -- I certainly understand
5 the logic of it, but I think in some ways it
6 undermines the sentencing flexibility that I think
7 is central to the military justice process to
8 enable the court to ensure that the punishment fits
9 the crime and the criminal and is not just
10 automatic based on the crime.

11 I just think that -- I question whether
12 it's been, just like the relationship to plea
13 bargaining, whether it's been kind of cross-
14 synchronized with all the other principles and
15 purposes of the military justice system.

16 CHAIRWOMAN JONES: Yeah, I think that's a
17 good question. I don't know the answer.

18 MS. FROST: And what are -- under the
19 House and Senate, what are the specific offenses
20 that relate to the mandatory?

21 CHAIRWOMAN JONES: Apparently the Senate's
22 are rape, sexual assault, forcible sodomy, or

1 attempts to commit those offenses. Well, maybe. I
2 mean, it says that those are offenses that should
3 be disposed of by courts martial rather than non-
4 judicial punishment.

5 GENERAL (RET.) HAM: But that's a sense of
6 the Senate.

7 CHAIRWOMAN JONES: But that's a different
8 -- yeah. And that's a sense.

9 GENERAL (RET.) HAM: That's a sense of
10 Senate, not --

11 CHAIRWOMAN JONES: Exactly. So I don't
12 know what the certain sex-related offenses --

13 MAJOR GENERAL (RET.) ALTENBURG: Other
14 considerations, we might consider -- listen to me.
15 Other considerations for us in this regard are,
16 one, the response of the Federal judiciary to
17 mandatory sentencing and what they think of that
18 and what they think are the limitations of
19 mandatory sentencing, and how it restricts their
20 ability to sentence in what they would think is a
21 meaningful way.

22 PROFESSOR CORN: Well, and to jump on

1 that, General, not just the Federal judiciary, but
2 I think the Federal trial litigation bar, both
3 prosecutors and defense counsel. I think there's
4 been fairly widespread criticism of the mandatory
5 -- or of the sentencing guidelines by everybody
6 involved in the system because it deprives them of
7 the flexibility to periodically adjust the sentence
8 based on, you know, the actual evidence.

9 MAJOR GENERAL (RET.) ALTENBURG: And we're
10 creating the irony of a mandatory sentence for some
11 type of sexual assault, but not a mandatory
12 sentence for murder just to use one example.

13 CONGRESSWOMAN HOLTZMAN: Well, I think the
14 -- to give the argument on the -- for the mandatory
15 sentence here is that what you're dealing with, I
16 mean, is a crime that too often has been minimized
17 and trivialized because it's not been seen as a
18 crime. And generally murder is seen as a crime. I
19 don't think we had too many social stereotypes that
20 excuse it when it's not justified. But rape -- a
21 husband raping a wife, some think it's still legal.
22 So I think that's probably the reason for it,

1 although I'm not in any way suggesting that the
2 arguments about mandatory minimums don't apply
3 here. But I don't know what -- how should we
4 approach this if we have these concerns?

5 MS. FROST: Well, I would --

6 PROFESSOR CORN: Well, this is Professor
7 Corn --

8 MS. FROST: -- add that part of the
9 problem, too, is that the research shows that
10 rapists tend to be serial rapists. I don't know
11 that most people who murder are serial murderers,
12 and I think that's part of the issue here.

13 PROFESSOR CORN: This is Professor Corn.
14 I think that one of my concerns is I don't know
15 that there's any empirical support for the
16 conclusion that service members who are actually
17 tried and convicted at general court martial for
18 these very serious offenses are routinely not
19 punished with a punitive discharge.

20 So I think that suggesting that the
21 mandatory requirement for punitive discharge is a
22 response to the historic minimization of the

1 offense itself mixes the problem of whether the
2 offense gets to trial with the history of what the
3 consequence of conviction is.

4 And I think most -- I would speculate that
5 you'd have to search far and wide to find a rape,
6 or a forcible sodomy, or an aggravated sexual
7 assault conviction by court martial that did not
8 result in a punitive discharge.

9 CONGRESSWOMAN HOLTZMAN: There was just a
10 sentence? Wasn't there somebody whose sentence was
11 overturned by a convening authority who was
12 convicted?

13 PROFESSOR CORN: I'm not talking about the
14 Article 60 clemency power. That sentence was
15 overturned because the convening authority
16 exercised his statutory authority to second guess
17 the judgment of the trial -- the trial court. The
18 trial court, to my knowledge, adjudged a punitive
19 discharge after they convicted the service member.
20 My point is -- go ahead, I'm sorry.

21 PROFESSOR HILLMAN: Sorry. Sorry, Geoff.
22 This is Beth. The sun is coming up in California.

1 I've had a little more coffee. I'm a little more
2 awake.

3 (Laughter.)

4 PROFESSOR HILLMAN: I have just a sort of
5 general question here. Maybe this is for Judge
6 Jones. What should we be trying to do with respect
7 to this? It sounds like actually part of what we'd
8 like is some more information on not only what the
9 bills would do, but the scope of the problems
10 they're trying to address. For instance, Geoff
11 just said that there's really -- there aren't
12 convictions for -- you know, there aren't 120
13 violations for which service members are convicted,
14 and they're not subject to a punitive discharge.
15 Surely we could ask for that.

16 COLONEL HAM: We have asked for that, and
17 we either have it already and are going through it,
18 or to do it with the next two requests for
19 information batches that are due on November 21 and
20 December -- I'm forgetting the exact date. We've
21 asked for all of that information, and we either
22 have it or we'll be receiving it very shortly.

Comment [E1]: Please review audio.

1 PROFESSOR HILLMAN: That's great, Colonel
2 Ham.

3 CHAIRWOMAN JONES: You know, what I --

4 PROFESSOR HILLMAN: Go ahead.

5 CHAIRWOMAN JONES: What I was going to say
6 is I came today expecting to actually discuss the
7 Gillibrand proposal with respect to removing the
8 commander or removing the chain of command from the
9 military justice system. And so, I think that's
10 what our presenters are here to discuss. And the
11 first few minutes were really intended to be like a
12 menu of other issues that are going to be before
13 us. And I don't think we're really prepared to
14 talk about them right now, but they'll be on in
15 future Subcommittee meetings.

16 So maybe I could suggest that we go to
17 General Pede, who is sitting back patiently, and
18 ask him to do his presentation. And then I think
19 we'll be in good shape.

20 CONGRESSWOMAN HOLTZMAN: General?

21 PROFESSOR HILLMAN: Thanks, Judge Jones.

22 CHAIRWOMAN JONES: Thank you, Beth.

1 CHAIRWOMAN JONES: Good morning, General.

2 GENERAL PEDE: Ma'am, good morning. Good
3 morning, members of the Panel and for those on the
4 phone. My name is Chuck Pede, and it's a privilege
5 to be here to talk with you. Specifically, I was
6 asked to discuss the mechanics of what I'll refer
7 to as Senate Bill 1197, which I think has been
8 earlier referred to as 967. I think 1197, the
9 amendment, is the latest version that Senator
10 Gillibrand has offered. They're very similar, so
11 I'll reference it as Senate Bill 1197.

12 If I may just by way of introduction, let
13 you know that I'm currently assigned as the
14 Commander of the Legal Services Agency at Fort
15 Belvoir in the Chief of our Army Criminal Appeals
16 Court. However, today I appear before you as the
17 former Chief of the Criminal Law Division of the
18 Office of the Judge Advocate General, Army, a
19 position I left about five weeks ago to assume my
20 current duties. And so I had a good deal of
21 experience with the matters you've just discussed
22 and the matters I'm about to discuss, and feel

1 privileged to be here today to talk with you about
2 those matters.

3 I should state at the outset that as I
4 present these materials, I don't pass judgment on
5 any of the legislation I'm here to discuss the
6 mechanics of. It's simply an outline of what my
7 counterparts in the other services and I have
8 concluded would be the mechanical application of
9 the statute as it's currently drafted. And so,
10 that is what I'll endeavor to do with you this
11 morning. I can obviously cover any other topic
12 that you wish to discuss and take back your
13 questions to either a particular service, of
14 course, or to the Joint Service Committee, if you
15 choose.

16 Before you -- I provided to the members of
17 the Panel a number of documents which are going to
18 be referred to as documents as I proceed and
19 exhibits. I did that simply because it is not an
20 easily understood set of materials, and so -- and
21 because some folks were remote, I wanted to make
22 sure you knew what I was referring to as we discuss

1 them.

2 And so, you've got documents one through
3 five, Exhibits A through D. And I have on display
4 right now behind me, which we'll use a little bit
5 for those on the phone, Exhibit A and D. And I
6 know that all of you are probably very familiar
7 with a number of these things, so I won't spend a
8 lot of time on A and D, but I thought just by way
9 of reference, they will become useful as we go
10 through.

11 COLONEL HAM: Members, they're at Tab 11
12 of your materials, and for those by phone, they
13 were sent separately by Colonel Green as materials
14 for General Peede's presentation.

15 GENERAL PEDE: I would note, as well I'm
16 in the Army obviously, and so I'm going to use the
17 Army as an example for this discussion. However,
18 the implications and application of the legislation
19 that we're talking about will essentially have the
20 same effect on all of the services. It is the
21 Uniform Code, so we're all doing the same thing.
22 We're built a little differently, but the impact of

1 the legislation and how it will work will generally
2 be the same for the services.

3 Of the documents you have, you should have
4 the bill itself, the Amendment 1197. You should
5 have Articles 22 and 23 of the Code as they are
6 currently written today. I'll make reference to
7 that. Document 4 is the maximum punishment chart,
8 which is a handy reference tool to see all of the
9 offenses under the Uniform Code that exist
10 currently. This will become important when we talk
11 about how 1197 bifurcates responsibility for those
12 offenses. And then finally, you have a set of
13 implementation questions, which were developed by
14 the Army Criminal Law Division to try to understand
15 the legislation.

16 So, first, if I could just refer to
17 Exhibit A, and leaving a few moments for the
18 members on the phone to find exhibit A. It's
19 simply a chart with blue, red, and green boxes that
20 show the process. And I won't bore you with the
21 details. Suffice it to say, first, this is not a
22 sexual assault specific process. There are

1 overlays to this process which I can discuss that
2 are specific to sexual assault offenses and
3 important differences. But in general, it's
4 important to understand that our court martial
5 process is very similar to any Federal criminal or
6 state criminal trial process with the report of a
7 crime in the upper left-hand corner, and an
8 investigation ensues. And then some responsible
9 authority in the blue boxes on the left side
10 initially disposes -- starts to dispose of the
11 allegation. At some point, that allegation moves
12 to the right into the red boxes.

13 And in the Army and in the services, we
14 have echelons of responsibility. And they're
15 indicated on this chart by rank. But, for example,
16 a battalion commander is referred to -- you see at
17 the bottom -- a summary court martial convening
18 authority, SCMCA. A special court martial
19 convening authority is a colonel, typically an O-6
20 in any of the services. And then, of course, a
21 GCM, or general courts, are what are generally, but
22 not always accurately, referred to as general or

1 felony level courts because in the services we
2 don't break out between felony and misdemeanors.
3 General courts are courts that have the ability to
4 impose the maximum punishments authorized by law.
5 But you see those echelons, and each of those
6 echelons in general with garden variety offenses
7 can dispose of criminal allegations.

8 In general in the Army, courts are
9 convened by a general court martial convening
10 authority who has a staff judge advocate legal
11 advisor, and they can go in three levels of courts:
12 summary, special, and general. Typically, a GCM
13 authority will refer cases to special or general
14 court. That's where cases typically go. And then
15 everything else is pretty much the same in your
16 experience. There's an arraignment of an accused
17 who has to plead and choose[?] what forum he'd
18 like. The merits of the case itself, if they're
19 found not guilty, it ends. If they're found
20 guilty, it goes to sentencing. And then of course
21 in the post-trial process, which was referred to
22 earlier, the convening authority can take action,

1 and then, of course, it goes up on appeal. So
2 that's the general process.

3 The sexual assault overlay on this is
4 quite significant in terms of who has
5 responsibility for what. And that's a function
6 of[?] the developments over the last six to eight
7 years, and most especially, as you've probably
8 seen, just over the last 12 to 24 months, the
9 SECDEF's mandates on who does the 32, who does the
10 32 investigations.

11 The SECDEF recently mandated that judge
12 advocates will -- must -- conduct the Article 32
13 pre-trial investigation. The SECDEF has mandated
14 that a special victim counsel will be provided to
15 victims. The SECDEF has mandated that this O-6
16 special court martial convening authority is the
17 first person who can make decisions with regard to
18 allegations of sexual assault. So in terms of what
19 the institution has done recently, there's a lot of
20 overlay on that general process that's sexual
21 assault specific.

22 If there are no questions on Exhibit A,

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1 I'll refer then to Exhibit D, which is just a
2 general resourcing model for the Army. All the
3 other services have similar constructs, slightly
4 different. The reason this is important is because
5 of what it will mean with regard to the
6 implementation of 1197.

7 You probably all know that we have JAG
8 offices, legal offices, all over the world serving
9 commands. They're generally comprised of a lot of
10 lawyers, a lot of paralegals, performing multiple
11 types of legal services.

12 COLONEL HAM: Members on the phone, we're
13 looking at Exhibit D, Delta.

14 GENERAL PEDE: On the left side of the
15 chart of Exhibit D, you see those practice areas
16 that they provide legal services on. It can be
17 legal assistance. That's family law, divorce,
18 separation, financial issues. Administrative law
19 has a lot of questions regarding regulations and
20 the interpretation thereof, how to spend money.
21 Operational law is the law of war, claims. People
22 lose things, people have things damaged by

1 government movers, they file claims. Property is
2 damaged in a storm; they file a claim. Those are
3 all legal services delivered by a legal office.

4 And then, in the center there's a whole
5 other practice area we know as military justice,
6 criminal law. And I provide a breakout of who's
7 there in that office just so you have a sense of
8 how military justice is delivered at the
9 installation level where you're talking about
10 general and special courts, who's prosecuting those
11 cases, who's investigating them, and how they're
12 getting to trial.

13 So that's a staff judge advocate, usually
14 a lieutenant colonel or colonel with 15 to 24 years
15 of experience practicing law; a deputy staff judge
16 advocate, 14 to 18 to 20 years of experience. And
17 then specifically, the prosecution office, the
18 Chief of Criminal Law, usually a major who has a
19 number of trial counsel prosecutors working for
20 him, along with non-commissioned officers to
21 process the cases, to produce convening orders, to
22 find witnesses, to ensure witnesses are present for

1 trial, to ensure bailiffs are present for trial to
2 support the military judge in the courtroom
3 process. And then we have court reporters and
4 other support personnel.

5 All of those people are very much tied to
6 company, battalion, and brigade leaders who deal
7 with allegations. And, of course, the staff judge
8 advocate is tied to corps and division level
9 commanders, who in the Army will typically convene
10 our courts martial. So that resource and construct
11 you see there in the center may become important.

12 In the Army, for example, we have roughly
13 70 general courts jurisdictions around the world.
14 There's roughly 50 that are active. We try roughly
15 1,200 to 1,500 courts a year. We actually have
16 over 2,000 to 2,400 cases preferred -- that means
17 charges sworn out -- in a given year. And that's
18 dispersed -- although there are 70 jurisdictions,
19 in the most active there's about 50 around the
20 world -- 50 jurisdictions. Although this says 70,
21 active jurisdictions, about 50. And among those,
22 they're dealing with those courts, but remember

1 this office is also dealing with the allegations of
2 crimes that never get to court as well. There's
3 nobody else that does that. They do that. And on
4 a given year, we have roughly 30,000 to 45,000
5 allegations of crime throughout the Army, around
6 the world.

7 And so, when you think about the volume of
8 activity that this group of people are addressing
9 and sorting out, where does it go in the process
10 over here? When you divide that among the 50
11 jurisdictions, it's a fair amount of business.

12 COLONEL HAM: Sir, how many Article 15 or
13 non-judicial punishments does -- again, I know
14 you're from the Army -- does the Army generally do
15 on an annual basis? Do you know that number?

16 GENERAL PEDE: The number ranges from
17 35,000 to 45,000 Article 15s a year. Those are all
18 being produced in these offices. It's roughly
19 5,000 a month around the world. Those are being
20 produced at all levels -- summary court, special
21 court, general court -- depending on the severity,
22 the gravity of the offense. If it's an officer who

1 commits the misconduct, usually a general officer
2 administers the Article 15, a flag officer. If
3 they're senior NCOs, a brigade commander might do
4 that. A general officer might administer the non-
5 judicial punishment.

6 CONGRESSWOMAN HOLTZMAN: Could you just
7 explain what the Article 15 encompasses? What are
8 we talking about, non-traditional?

9 GENERAL PEDE: Yes, ma'am. Non-judicial
10 punishment is a --

11 CONGRESSWOMAN HOLTZMAN: Oh, non-judicial.
12 I didn't see your word. Okay.

13 GENERAL PEDE: I'm sorry, ma'am. Non-
14 judicial punishment is referred to as NJP.

15 CONGRESSWOMAN HOLTZMAN: Got it. Got it.

16 GENERAL PEDE: And a typically designed
17 commanders' tool to deal with lower-level --

18 CONGRESSWOMAN HOLTZMAN: Right, okay.

19 GENERAL PEDE: So that's just by
20 orientation. Any questions on Exhibit A or D?

21 CHAIRWOMAN JONES: So you say it's 35,000
22 to 45,000 allegations, charges that end up in the

1 non-judicial punishment?

2 GENERAL PEDE: No, it's general crime
3 allegations investigated throughout a year.

4 CHAIRWOMAN JONES: Total.

5 GENERAL PEDE: Yes, ma'am.

6 CHAIRWOMAN JONES: So it would be
7 everything.

8 GENERAL PEDE: Yes, ma'am.

9 CHAIRWOMAN JONES: Okay.

10 GENERAL PEDE: Okay. And out of that you
11 might have -- well, in our case we had roughly
12 anywhere from 1,500 to 2,000 charges preferred;
13 1,200 ultimately went to trial and went to court.

14 CHAIRWOMAN JONES: Okay.

15 GENERAL PEDE: But remembering that that
16 could be a larceny of someone's ID card to --

17 COLONEL HAM: So how many went to NJP?

18 GENERAL PEDE: Of that 45? Anywhere from
19 35,000 to 40,000 -- 45,000. Remember, some crimes
20 don't get reported through CID. They're low-level
21 -- disrespect, disobedience, somebody is late for
22 work. They go into the NJP process at a low level,

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1 but they don't come up on our statistical charts.

2 CHAIRWOMAN JONES: Okay.

3 GENERAL PEDE: So the 35,000 to 45,000
4 allegations are those offenses investigated by our
5 criminal agencies in the Army, typically CID. Of
6 the 35,000 -- again, it's an oddly similar number,
7 but of the 35,000 to 45,000 non-judicial
8 punishments, many of those are never investigated
9 formally by law enforcement. It's kind of a
10 separate category. It may consume some of those
11 allegations investigated by law enforcement, but a
12 lot of it is done by local commands. They identify
13 a soldier that has a problem. They discipline the
14 soldier.

15 CHAIRWOMAN JONES: So they're a little
16 overlapping, I guess is what we're saying.

17 GENERAL PEDE: Yes, ma'am.

18 CHAIRWOMAN JONES: Okay, great. Thank
19 you.

20 GENERAL PEDE: Any other questions on
21 Exhibit A and D from members on the phone?

22 (No response.)

1 GENERAL PEDE: What I thought I would do
2 now for the Panel is look at Exhibit B. You may
3 also find useful pulling out of your folders
4 Document 1, which is the Senate Bill 1197, the
5 latest version of Senator Gillibrand's legislation
6 that we have. And Document 2 for ready reference
7 as I go through it, that's Article 22 of the
8 Uniform Code.

9 CONGRESSWOMAN HOLTZMAN: Where is that
10 Document 1?

11 GENERAL PEDE: It should be Tab 11.

12 CONGRESSWOMAN HOLTZMAN: Tab 11. I don't
13 have the bill.

14 COLONEL HAM: We didn't recopy 1197. It's
15 at Tab 4.

16 CONGRESSWOMAN HOLTZMAN: Okay, that's what
17 I'm asking. Okay.

18 GENERAL PEDE: So I have, again, Exhibit B
19 on display, and I'll use Document 1 and 2. And
20 again, there's a lot of, I just refer to them as,
21 rabbit holes throughout this legislative -- every
22 piece of legislation has rabbit holes. But I can

1 go anywhere you'd like, where your interest
2 dictates. But I will try and follow the scheme as
3 outlined in the statute and raise some of the
4 questions on implementation we've identified.

5 COLONEL HAM: And for the record, the S.
6 1197 the members are referring to and General Peđe
7 is referring to is the amendment intended --
8 entitled "The Amendment Intended to be Proposed by
9 Mrs. Gillibrand, An Amendment to the National
10 Defense Authorization Act," pending in the Senate.

11 GENERAL PEĐE: I'm also going to put up
12 for display Exhibit C. That should be in your
13 folder as well. This just gives you a visual of
14 what the statute intends to do with the criminal
15 offenses. But I'll begin with Exhibit B, and this
16 will just be a general overview. It might prompt
17 some questions just simply as I go through it. I
18 would not want you to take from the fact that I've
19 got sequential boxes and some appearance of order
20 on this chart to suggest that -- and I don't mean
21 anything by this other than to say I've tried to
22 render order to that which to many who have

1 practiced in our system as currently configured,
2 it's difficult to create sequencing and order based
3 on our current system, which is to suggest that
4 there's a lot of the adjustments that we'll have to
5 make if this should pass.

6 In general, the amendment intends to
7 bifurcate our Criminal Code into two groups, and
8 each group is -- someone is responsible for that
9 group of offenses, what you see in Exhibit C. So
10 on Exhibit B, the amendment proposes to separate
11 out and make a certain person responsible for
12 Articles 118 through 132. That's murder through
13 fraudulent claims.

14 Article 78, 80, and 83 are things like
15 conspiracy attempts, solicitation to commit
16 offenses. These are specified in the statute. But
17 conjunctive with that is that only if those
18 offenses carry a maximum punishment in excess of a
19 year. So the theory is we're going to take away
20 from the commander, which is the intent, the
21 serious offenses, 118 through 132, and they're
22 attempts or conspiracy to commit them, so long as

1 they carry more than a one-year sentence. And we
2 will give those offenses to this new disposition
3 authority, and I just refer to this person as the
4 DA for ease of reference. You'll see other terms
5 thrown about. There's no specific term listed in
6 the statute -- the DA.

7 By the statute you can see, and I'll walk
8 you through this, it has to be a judge advocate.
9 It has to be a commissioned officer. It must be an
10 O-6 at least, a colonel, in any of the services.
11 They have to be available for detail under Article
12 27. That's language from the statute. That simply
13 means they need to be able to be a trial counsel.
14 The theory is in here, this is a prosecutor who's
15 making these decisions over serious offenses.

16 They have to have significant experience
17 with general courts and special courts that is
18 trying these cases, although that's not defined in
19 the statute. And they have to be outside the chain
20 of command of the accused, which we'll talk about.
21 That can present some challenges.

22 Now, this new disposition authority over

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1 this category of offenses makes a couple of
2 determinations, and they are binding
3 determinations. They determine whether or not to
4 try the allegation, the charge itself, and what
5 level of court it will go to -- general court or
6 special court. So you have now a disposition
7 authority, a prosecutor, who has authority over
8 serious offenses, who will make binding decisions
9 on whether they -- those charges go to court.
10 That's the general construct that's outlined in the
11 statute.

12 Now, what you can see here on Exhibit C,
13 when you look at Exhibit C, this is just a visual
14 bifurcation of the offenses under the Uniform Code.
15 On the left side are those offenses that, assuming
16 they carry a maximum of a year or more -- more than
17 a year, I should say -- are the offenses that the
18 disposition authority, the super prosecutor, if you
19 will, would have authority over. The offenses
20 listed on the right remain with the command, would
21 remain with the structure as it currently exists.

22 Now, one thing to keep in mind, if you go

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1 all the way to the bottom on the right-hand side,
2 General Article 134, I'll talk about that in a
3 moment. But there's a whole other chart I could
4 fill up with 134 offenses under the Uniform Code,
5 and I'll do that. I can show you that in just a
6 moment. But this is the general notion of this
7 statute.

8 Now, on the right side are those offenses
9 left for the command from 83 -- actually I have a
10 typo here. It should actually be 82. On Exhibit B
11 on the left side, upper box, it says 80 to 83. It
12 should be 80 to 82, because under the statute, the
13 commander has Articles 83 to 117, 133 and 134, and
14 all offenses that carry a maximum punishment of a
15 year or less. The theory, again, as articulated by
16 the Senator and in some of her documents, that the
17 prosecutor will take serious offenses. The
18 commander will be left with what's generally been
19 referred to as the military offenses. Leave the
20 command with the military offenses. And so, what's
21 captured in this group is disrespect, disobedience,
22 malingerings, AWOLs, desertions. But as you'll --

1 as I'll note for you, there are many serious
2 offenses in this category left with the command
3 that are not military. So, for example, drugs,
4 DUIs, kidnapping, embezzlement, a variety of
5 offenses that are very serious, carry maximums of
6 well in excess of a year, but are left with the
7 command.

8 The bill -- I'm now referring to Exhibit
9 A. When you come down on Exhibit B to the second
10 box, it says "Brigade BDE" is their abbreviation
11 for "brigade commander." When you come down to
12 this first box, the reason it says "brigade
13 commander" is because the statute eliminates the
14 general court martial convening authority concept
15 in the command world, so that division and corps
16 commanders under the statute are no longer general
17 court convening authorities. The brigade commander
18 is the only convening authority in the statute as
19 drafted that remains, and they're a special court
20 convening authority. So those are courts that can
21 mete out up to a one-year confinement. Now, a
22 brigade commander could also under the statute

1 administer summary court martial or non-judicial
2 punishment.

3 Now, the last thing I will highlight that
4 the statute does before I get into more questions
5 and discussion, is that it creates a new convening
6 authority office. And so, on the right side the
7 statute has deleted the authority -- if you look on
8 Exhibit A again of the general court martial
9 convening authorities, the general is a division
10 two-star and three-star general. It, however,
11 creates in the service chiefs -- the Chief of Naval
12 Operations, four-star generals in the Pentagon,
13 Chief of Staff of the Army, Chief of Staff of the
14 Air Force -- it creates in them the authority to
15 convene general courts. And they are in the
16 statute directed to appoint general court convening
17 authorities.

18 And those new convening authorities cannot
19 be in the chain of command of the victim or the
20 accused. They must be officers, and that's non-
21 commissioned officers at that point, but they must
22 be officers O-6 and above. And as a statutory

1 provision, there must be no cost to the services.
2 No additional authorizations are included in the
3 bill, so you have to use existing billets to create
4 this office and this office. That is the -- I'm
5 sorry -- for members on the phone, you cannot --
6 you must use existing billets to create the office
7 in the lower center box on Exhibit B, and you must
8 use existing billets -- people and money -- to
9 create the box on the left side that's entitled
10 "Disposition Authority." So no cost to build this
11 structure on the left to the services.

12 Now, that's Senate Bill 1197 in broad
13 brush. And I'm prepared to, if you have the
14 inclination, to go into to the details of the
15 statute with you now and to highlight some of the
16 questions that we have if we were to implement it.

17 CHAIRWOMAN JONES: We are inclined to do
18 that, yes.

19 GENERAL PEDE: If you'll pull out Document
20 1 then, that's the statute -- I refer to it as
21 Document 1 -- and Document 2, Article 22. We'll
22 proceed through the statute. And, in general, if I

1 may orient the members to the statute, it consists
2 of 10 pages. You should have 10 pages in front of
3 you so that we're all using the same document. I
4 won't go through every line, and so you don't need
5 to worry about that, but I will orient you to the
6 statute, and draw your attention to certain key
7 provisions. Is there anyone that does not have the
8 statute in front of them who wants me to pause?

9 (No response.)

10 GENERAL PEDE: The first page is merely an
11 introduction. It's the Military Justice
12 Improvement Act. If you'll proceed to page 2, in
13 general the first half of page 2 to page 6 modifies
14 the process of getting charges to trial. So it's a
15 series of provisions that create -- if you're
16 looking at Exhibit B again, it creates the
17 structure that you see roughly identified here,
18 with the exception of the box in the center bottom
19 of Exhibit B. So the first half of the bill simply
20 creates this new prosecutor and divides offenses.
21 The second half of the bill creates this central
22 office of convening authorities, and I'll talk

1 about that as we go through.

2 So if you look at page 2, and this, again,
3 is difficult -- sometimes difficult statutory
4 language, but I'll start by looking at -- ma'am, if
5 it suits you, I'll go through just some select
6 provisions.

7 CHAIRWOMAN JONES: Yeah, that'll be fine.
8 And I'm sure there'll be questions.

9 GENERAL PEDE: Yes, ma'am. So Alpha 1 --
10 I'll refer to it as Alpha 1 -- Modification of
11 Authority. This is where you get the beginning of
12 the bifurcation of offenses. And toward the center
13 of Alpha 1, it refers to those offenses for which a
14 maximum punishment includes confinement for more
15 than a year, and then it refers you later to
16 Paragraph 3. So if you just hold that thought,
17 "confinement for more than a year" and reference to
18 Paragraph 3, and move then to Alpha 2, you then see
19 language called "Excluded Offenses." And this is
20 when it becomes a bit difficult because we now have
21 things that are referred to as excluded offenses.
22 And that, in essence, is the right side of Exhibit

1 B.

2 Excluded offenses are 83 through 117, 133,
3 134, or anything that has a max of less than a
4 year. So if you really wanted to be -- you know,
5 if you get out of the weeds for just a moment, bear
6 with me, and you looked at Article 121, which is
7 larceny, larceny is the theft of property, but it's
8 based on the gravity of the property. If you steal
9 less than \$50 -- you know, steal \$50 from somebody,
10 that doesn't carry a maximum punishment of a year.
11 That means the commander gets it. If you steal
12 \$500, the DA gets it.

13 So it might be, I'll just refer to it as
14 an included offense on the left side, but because
15 of the gravity of the offense, it actually kicks
16 over to the commander. We don't practice this way
17 now, as you know. This is all -- it's all unitary
18 now, if you will, if you'll allow me to use that
19 word.

20 So Paragraph 2 is excluded offenses, and
21 that's where you actually see identified what's
22 excluded from this new prosecutor, and that is,

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1 again, 83 through 117. Just so you have a face to
2 some of these, 83, fraudulent enlistment, and 117,
3 provoking speech and gestures. And you may have
4 heard of 133 and 134. 133 is conduct unbecoming an
5 officer. 134 is referred to as the General
6 Article. And again, the General Article could fill
7 up with the number of offenses this entire chart.
8 That is Exhibit C.

9 Okay. So that's what Paragraph 2
10 accomplishes. It creates this bifurcated category
11 of excluded offenses, and it identifies them by
12 number, and that's left with the commander. Now, I
13 would point out to you that within that excluded
14 number of offenses, there are some very serious
15 crimes to include kidnapping, et cetera, under the
16 excluded offenses which are left with the
17 commander.

18 If we proceed then to Paragraph 3 on page
19 3 listed as requirements, this simply identifies
20 who will take care of those offenses that are not
21 excluded. Now, the offenses that are not excluded
22 are those offenses on the left side of the chart,

1 and now the statute tells you who's going to do it,
2 who's responsible for them. And by paragraph, it
3 says a commissioned officer in Paragraph A, O-6 or
4 higher, at the bottom of that Paragraph A,
5 available for detail under Article or Section 27.
6 That's Sub (a)(i). That's again -- Article 27 of
7 the Code is a licensed to practice judge advocate.
8 Article 27 is the Article that creates a judge
9 advocate and allows them to try courts martial, and
10 only TJAGs, the judge advocates general, have
11 authority to certify a judge advocate as qualified
12 to practice before courts martial. So being
13 available for detail under 27 means you can try
14 criminal cases in Federal courts martial. So that
15 person has to be a prosecutor -- or has to be a
16 judge advocate.

17 Sub (2)(i) have to have significant
18 experience in trials by general or special court.
19 Now, there should be some pause to discuss how many
20 of those we have in our inventory. And so, among
21 the services, again, I will only speak for the
22 Army, but one relevant question for all of us

1 within the services is, how many of those do we
2 have? We have approximately -- approximately --
3 135 to 145 colonel O-6s at any given time, bearing
4 in mind that each of them are currently assigned to
5 existing billets. And this may have -- this may
6 sound sarcastic, but it's not intended to. They
7 all occupy billets of some importance obviously,
8 otherwise they wouldn't have the billet. So
9 they're already engaged in the practice of law
10 somewhere.

11 And so, those O-6s are assigned, and then
12 we have to figure out among that group that's
13 already assigned, how many have significant trial
14 experience. I can't tell you today how many of
15 the, let's say, 135 -- would have significant trial
16 experience, although I would suggest to you that
17 it's far less than the 135 that we have.

18 They have to be outside the chain of
19 command in Sub (3)(i). And then we move to page 4,
20 which creates the binding authority language. In
21 the top, it identifies that this person will make a
22 determination whether to try the charges by general

1 or special court. That's in Sub (b). And then (c)
2 is the binding nature of that decision. Paragraph
3 C, the center of page 4, "This decision to
4 termination shall be binding on any applicable
5 convening authority."

6 In Sub (d), unlawful command influence,
7 which is something I'm sure you've heard people
8 testify about, is invoked in Sub (d) to ensure that
9 the person, this disposition authority at JAG O-6
10 is not subject to unlawful command influence. And
11 then Sub (e) that goes from the bottom of 4 to page
12 5 simply states that if this person makes a
13 decision -- if the disposition authority makes a
14 decision not to try a case, not to send it to
15 general or special, then this person on the right
16 side of the chart, the brigade commander, still has
17 authority to impose summary court or non-judicial
18 punishment. So they can still send a soldier to a
19 summary court martial for which the maximum
20 punishment is 30 days, or non-judicial punishment.

21 GENERAL (RET.) HAM: But not special.

22 GENERAL PEDE: That's correct, because

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1 under this construct, this disposition authority
2 has binding authority, and he's determined -- he or
3 she has determined it will not go to trial.

4 Now, one of the interesting questions that
5 you see reflected at one of your tabs -- it should
6 be Document 5, a number of implementing questions,
7 what happens as you probably remember, soldiers
8 have the authority -- sailors, airmen, marines have
9 the authority to refuse trial by summary court as
10 well as non-judicial punishment. So having made a
11 binding decision not to go to trial and kicking it,
12 for example, the DA declines a case -- this box in
13 the middle -- kicks it to the brigade commander.
14 The statute currently doesn't address what to do in
15 a case where the soldier refuses, as is their
16 right, the summary court martial or non-judicial
17 punishment. Many of the brigade commanders try the
18 cases. According to the statute, that's not
19 authorized. He's disposed of it and declined.
20 Does it go back to the disposition authority, and
21 we would presume it does, but there's no answer for
22 that. Currently all of that is taken care of on

1 the right side in the commander channels. Sir?

2 MAJOR GENERAL (RET.) ALTENBURG:

3 Technically, the accused's right when offered
4 punishment under non-judicial punishment or
5 proceeding under non-judicial punishment or
6 proceeding at a summary court martial to adjudge
7 guilt or innocence, his right is to demand trial at
8 a special court or higher, is that right?

9 GENERAL PEDE: The right is to demand
10 trial, yes, sir.

11 MAJOR GENERAL (RET.) ALTENBURG: Right.

12 GENERAL PEDE: It is always ultimately the
13 government's option to provide the trial. The
14 government has the option not to proceed to trial
15 upon the demand, but then no disposition is
16 essentially the windfall to the accused, who
17 decides to invoke that right.

18 MAJOR GENERAL (RET.) ALTENBURG: And one
19 might infer from the legislation that's drafted
20 that it creates a loophole, so to speak, because
21 it's hard to imagine an accused with the only
22 alternative for the command to do a non-judicial

1 punishment or a summary court. It's hard to
2 envision an accused with advice of counsel, saying,
3 oh, sure, I accept that, because if he demands a
4 trial, it looks like there's no alternative. There
5 won't be a trial.

6 GENERAL PEDE: On first blush it does
7 appear that way and second blush. There's just no
8 answer currently in here. Presumably the
9 disposition authority would take it back and make a
10 decision, but we don't know that, and there's no
11 authority listed to be able to do that.

12 MS. FROST: But wouldn't that then be the
13 basis of an appeal if you initially said there
14 wasn't compelling evidence to move forward with
15 criminal prosecution, it gets kicked back, and you
16 changed your mind? I would -- that strikes me
17 as --

18 GENERAL PEDE: That's one basis, although
19 you can argue in some cases, prosecutors make
20 decisions for different reasons. Sometimes they
21 choose not to prosecute based on caseload, based on
22 availability of resources and money. The services

1 don't typically make decisions to prosecute or not
2 prosecute based on funding. We're not as
3 constrained perhaps as maybe a state office with
4 limited resources. But sometimes they do make
5 decisions -- prosecutors around the world make
6 decisions based on resources, so there are other
7 reasons. But there is no escape hatch or
8 explanation of how that's to be resolved.

9 CONGRESSWOMAN HOLTZMAN: And without more
10 -- let's just assume this legislation passed. How
11 would the military deal with that problem? What
12 would you do? I mean, could it be solved in any
13 way? I guess my specific question is, short of
14 some legislative correction, how would you deal
15 with this problem? Could you deal with this
16 problem?

17 GENERAL PEDE: That's the money question,
18 ma'am. Typically --

19 CONGRESSWOMAN HOLTZMAN: \$64,000?

20 (Laughter.)

21 CHAIRWOMAN JONES: It's more today.

22 GENERAL PEDE: So your practitioners in

1 all of the services, ma'am, we make it work. We'll
2 find a way to make it work. The dilemma is, as
3 you've identified, is what type of errors will we
4 build in to the band-aid that we need to apply to
5 make it work? There could be just outright
6 impediments to making it work.

7 So, for example, we haven't gotten to it
8 yet, but what you'll see when you look at this is
9 there will be some courses of misconduct for which
10 both sides of this construct have authority. So I
11 may go AWOL, I may kidnap someone. That's all on
12 this side. And then I may rape them and then
13 murder them. That's on this side. By the statute,
14 both have authority over each category of those
15 offenses, certain of those offenses. Neither has
16 authority to do all of them.

17 Now, how do you determine who will take
18 jurisdiction? Do you have two trials wherein the
19 victims must testify in both, or do you have a
20 consolidated trial in which you now imbed potential
21 error, because as an accused I would argue, you
22 don't have authority to try -- legal authority to

1 try the kidnapping, which belongs to him or her, or
2 the AWOL. You only have authority over the murder
3 and rape. Again, legal error.

4 So back to my original example, yes,
5 ma'am, we will try and work it through comity, with
6 a "T," between the commander -- and remember, the
7 commander system remains -- what you see on Exhibit
8 D, the staff judge advocate, senior legal advisor,
9 usually a colonel or an O-5, would work with the
10 commanding general and the brigade commander to
11 sort out what do we do with this if this O-6 has
12 declined to prosecute, or we have shared
13 jurisdiction, for lack of a better term. And we
14 would try and negotiate who's going to try it, but
15 we'll not know the answer until an appellate court
16 tells us if we're right or wrong. We will not.

17 CHAIRWOMAN JONES: Go ahead.

18 GENERAL (RET.) HAM: This is Carter Ham.
19 On a practical level, General Pede, have you looked
20 at, again, if the legislation as proposed passes,
21 how you would implement in terms of manning with
22 the establishment of two new authorities,

1 disposition authority and chief of services, but
2 the staff judge advocate, less military justice
3 matters still is a necessary function for general
4 officers in command, though they no longer hold
5 military justice responsibilities. Do you have the
6 wherewithal within existing structure to execute
7 this?

8 GENERAL PEDE: Sir, I believe that the
9 judge advocates general have provided cost
10 estimates to build the structure you see on Exhibit
11 B, and I'll highlight some of those at least for
12 the Army.

13 So to build this structure just within the
14 disposition authority box, sir --

15 COLONEL HAM: And you have those at Tab 9,
16 sir.

17 GENERAL (RET.) HAM: Okay, all right.

18 GENERAL PEDE: And I refer you from, and I
19 apologize to members on the phone. I'm looking at
20 Exhibit B, the box that says "Disposition
21 Authority." To build that person, you must build
22 an office around that person resourced to prosecute

1 cases. And in the Army, as I mentioned, we have
2 roughly 15 jurisdictions. Just as an example, all
3 the services have multiple prosecution centers
4 around the world. For the Army, we've got about 50
5 of these doing it now. They're called staff judge
6 advocates. And, sir, just to clarify, this staff
7 judge advocate, and this chief of the criminal law
8 on Exhibit B still have full responsibility for
9 over half of the offenses under the Uniform Code.

10 So I believe that TJAGs would tell you
11 that this structure must remain in large part in
12 order to continue to advise corps, division,
13 brigade, battalion commanders, and to dispose of
14 all of the offenses on the right side of this
15 chart, Exhibit C. They still have to prosecute the
16 kidnappings and the AWOLs, desertions, the
17 malingerings, the drunks, the DUIs, the drug cases.
18 All of that still needs to be prosecuted, and these
19 people will still do those. The courts martial
20 that are conducted on this side still need to be
21 taking verbatim transcripts. We still need court
22 reporters. We still need NCOs to run the courts,

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1 and to find witnesses, and to interview, and to do
2 all of the administrative preparations of records
3 of trial. All of that still needs to exist within
4 the staff judge advocate to continue to advise
5 these commanders.

6 So to do that, it requires all of this in
7 the center of Exhibit D, I think The Judge Advocate
8 General in the Army, for example, said to do that
9 here on Exhibit B, the disposition authority, you
10 need to do roughly -- to be able to try cases with
11 the same measure of speed that we do now, you'd
12 need -- we would need in the Army roughly anywhere
13 from 35 to 50 of these people. So I need 35 to 50
14 senior judge advocates with significant criminal
15 law experience. And then I need that pyramid under
16 them to do the same thing for all those other
17 offenses, unless I cut this in half and turned it
18 over to them. And by doing that, I would argue,
19 having done this for about 24 years -- that is,
20 prosecuted or defended cases -- this slows down and
21 is decremented in some significant, meaningful way,
22 as it deals with all of the misconduct that is left

1 with commanders.

2 So it's -- in a way, you're cutting the
3 Gordian knot, and you've got -- using now in some
4 way to a criminal to the capability on either side.
5 But both must be resourced. This O-6 can't
6 investigate 15,000 allegations. You need to spread
7 it out across the world so it's manageable. Then
8 he also needs other judge advocates to get cases
9 ready for trial, to identify if they should go to
10 trial, to prepare for trial. He needs paralegals
11 to help him do that. He needs court reporters and
12 judges. So there's a whole structure here.

13 The judges can probably be shared. Court
14 reporters can probably be shared to some degree.
15 But who do they work for? Right now they work for
16 the staff judge advocate. Those are questions
17 that, again, are unanswered. We would figure it
18 out. We would figure it out, but it would be very
19 difficult for the first probably 12 to 24 months.

20 CONGRESSWOMAN HOLTZMAN: How would plea
21 bargaining take place? If you had a case -- the
22 example you gave where you have a kidnapping, a

1 rape, whatever -- offenses on both the left and the
2 right side.

3 GENERAL PEDE: It's impossible to say
4 today, ma'am, because it's not clear. I would
5 point out that Article 22 of the Uniform Code -- it
6 was Document 2 in your folder -- useful to look at
7 that because while this person has GCM authority,
8 general court authority, as we understand it, it
9 doesn't exist on the right side anymore. So these
10 commanders who traditionally have held that
11 authority with this legal advisor don't -- can't
12 convene general courts.

13 COLONEL HAM: It can't convene special
14 courts either, can they?

15 GENERAL PEDE: And they cannot -- thank
16 you -- under Article 23, these people can't convene
17 special courts either. So general officers don't
18 have authority to convene this lower level court.
19 This person does, the brigade commander, but
20 historically, at least in the Army, they don't do
21 this. So these brigade commanders have no
22 experience convening courts. So for a period of

1 time, we'd be left guessing until we sort it out.

2 Now this new office of convening authority
3 -- referring for members on the phone to Exhibit B
4 -- the Chiefs of Services have authority to create
5 new convening authorities. So presumably, the
6 Chief of Staff of the Army, General Odierno, would
7 identify at least one convening authority who could
8 convene general courts for all offenses worldwide.
9 Now again, currently we have roughly 70 in the
10 Army. There's an efficiency obviously that that
11 generates for you. It's close to where the offense
12 was committed. There's a legal advisor physically
13 present, can advise the convening authority and
14 move cases quickly. If you have --

15 PROFESSOR CORN: General Peede?

16 GENERAL PEDE: Yes?

17 PROFESSOR CORN: I'm sorry. I didn't mean
18 to interrupt. I thought you were done.

19 GENERAL PEDE: We would presume that the
20 Chief of Staff of any of the services would create
21 multiple convening authorities to spread them
22 around the world for efficiency. He has the

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Comment [E2]: Please review audio -
I believe this was Vice Admiral
(ret.) Houck.

Comment [E3]: Same as above.

1 authority to do that. We don't know what his
2 constraints are. Having taken away these authority
3 from these individuals, three- and two-stars, is
4 the Chief of Staff of any of the services
5 comfortable reappointing them given that the
6 authority was, at least congressionally, seems to
7 indicate that they should not have it? Who is the
8 Chief of Staff to appoint at that point?

9 Assuming the Chief of Staff does that then
10 with regard to pre-trial negotiations, ma'am, we
11 would have to assume that that GCM would have the
12 authority to negotiate.

13 CONGRESSWOMAN HOLTZMAN: Over what crimes,
14 or what offenses?

15 GENERAL PEDE: Well, it would depend on
16 which offenses came to hand from which side of the
17 chart, if you will. Under the statute as currently
18 drafted, there is no way as I read it, ma'am, for
19 the offenses left with commanders -- even if you
20 reappointed them, there's no way for those offenses
21 to get to the new convening authorities because
22 it's generally constructed that the disposition

1 authority feed the new convening authorities.

2 It's not clear how that would happen under
3 the current language. It doesn't mean it can't be
4 fixed, ma'am, but just under the current language
5 it's not clear how military -- I won't say military
6 offenses because the carve-out, the excluded
7 offenses, are far more than just military. So,
8 those offenses left with the commander, they need
9 an outlet to the general court environment. But
10 right now it doesn't exist in the statute as
11 drafted.

12 CONGRESSWOMAN HOLTZMAN: But my
13 question --

14 PROFESSOR HILLMAN: General Peede, this is
15 Beth Hillman. May I ask a question?

16 GENERAL PEDE: Yes, ma'am.

17 PROFESSOR HILLMAN: I wonder if you have
18 looked at what happened in the UK when they
19 undertook comparable changes, which really have
20 happened over a long period of time, but especially
21 in the Armed Forces Act of 2006 and then the
22 changes that were sort of fully implemented by

1 2009. Because what they did was actually
2 centralize more than what you're contemplating here
3 or what the bill specifies. It centralizes this
4 authority that deals with serious charges, and left
5 the authority to deal with lesser offenses reside
6 in command. Did you look at what they did?

7 GENERAL PEDE: Yes, ma'am, but I would
8 tell you that I haven't looked at it in greater
9 detail than what you described. I think I've read
10 -- well, I've certainly read articles about it.
11 I've talked with British judge advocates about its
12 effect and implementation. I think our Judge
13 Advocates General have also commented on it, and it
14 is, in our assessment, a question principally of
15 scale. But there's also a philosophical
16 underpinning I believe our judge advocate general
17 have highlighted.

18 So on the scale issue, we are a worldwide
19 deployed force. The British army is not. And on
20 the philosophical -- and what that means is we have
21 to have the ability to prosecute crime where we
22 find our soldiers, wherever they may be. And

1 again, that's a question --

2 PROFESSOR HILLMAN: General, I
3 understand --

4 GENERAL PEDE: Yes, ma'am, go ahead.

5 PROFESSOR HILLMAN: I'm sorry to
6 interrupt. I understand the objections to the
7 scale, and I understand that many on this Panel
8 just reject the relevance of the foreign
9 experiences. But in terms of the process and the
10 -- what looks an incredibly redundant and
11 excessive, you know, sort of -- is that what they
12 experienced? Did they end up with sort of
13 redundancy and a complete lack of efficiency as a
14 result of making that change?

15 GENERAL PEDE: I can't answer that, ma'am,
16 because I don't know that they left court martial
17 authority for purely military offenses with
18 commanders. The dilemma here, if there is such a
19 dilemma, is that both commander and the new
20 disposition authority have authority over -- well,
21 let's just use normal terms -- felony level and
22 misdemeanor level misconduct.

1 And so, I don't believe that's what they
2 did in the British system. However, here the
3 Senator has generally described the offenses left
4 with the commander as military offenses, suggesting
5 that they're lower in gravity perhaps, or at least
6 not general court martial material. And so,
7 therefore, you don't need to worry about gravity as
8 much. However, the reality when you look at the
9 bifurcation is, that's just not the case. And
10 so --

11 PROFESSOR HILLMAN: You know, General
12 Pede, I think you hit on a critical point there,
13 and that's that the bill as currently drafted
14 doesn't take the most serious offenses and shift
15 them to a non-chain of command authority, but
16 actually takes civilian style offenses of a serious
17 nature and shifts them to a civilian or, sorry, a
18 non-chain of command authority, the military
19 prosecutor, removing that from the chain of
20 command, but leave minor offenses and military
21 offenses within the chain of command. I think
22 that's the big -- that's the --

1 COLONEL HAM: It also leaves offenses like
2 child pornography, ma'am, all the child pornography
3 offenses, which are in Article 134, it leaves all
4 offenses that can be assimilated by Federal law,
5 for example, Internet enticement of a minor under
6 18 U.S.C. 2422.

7 GENERAL PEDE: If you think about the
8 offenses for which Bradley Manning was tried, those
9 were offenses against the Espionage Act and one
10 other Federal statute. Those were assimilated
11 crimes under 134. So I agree with what you
12 described, ma'am, with that one addition, that
13 commanders are also left with very serious common
14 law crimes and serious codified crimes.

15 So the intent in the bifurcation may not
16 have been well executed; however, it may be
17 perfectly aligned with the intent of the drafter.
18 It's just too -- it's impossible for us to know,
19 ma'am.

20 PROFESSOR HILLMAN: Thank you, General.

21 PROFESSOR CORN: General Pede, this is
22 Professor Corn. I have three questions for you.

1 First off, has the Army Judge Advocate General
2 contemplated the percentage of O-6 judge advocates
3 who might not meet the qualification under the
4 statute because of a lack of significant criminal
5 prosecution experience? In other words, are we
6 assuming that if you're an O-6, you meet the
7 qualification, or do you think that the pool of
8 qualified officers would be substantially less than
9 the total number of O-6s in the force? That's my
10 first question, and how that might affect
11 implementation.

12 My second question is, are you looking at
13 the potential impact of creating these disposition
14 authorities on judge advocate officers'
15 professional development, so to speak, in other
16 words, their career development. And is there any
17 concern that by essentially tailoring career paths
18 to facilitate competence in this function, we might
19 be undermining the ability of these same officers
20 to perform the more kind of global function that
21 judge advocates routinely perform today, as you
22 outlined at the beginning of your presentation?

1 And then the third question is on the
2 efficiency issue, I thought that was interesting
3 because I recall at one of the earlier hearings
4 where I testified, that Professor Fidell actually
5 made the exact opposite argument. He argued that
6 he believed that having a centralized chief
7 prosecutor of the Army would actually be more
8 efficient. And all potential, what we might say,
9 serious or felony type offenses would go through
10 that centralized office ostensibly within the
11 office of a judge advocate general.

12 And I'm just interested in your opinion on
13 the feasibility of centralizing this function and
14 maybe having I'd have regional representatives,
15 kind of like the Regional Defense Counsel model
16 that we use in the Army, if you think that's
17 feasible, or if you and your colleagues are
18 convinced that the only way to effectively
19 implement this in our force would be to essentially
20 do what you're suggesting, which is to create 50 to
21 70 of these disposition authorities and disperse
22 them around the force.

1 GENERAL PEDE: Yes, sir. I would say out
2 of the gate, we don't have 50 to 70 O-6s with
3 significant experience doing trial work that could
4 immediately be fielded, even if you pulled out the
5 sitting staff judge advocates from these important
6 jobs around the world. They simply don't currently
7 exist in the inventory. I can't speak to the other
8 services, but I would believe we're all fairly
9 hard-pressed even now, given 12 years of war,
10 wherein certain skill sets can atrophy if you've
11 been focused on advising commanders in the field.
12 Your capabilities and skill sets with regard to
13 criminal law and the delivery of those services can
14 atrophy.

15 So in general, I think all of the services
16 would be hard pressed to field sufficient numbers
17 of disposition authorities to maintain the current
18 speed of prosecutions and the quality of
19 prosecutions. But specifically to your questions,
20 I've been -- and again, I'm speaking as the former
21 Chief of Criminal Law, not in my current capacity,
22 to be clear. I served as the Chief of Criminal Law

1 for about four and a half years. I was deployed as
2 a staff judge advocate in Iraq for a year -- over
3 the last five years, and I was recently the
4 Executive Officer for The Army Judge Advocate
5 General.

6 With that lens, my assessment would be
7 we'd have 20 to 25, perhaps more, judge advocates
8 with the level of experience that's expected for
9 these disposition authorities. I would like to say
10 there's more, and there could be. I haven't done a
11 critical analysis of the Army's inventory and the
12 skill sets. But I think at the lower grades they
13 exist, but at the higher grades with the work we've
14 been doing over the last 12 years, that's a
15 challenge. There are very few --

16 COLONEL TURNER: General Peede?

17 GENERAL PEDE: Yes, ma'am?

18 COLONEL TURNER: Lisa Turner here. To
19 pursue that question before you turn to the rest of
20 Professor Corn's questions, and just for the sake
21 of the record, we can't just hire an experienced
22 prosecutor on the street to be an O-6. So how long

1 does it take to grow an experienced O-6, and how
2 many people in the pyramid -- captain, you know,
3 major, et cetera -- level do you need to bring unit
4 accession levels to grow that force structure?

5 GENERAL PEDE: It takes approximately 18
6 to 24 years to build the kind of O-6 colonel that
7 we presume is identified in the statute.

8 COLONEL HAM: Members, for time purposes,
9 we've been notified Senator McCaskill still desires
10 to attend, and she's supposed to be here in about
11 10 minutes.

12 GENERAL PEDE: If that answers your
13 question, ma'am, it takes many years to build an O-
14 6 that you would -- that we presume would be
15 qualified under these criteria, although there's
16 not a lot of detail in the criteria. It's a
17 significant experience with criminal trials at the
18 general and special court martial levels.

19 COLONEL HAM: General Peede, can I ask a
20 question?

21 GENERAL PEDE: Please.

22 COLONEL HAM: What happens to lesser

1 included offenses that fall from one side to the
2 other? Have you considered that?

3 GENERAL PEDE: Well, we have, and it's not
4 identified in the statute what happens. But
5 presumably if it's a lesser offense, it can get to
6 the other side, if you will, the commander side in
7 a couple of different ways. The DA can choose not
8 to prosecute it or -- I'm not sure what example
9 you're thinking of.

10 COLONEL HAM: What if the panel wants to
11 convict of a -- I mean, it may be an obvious
12 answer. What if the panel wants to convict of a
13 lesser included offense? I would think they still
14 could. The DA doesn't have jurisdiction over that
15 offense, but I would think it still remains a
16 lesser included offense for the panel or judge to
17 convict.

18 GENERAL PEDE: I presume once the court
19 has convened, those offenses remain available to
20 the panel to convict on. And then I'll just move
21 quickly through the remainder here, but to answer
22 Professor Corn's last two questions, there's no

1 discussion in the statute obviously about
2 professional development. But to be able to create
3 this cadre in the disposition authority arena,
4 you've essentially got to track them over the
5 course of their career. That, again, nixes down
6 the amount of people available to do that.

7 It also deprives -- you know, when you
8 talk about an Army prepared for war, many of us
9 have spent a lot of time in deployed settings or in
10 garrison settings preparing for war. And a lot of
11 our time is spent on the left side of Exhibit D;
12 that is, in legal assistance at law, operational
13 law, in particular, and claims. You have to
14 develop that proficiency to be able to go to war
15 effectively and advise senior commanders. It's not
16 just military justice. So in order to maintain the
17 broadness of our skill set, we have to be able to
18 do all of it to be able to serve our Army and our
19 organizations, all of the services.

20 Efficiency of the centralized prosecutor,
21 to me it speaks for itself. The notion of having a
22 single or a single office maybe with multiple

1 prosecutors in it responsible for worldwide
2 prosecution would bring us to a grinding halt. And
3 I can say that with some measure of confidence.

4 PROFESSOR CORN: Thank you.

5 CONGRESSWOMAN HOLTZMAN: General, maybe I
6 didn't ask my question clearly. But let's just say
7 -- going back to the question I asked about plea
8 bargaining. If the DA, the disposition authority,
9 does not want to plea bargain with regard to
10 certain offenses, or thinks that the sentence
11 should be X, and on the right side, that commander
12 doesn't want to plea bargain at all. How does this
13 get resolved when you have the same series of
14 offenses involved in a single incident? What do
15 you do? Is there authority? Who takes precedence?
16 Who has control?

17 GENERAL PEDE: There's no explanation. I
18 can't provide you an explanation, ma'am.

19 CONGRESSWOMAN HOLTZMAN: Okay. So the
20 statute doesn't solve that problem.

21 GENERAL PEDE: No.

22 CONGRESSWOMAN HOLTZMAN: So it's possible

1 to have a complete breakdown in terms of how to
2 prosecute this case.

3 GENERAL PEDE: Yes, ma'am.

4 CONGRESSWOMAN HOLTZMAN: Okay.

5 GENERAL PEDE: And as you've identified,
6 much of the conduct we face in our daily lives is a
7 combination of misconduct. It's not a single
8 offense. It's a course of conduct. It's a course
9 of conduct that streams from left to right and back
10 again on Exhibit B. And that's what this center
11 box, this center phrase, cases with both excluded
12 and included offenses, what do we do with them,
13 which is your point, ma'am.

14 In addition, who has authority? How do
15 you negotiate pre-trial agreements? It's not
16 clear. It doesn't mean it can't be made clear, but
17 it's not currently in the statute as drafted. Sir?

18 MAJOR GENERAL (RET.) ALTENBURG: When you
19 were talking about the comparison to other
20 countries' military justice systems, you used two
21 concepts of distinction. One was scale. What was
22 the other?

1 GENERAL PEDE: Philosophical
2 underpinnings, sir.

3 MAJOR GENERAL (RET.) ALTENBURG: Right,
4 okay. Going back to scale, I would suggest that
5 when you talk about scale and worldwide deployment
6 of the U.S. forces compared to the relative lower
7 level of deployment of the forces from the European
8 countries especially, that when you address that,
9 you might also include the size of the country
10 because for their domestic military crimes, you
11 know, England is the size of -- you know, smaller
12 than many states. And when you take the U.S.
13 forces and spread them across CONUS in Alaska, and
14 not talking about deployment, just talking about
15 garrison crimes, there is a huge geographic area
16 that makes what they've done in those other
17 countries much more difficult for us to accomplish.

18 GENERAL PEDE: I would observe that in
19 practice in a number of CONUS stateside
20 jurisdictions that in general, and we see this
21 reflected still routinely, local state prosecutors
22 who have jurisdiction over the offenses our

1 soldiers commit -- sailors, airmen -- are not
2 interested in asserting jurisdiction in general, in
3 the main, simply because their loads are already --
4 their caseloads are already full, their courts are
5 already full, and it costs them money. And we have
6 the capability resident, and we're interested in
7 doing it, and we do it.

8 And our philosophy has always typically
9 been to maximize jurisdiction over soldier offenses
10 to maintain good order and discipline. I think
11 generally the services all abide with that
12 philosophy. And so, therefore, I don't believe
13 even in CONUS in the United States, we would be
14 able to jettison our crimes to either state courts
15 or particularly to Federal court. The thresholds
16 to get into Federal court are very high; that is,
17 District Court.

18 I used to try drug cases, and the Federal
19 prosecutor -- the U.S. attorney in my jurisdiction
20 would be very civil with me, but I would have to
21 have pounds of cocaine involved in order to
22 prosecute an aircraft mechanic working on our

1 aircraft on our installation. All I needed to
2 prosecute for distribution or use was an ounce or
3 less, and I was interested; he or she was not. So
4 there's no outlet -- civil outlet -- that has, in
5 my experience, the capacity or interest to deal
6 with our caseload.

7 And I know my time is very limited, so if
8 I may just quickly jump back to the statute very
9 quickly, at the bottom of page 6, I would simply
10 highlight that from 6 onward, the statute -- page 6
11 onward -- the statute creates the convening
12 authority construct to replace all of those that
13 were deleted from Article 22. And if you pull
14 Article 22 again, important to note that Article
15 22, which was Document 2, is amended by this
16 statute to delete -- if you have Article 22 in
17 front of you, it deletes Subparagraphs (a)(5)
18 through (8). So this statute beginning on page 6
19 deletes those who can convene general courts, which
20 include Army groups, typically three-star and four-
21 star commanders, to division commanders, to
22 admirals of the fleet, et cetera, to air commanders

1 at the general court martial level.

2 It also interestingly deletes the
3 Secretaries' authority -- the Secretaries of the
4 Services' authority -- to appoint general court --
5 convening authorities, and interestingly, vests
6 that new authority with the Chief of Staff of the
7 Army, which is interesting. The Secretaries no
8 longer have authority to create general courts.
9 The Chief of Staff of the Army does.

10 COLONEL HAM: General Peede, could I ask
11 you again -- can you explain using Article 23 why
12 current general court martial convening authorities
13 have no authority at all anymore?

14 GENERAL PEDE: If you look at Article 23,
15 which is Document 3, general court convening
16 authorities have their authority in two fashions.
17 A division commander, a fleet admiral or an admiral
18 of the fleet has authority based on Article 22
19 because of their position. It's statutory. It's
20 just because of who they are and the billet they
21 occupy. They can automatically convene general
22 courts, or the Secretary has given them special

1 authority. They've just said in an order you're a
2 general court convening authority. That's it.

3 If that doesn't exist, they don't have it
4 because it doesn't reside in Article 23. Article
5 23 is special court authority. Article 23 lists
6 those who have special court authority. Division
7 commanders, fleet admirals, air commanders at a
8 certain grade are not listed. Article 23 is
9 designed for lower level, lower echelon commanders.
10 And, therefore, who used to convene courts may no
11 longer convene courts unless the Chief -- in the
12 Army's case, the Chief of Staff of the Army so
13 designates them after congressional intent,
14 presuming the statute is passed, has said they
15 should not have it.

16 It's just an interesting conundrum that
17 would have to be wrestled with by the Chief of
18 Staff of the Services. Who do I appoint now?

19 COLONEL HAM: I think I'm asking -- maybe
20 I'm interpreting it incorrectly. Article 23 also
21 says any person who can convene a general court
22 martial can also convene a special court martial.

1 So the stuff that's deleted from 22, division
2 commanders, et cetera, no longer have general court
3 martial convening authority.

4 GENERAL PEDE: Right, they cannot --

5 COLONEL HAM: Then they are no longer a
6 person who can convene general courts martial.
7 They no longer have special court martial convening
8 authority. Is that the right logic?

9 GENERAL PEDE: Right, but remember -- I
10 believe that's correct. That's the way I read it.
11 But remember that this person has it; that is, the
12 brigade commander in the Army, O-6 commander. But
13 remember, in the Army this person has never
14 heretofore convened courts. They have the
15 authority under the law. We just don't do it that
16 way as a matter of practice. The marines tend to a
17 little bit. But in our practice, historically
18 they've not had that.

19 MAJOR GENERAL (RET.) ALTENBURG: For
20 what's it worth, since the early '80s --

21 GENERAL PEDE: Sir?

22 MAJOR GENERAL (RET.) ALTENBURG: -- in the

1 '70s, brigade commanders routinely referred what we
2 call regular special courts martial.

3 GENERAL PEDE: Yes, sir.

4 MAJOR GENERAL (RET.) ALTENBURG: That's
5 when the caseload was three times what it was
6 later.

7 GENERAL PEDE: Right. And they would
8 handle the lower level cases that needed to go to
9 trial.

10 MAJOR GENERAL (RET.) ALTENBURG: Right.
11 And that was all in the wake of the '68 amendments.
12 I mean, there were huge numbers of special courts.

13 GENERAL PEDE: And the maximum punishment
14 was up to six months of confinement. Now it's a
15 year, so it's different historically.

16 MAJOR GENERAL (RET.) ALTENBURG: Right.

17 GENERAL PEDE: And I would note as well,
18 unless there are other questions, Document 4 in
19 your packet is the maximum punishment chart, which
20 is a handy tool all prosecutors and defense counsel
21 use. It's just a massive listing of every punitive
22 provision in the Code, and it has the corresponding

1 maximum punishment.

2 And I just wanted to simply highlight for
3 you, if you flip to the very last two pages, all of
4 those offenses you see on the last two pages are
5 Article 134 offenses that fall under what we refer
6 to as the General Article, and that allows a
7 commander to try those specified offenses.

8 And as you can see as you read that list
9 and the maximum punishments of confinement to the
10 right, many of those offenses are in excess of a
11 year. Now, those offenses are all left with the
12 commander. None of them by the statute, as
13 currently drafted, can be disposed of by the
14 disposition authority. They've been carved out.

15 I would also note that the General Article
16 allows us to, what we say, assimilate state and
17 Federal crimes [that's not articulated[?]]. Again,
18 Bradley Manning, as just an example, was tried for
19 certain espionage offenses under the Espionage Act.
20 That was assimilated and pulled in from the Federal
21 law under 134.

22 SENATOR MCCASKILL: Hi.

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Comment [E4]: Please review audio.

1 COLONEL GREEN: Good morning.

2 SENATOR MCCASKILL: I didn't want to
3 interrupt.

4 CHAIRWOMAN JONES: Hello, Senator.
5 Senator McCaskill has arrived. And I think what we
6 -- General Peede, do you want to just finish if you
7 have not?

8 GENERAL PEDE: Ma'am, thank you. I simply
9 wanted to call your attention to that. It is a
10 handy reference for the members of the Panel to get
11 scope and to understand the bifurcation that's
12 affected by the Senate -- current Senate Amendment
13 1197.

14 CHAIRWOMAN JONES: Senator, I have one
15 more question I'd like to ask the General, and
16 then --

17 SENATOR MCCASKILL: Sure, not a problem.
18 I'm a little early. Not a problem.

19 CHAIRWOMAN JONES: Okay. I'm looking at
20 your Exhibit B, General, and so the left is the
21 disposition authority, and then our new convening
22 authority is the middle box at the bottom?

1 GENERAL PEDE: At the bottom center, yes,
2 ma'am.

3 CHAIRWOMAN JONES: Okay. And this new
4 convening or these new convening authorities are
5 the ones now who would pick the judge, detail the
6 panel or the jury, choose the prosecutors, and
7 choose the defense counsel?

8 GENERAL PEDE: According to the statute as
9 drafted, that office -- this new office would have
10 the authority to detail what you've just described,
11 the military judge, apparently both sides of the
12 bar, the counsel, trial and defense, and pick
13 selected members of the panel.

14 Now, as you've -- and some of these are
15 highlighted in some of the questions in the
16 document. All of this is now done by separate
17 authority within the military services to ensure
18 not only the appearance of fairness, but the
19 reality of fairness in who's controlling the
20 detail.

21 Ages ago, defense counsel were detailed by
22 a staff judge advocate. They worked for the staff

1 judge advocate. They decided in great wisdom to
2 separate that function because it didn't look
3 right, and there could be a conflict of interest.
4 So that's all done separately now. This statute
5 would sort of take us back in time and have one
6 person detail all of those individuals.

7 CHAIRWOMAN JONES: Has there been any
8 discussion about how to -- assuming people think
9 that that's bad either in appearance or in
10 actuality, has there been any discussion about how
11 to amend that or fix that?

12 GENERAL PEDE: Like other provisions,
13 ma'am, not further than what we've discussed here.
14 And amongst the practitioners, the senior
15 practitioners in our services, we've raised this as
16 a concern obviously. But currently there's no
17 amendment to that portion.

18 CHAIRWOMAN JONES: Nothing in the bill.

19 GENERAL (RET.) HAM: I'm sorry, just one
20 more beat of the drum on resourcing. Because the
21 legislation as currently drafted proposed -- does
22 not allow any increase in end strength. The growth

1 in the various boxes that you've depicted, General
2 Pede, those are all now billets to the services.
3 The services would have to find those additional
4 billets and the fiscal resources within their
5 existing authority at a time when both budgets and
6 manpower are decreasing. Is that a correct
7 assumption?

8 GENERAL PEDE: That's an accurate
9 statement, sir. They have to be harvested
10 somewhere within the current inventory, and
11 buildings and offices would have to be found for
12 these people who, remember, who are not part of the
13 unit for which they're now responsible.

14 GENERAL (RET.) HAM: Thank you.

15 GENERAL PEDE: So they would be tenants in
16 some fashion. But they'd have to be pulled from
17 that existing structure.

18 CHAIRWOMAN JONES: Yes?

19 MAJOR GENERAL (RET.) ALTENBURG: Just one
20 more. Do you think it's fair to characterize
21 things like one person detailing all of these
22 entities where before they were, you know,

1 different entities. Is it fair to characterize
2 that as one of many probably unintended
3 consequences of the drafting in fairness to the
4 drafters and maybe bending over backwards to be
5 generous to them, that that's an unintended
6 consequence?

7 GENERAL PEDE: I think that's a fair
8 description, sir. I don't think there's many
9 provisions in here -- I think our estimate is
10 roughly 30 to 40, 45 provisions of the Rules for
11 Court Martial at a minimum that would have to be
12 amended to accommodate this structure. Those are
13 consequences that I don't think are necessarily
14 intended, perhaps simply not appreciated, but I
15 can't say, sir. I don't know. But I think it's
16 fair to say.

17 MAJOR GENERAL (RET.) ALTENBURG: Just as
18 the 120 redo in 2006 had the unintended consequence
19 of being partially unconstitutional?

20 CHAIRWOMAN JONES: Yes, Liz?

21 CONGRESSWOMAN HOLTZMAN: Has your office
22 or has anybody discussed these issues or concerns

1 with Senator Gillibrand or her staff to see what
2 their response is and how they would address these
3 issues?

4 GENERAL PEDE: Ma'am, I'm privy to early
5 conversations with various members and their
6 offices on the Hill. Recently I believe -- I can't
7 speak to recent conversations, engagements with the
8 office and to what extent they have addressed some
9 of the issues.

10 CONGRESSWOMAN HOLTZMAN: Thank you.

11 CHAIRWOMAN JONES: Thank you very much,
12 General Pede. For those of you on the phone, we
13 are going to take about a five-minute break now,
14 and then when we return, Senator McCaskill is going
15 to speak with us. Thank you.

16 (Whereupon, a recess was taken.)

17 CHAIRWOMAN JONES: Do we have everyone
18 back who's attending by telephone? Beth, are you
19 here?

20 PROFESSOR HILLMAN: Yes.

21 CHAIRWOMAN JONES: Jim?

22 VICE ADMIRAL (RET.) HOUCK: I'm here.

1 CHAIRWOMAN JONES: Okay, great. Professor
2 Corn?

3 PROFESSOR CORN: Yes, ma'am, I'm here.

4 CHAIRWOMAN JONES: Okay, great. Have I
5 forgotten someone?

6 COLONEL GREEN: Colonel Turner.

7 CHAIRWOMAN JONES: Oh, Colonel Turner.

8 COLONEL TURNER: I'm here also, yes,
9 ma'am.

10 CHAIRWOMAN JONES: Great. Okay. As you
11 know, Senator McCaskill is here, and we'd like to
12 hear from you, Senator. Our concentration this
13 morning is to look at the Senate proposal sponsored
14 by Senator Gillibrand, and specifically with the
15 structure that is proposed, which removes
16 commanding officers from the convening authority
17 positions.

18 SENATOR MCCASKILL: Well, thank you, and
19 I'm pleased to be here. It is -- frankly, my staff
20 was laughing at me because I looked forward to this
21 because my frustration is so high in dealing with
22 this issue on a superficial political level. This

1 has been personally very painful for me. I've
2 spent my life working on behalf of victims of
3 sexual assault. I would never advocate any
4 position that I believed was not going to do the
5 very best job the law would allow in terms of their
6 protection, their empowerment, and the ability to
7 put perpetrators in prison.

8 I have been on the front row, I think,
9 doing reforms in every part of the military. One
10 of the things that some of my colleagues laugh at
11 is the characterization that some victims'
12 organizations have made of me that I'm coddling the
13 military. I think if you check with the military
14 leadership and my record on the Armed Services
15 Committee, I don't think they would characterize as
16 coddling. I've been very tough on our military on
17 a number of different subjects, and I think this is
18 one where I have been consistently tough on them.

19 I think we do victims a terrible
20 disservice by simplifying this to victims versus
21 commanders. It is much more complex than that.
22 When arguments have been made about this change in

1 the UCMJ, they have shifted over time when we have
2 met them. The initial argument that was made in
3 front of the Armed Services Committee was our
4 allies have all done this and reporting went up.
5 In fact, Senator Gillibrand said in the Committee
6 that reporting had gone up 80 percent in Israel.

7 Well, the truth is that is not correct.
8 Reporting has not gone up in many of our allies
9 that have done this. And, in fact, even in Israel
10 reporting went up the year after they made a
11 change, but it only matched the same number that
12 they'd had two years previously. So it was a
13 statistical aberration. It was not a trend. It
14 was not an indication that the change had resulted
15 in additional reporting.

16 So if the reason for doing this is our
17 allies have done it and it has worked, and if the
18 whole premise of this change is that we've got to
19 bring victims forward out of the shadows, then
20 certainly we have data, and the prosecutor in me
21 wants the data. And the data would say that's not
22 true.

1 Well, then the next argument was, well, if
2 we don't change it, they will not come forward
3 because they don't have confidence. And I am
4 pleased with the changes that have been made over
5 the last two to three years that we are seeing,
6 unlike our allies, an increase in reporting.
7 Reporting is not just up 50 percent this year. It
8 has been up every year over the last several years.

9 I am by no means excusing the military
10 from doing better, and I am by no means saying we
11 have this under control. But I think the reforms
12 that we have put in the bill are historic, and when
13 enacted, and I believe they will be enacted and
14 signed into law, we will have the most victim
15 friendly military -- most victim friendly sexual
16 assault regimen in the world. There is no system
17 where a victim has their own lawyer. There is no
18 system where the victim is going to be given as
19 many opportunities to weigh in in a formal way as
20 to the way the case should go forward. So I really
21 believe the changes we are embracing are important
22 and needed, and in some ways the value of them have

1 been diminished by this very contentious argument
2 over how we decide command authority on these
3 cases.

4 I am not going to -- I know you just had
5 an expert that went through a lot of the details.
6 I am happy to go through the details. One of my
7 frustrations is that my -- the other side of this
8 argument has not been as willing as I would like to
9 debate the details, not willing to take the
10 questions about the practical impact. And I can
11 assure you the question was asked of the drafters
12 of this legislation, do they know the problems. I
13 think they need to note the problems. I mean,
14 let's just look at the shift that is evidently
15 occurring right now. I believe because of the
16 advice of Professor Fidell, and to some extent, I
17 think this is the position of Professor Hillman
18 that she stated in writing, that it's important to
19 shift a lot of these offenses over to a disposition
20 authority outside of the chain of command.

21 Now evidently, Senator Gillibrand is
22 telling our colleagues she's going to limit it just

1 to 120 offenses. And now that means we have some
2 other practical considerations if, in fact, that
3 occurs. If it is just a sexual assault, then you
4 not only have the two track problem -- the
5 constitutional problems, the practical problems,
6 the pragmatic problems -- you have a real problem
7 as to the kinds of cases that I wish weren't common
8 in this area, but are.

9 And I am handcuffed by my review of all of
10 these issues by my experience. Until you have
11 handled hundreds of sexual assault cases and the
12 problems they present from a practical viewpoint,
13 it is very difficult to understand why this
14 amendment is so unworkable. I can give you
15 specific examples of cases I've handled. Let me
16 give you a couple of scenarios that will
17 demonstrate my point.

18 A woman comes forward and believes that
19 she has been fondled and inappropriately touched in
20 a sexual way. That would be a 120 offense. It
21 would go over to the disposition authority. One of
22 two things happens. The victim comes to the

1 prosecutor and says, or in this instance comes
2 through their advocate, which they would have, and
3 says, you know, I'm done. I will not go forward.
4 It is too personally painful in my life. My
5 counselor says that what I'm going to gain out of
6 this is not as much as what I'm going to lose in
7 terms of my mental health. I'm done.

8 Now, in that instance, if I were the
9 prosecutor, I'd want to get something. I'd want to
10 mark that guy. And in this instance, we want him
11 out of the military. That disposition authority,
12 now what do they do? Do they decline the case and
13 then does it seamlessly go back to the commander
14 for maybe a simple assault charge? Can they
15 legally do that? Not clear. Their authority is
16 binding.

17 And obviously -- I'm sure that the General
18 discussed NJP. What I would've given as a
19 prosecutor in the cases that I had to dismiss
20 either because factually they fell apart or because
21 the victim wouldn't go forward, what would I have
22 given to have NJP. What would I have given to have

1 a way to remove this person from the environment
2 where the victim wanted to serve.

3 And now, if you do what Senator Gillibrand
4 is advocating, that commander cannot do NJP because
5 all the perpetrator has to say is, sorry, I'm not
6 interested. The entire leverage of the trial is
7 removed from the ability to get that defendant to
8 take some kind of punishment, and, most
9 importantly, get them the hell out of our great
10 military.

11 Those are the kinds of practical and
12 pragmatic considerations that are not being
13 considered. Right now we are surfing a very
14 emotional wave as either you're on one or two sides
15 -- you're on the victim side or you're on those
16 dirty rotten commanders' side. And it's terribly
17 unfair to Senator Levin and half of the Democrats
18 on the Armed Services Committee. It's terribly
19 unfair to the women, and there are several of us
20 that did not give up our credentials as women, that
21 believe this is wrong for victims, to say that we
22 are anti-victim. Nothing could be further from the

1 truth.

2 And for the life of me, I cannot
3 understand. If you believe this new architecture
4 system is going to make a difference, why in the
5 world would you include language to say you can't
6 fund it unless this is a political exercise? Why
7 would you ever include that in your amendment? I
8 can't figure that out for the life of me.

9 I'm told it's what she had to do to get
10 some of the Tea Party support that she's gotten. I
11 don't know if that's true or not. There's a lot of
12 things being said that aren't true on both sides of
13 this equation, and I don't want to be irresponsible
14 about this. But I know the language of the
15 amendment, and it's included. And I think it's
16 really a problem, much less to say where are we
17 going to get all of these experienced colonels?
18 Where are they going to come from?

19 And, you know, with all due respect to the
20 people in the room that have had that rank or have
21 that rank, I'm not sure colonels are necessarily
22 the right ones to try these cases. And obviously,

1 I think the General went over the problems that we
2 have in terms of the concentration of power, which
3 is clearly problematic. We've got speedy trial
4 issues. We've got one entity picking everybody
5 that plays in this system.

6 Now, I think if we only do 120, then we've
7 got to look at the global question. If we can't
8 trust the commanders on sexual assault, can we
9 trust them on murder? How do you reconcile that?
10 How do you reconcile it on anything?

11 So I think there are two competing
12 interests that are swirling around this. There are
13 those -- some academicians, and some I respect
14 greatly about their knowledge of military law,
15 including one member of your committee, that
16 believe we should have more civil involvement in
17 the criminal justice system within the military.
18 And some advocate that there should not be a
19 criminal justice system within the military, that
20 it should all be civilian. I can have that
21 argument. But this weird stew mix in this kind of
22 setting, I think, will set back the meaningful

1 progress we're making.

2 And I know from the hundreds of victims I
3 have dealt with on a personal basis, the moment of
4 truth for them as to whether or not they will come
5 forward out of the shadows has everything to do
6 with how they are treated when they report, and the
7 support and information they get in the days
8 following their report. And we're fixing that.
9 We're fixing that.

10 And finally, let me close with this. We
11 are fixing a problem that cannot be documented. I
12 have asked over and over again, bring me a case
13 where the JAG has said go and the commander says
14 stop. If this remedy is needed, wouldn't those
15 cases be out there? They're not there. In fact,
16 just the opposite is there. We found 93 cases in
17 the last two years where the prosecutor said no,
18 and the commander said yes. So under the
19 Gillibrand proposal, when those prosecutors said
20 no, it's over. There's nothing else. So that's 93
21 cases just in the last two years where those
22 victims would not have had their day.

1 So we're fixing a problem that can't be
2 found. More importantly, let's assume this problem
3 is one we can identify in the data. Let's assume
4 that the commanders are exerting such an influence
5 on their JAGs, which I fundamentally reject. But
6 let's assume for purposes of this argument that
7 they are putting such influence on their JAGs that
8 the JAGs are giving them the recommendations they
9 want. If the commander says no, we've now got
10 checks and balances on him like the UCMJ has never
11 seen in terms of the appeals that must go up, all
12 the way to the Secretary of the Services,
13 civilians, not military.

14 This will not accomplish what some of the
15 academicians want because we're not moving anything
16 to the civilian system. We are going to give
17 victims -- in the side-by-side I'll be offering we
18 are going to give victims choices to weigh in on
19 whether they prefer, if they're off base, if
20 they're not on the base, if they would prefer the
21 civilian system handling it. And I think the
22 military will respect those preferences.

1 So I'll stop there, and I'm happy to take
2 any questions. I hope you bear with my frustration
3 and my ability to get in the weeds a little bit.
4 This has been probably the most challenging issue I
5 have faced in 30 years of public service because of
6 the nature of it, the emotion of it, and the fact
7 that I have to lay my head on my pillow every night
8 knowing there will be people that will never
9 understand that my advocacy on this issue has to do
10 with caring about victims, not because I don't.

11 CHAIRWOMAN JONES: Thank you, Senator, for
12 coming in and giving us that presentation. Are
13 there any questions for Senator McCaskill?

14 PROFESSOR HILLMAN: Judge Jones, this
15 is --

16 CHAIRWOMAN JONES: Yes, Professor?

17 PROFESSOR HILLMAN: I'm sorry to interrupt
18 you there. Senator McCaskill this is Beth Hillman,
19 and I regret that I'm not there in person, and I
20 very much appreciate you coming to talk to us. I
21 just wanted to -- first, I want to thank you for
22 your leadership on this issue. I've been there

1 when SWAN presented an award to you, and you made
2 remarks that clearly demonstrating then as they do
3 now how committed you are to finding the right
4 answers here. And that's what I personally am
5 committed to, too, as well as the rest of the
6 members of this Subcommittee and the Panel here.

7 Just one question for you on this. I'm
8 less concerned about the academicians, of whom I am
9 one, than I am about the victims, just like you.
10 And many of the -- you know, the victims' advocacy
11 organizations have lined up behind this change.
12 And yet, we have heard also from other victims, in
13 fact, last week in hearings of the full Panel. We
14 heard from persons with a wide range of views,
15 including at least one who was strongly supportive
16 of keeping this within the chain of command and not
17 making the kind of change that the proposal sets
18 out.

19 But to what do you attribute so many of
20 those advocacy organizations and individuals
21 putting the emphasis on this particular reform?

22 SENATOR MCCASKILL: Well, it's very

1 difficult for me to characterize them. I have a
2 great deal of respect for SWAN and many of the
3 victims that have become very vocal advocates. I
4 appreciate their courage. I think there are a
5 couple of things I would comment on.

6 There are many victims that I have -- I've
7 talked to a lot of victims that have gone through
8 the process in the military, and I will tell you
9 there is some line of demarcation between people
10 who have encountered the system recently and those
11 victims who were struggling a decade ago. And many
12 of the most vocal victims who have been active in
13 this debate truly suffered through some horrific
14 situations a decade ago. I'm not saying the
15 military has gone as quickly as I would've liked,
16 and I'm not saying that they have not gone without
17 some pushing.

18 But there's no question that there is a
19 significant difference in the leadership of the
20 military and their attention to this issue, the
21 oxygen that it's consuming within the military
22 leadership right now. I think they are

1 embarrassed, and they know they have a crisis, and
2 I think that if there's anything I can tell you is
3 the more recent victims have a different
4 characterization of the problem than those that
5 were victimized a decade or even longer ago.

6 The other thing is that I think it's very
7 easy to -- and for many of the victims, they don't
8 want to come forward that disagree with the victims
9 organizations. And I won't go into details here,
10 but there has been some inappropriate pressuring on
11 some of the victims that wanted to come forward and
12 be public, even a victim that was in *The Invisible*
13 *War*, who feels very strongly that we are correct,
14 that you cannot remove the accountability of
15 commanders by removing them from this process
16 entirely. And she received a great deal of
17 pressure, and she was receiving so much pressure
18 that I said, forget it, you don't need to be
19 victimized all over again around this.

20 So, you know, I think that the victim
21 community is not monolithic and just as women are
22 not monolithic. And I think that, you know, the

1 victim advocates are doing what they think is best.
2 I just fundamentally disagree with them that it is
3 going to be better for victims.

4 I had one of the JAG prosecutors -- I've
5 spent an awful lot of time -- in fact, I feel
6 guilty about the time I've taken from JAGs over the
7 last 18 months, sitting with them, many of them in
8 all services experienced, new, women, men. And
9 it's been pointed out to me over and over again
10 that the JAGs believe that if a victim is raped and
11 comes back in a unit, the environment in that unit
12 is going to be significantly different if everyone
13 knows that lawyers a half a continent away are
14 looking at it and they'll get back to us, versus
15 the commander signing off on a 34 or a 32. That's
16 a different kettle of fish. And, of course, we've
17 addressed that even further in our reforms by
18 making retaliation a crime.

19 So part of is, I think, some of the
20 victims just don't believe the military could ever
21 do better, and I get that. I would not ever -- I
22 understand that their personal pain trumps every

1 attempt I'm making to try to get this right. But I
2 think that is the best explanation I can give you
3 as to the fact that the two organizations that have
4 been formed around this are both advocating this
5 change.

6 PROFESSOR HILLMAN: Thank you, Senator.

7 CHAIRWOMAN JONES: Senator, did I hear you
8 correctly that the bill may shift yet again, so
9 what we're looking at now may not be what's
10 actually presented?

11 SENATOR MCCASKILL: She has made
12 indications -- she is trying to get 60 votes, and
13 she is willing to change the legislation again to
14 try to do that. And I believe what she's going to
15 do is -- this is what senators have been told. She
16 has not told me this. But senators have been told
17 that she is contemplating narrowing the
18 classification of cases that would go to this new
19 lawyer somewhere else, also in the chain of
20 command, I might add. I mean, it's not going to
21 civilian. It's going to be people in uniform that
22 ultimately are under the chain of command of the

1 commander in chief, just like the generals are
2 anywhere else. But that she's going to limit it to
3 120, which is all the sexual offenses.

4 CONGRESSWOMAN HOLTZMAN: Thank you very
5 much. Senator, I just wanted to say that in a way
6 you're being a little too modest about the role
7 you've played here. I would say that, yes, the
8 military understands that there's a serious
9 problem, and it's embarrassing, and it's shameful.
10 But without the extraordinary work that you have
11 done, and the other women on the Senate Armed
12 Services Committee and in the House, I don't
13 believe we would be where we are today. So I just
14 want to say personally thank you for standing up.

15 We've been focused on, as you can tell
16 from our conversation earlier, on the details of
17 Senator Gillibrand's proposal in terms of its
18 workability. We kind of address the philosophy
19 issues. We've tried to look at them, and they're
20 not easy. But we've been trying to focus on how
21 this bill would work practically, as you said. I
22 mean, and there do seem to be some quite

1 substantial practical issues.

2 Assuming for a moment that the bill were
3 to be passed, how will these issues be resolved, or
4 are there going to be amendments, or are these just
5 insoluble problems that the military is going to be
6 confronted with which could lead to cases lost
7 because of constitutional challenges, or because of
8 administrative hassles, or because it can't be
9 staffed up properly? I mean, what's your take on
10 this, because these could be very --

11 I mean, and I have no doubt that Senator
12 Gillibrand is extremely well-intentioned in what
13 her objective is here and the people who support
14 it. I think everybody has the same objective,
15 which is to try to do something about this terrible
16 phenomenon. But I think the practical issues, you
17 know, could be overwhelming the good intentions.
18 And I just wanted to get your sense of how, if this
19 bill were to pass -- her amendment were to pass,
20 how these could be resolved if they could be. I
21 don't know the answer to that.

22 SENATOR MCCASKILL: Well, I'm not sure

1 that some of them could be because they are
2 significant. And this is one of the dangers of
3 legislating, you know. I don't need to explain to
4 you, Liz, that it is a sausage making enterprise,
5 and you have policy intersecting with politics, and
6 sometimes it doesn't turn out well. I think this
7 is an instance where if it passes, which I think is
8 a big if, there is a real immediate problem in
9 terms of the system grinding to a halt. And there
10 are real speedy trial issues that I think will
11 arise because I think the military is really going
12 to be greatly circumscribed in terms of what they
13 can actually do.

14 Now, if it doesn't pass -- one of the
15 reasons I moved heaven and earth to be here this
16 morning is I think you all have a very solemn
17 responsibility. I think this Subcommittee and the
18 overall larger committee can play a vital role in
19 this because I don't believe that Senator
20 Gillibrand's proposal will become law this year,
21 which will give you an opportunity to weigh in.
22 And I think it's important that you do so. It's

1 kind of gotten away from me in terms of being able
2 to slow this thing down. But the House I do not
3 believe will accept it, and I do not believe she
4 will get 60 votes. Now, if she gets 60 votes,
5 that's another issue, and I can't predict what will
6 happen then.

7 But I think she's -- if she tries to
8 significantly change it now, I think she -- I'm
9 guessing. Some of this I'm speculating on, but I
10 think from a legislative -- if I was her -- I'm
11 trying to put myself in her shoes. If I were her,
12 and I made significant changes now, I think it
13 would undermine her credibility with many of the
14 senators she's talked into supporting it. That
15 might not be the case, but it does not appear to
16 have been drafted in a way that fully understands
17 the complexities of the UCMJ and the reality of the
18 practical application of the UCMJ in day-to-day
19 order and discipline of the United States military.

20 CONGRESSWOMAN HOLTZMAN: Thank you very
21 much.

22 CHAIRWOMAN JONES: General Ham?

1 GENERAL (RET.) HAM: Senator, again,
2 thanks. As one who has appeared before the Senate
3 Armed Services Committee and Subcommittees a number
4 of times, I don't recall anybody treating me with
5 kid gloves in any of those sessions.

6 (Laughter.)

7 GENERAL (RET.) HAM: Two specific
8 questions, ma'am. First, are there elements of the
9 legislation that's currently pending that you do
10 support? And secondly, in the creation of the
11 envisioned new convening authority, not the
12 disposition authority that we're talking about, but
13 the new kind of global, general courts martial
14 convening authority that would be appointed by the
15 Chief of Service as opposed to the Secretary of the
16 Service, do you see any problems removing the
17 service Secretaries from that traditional role of
18 civilian leadership?

19 SENATOR MCCASKILL: Well, I'm a big
20 believer that our military -- and not that we
21 haven't had issues with it in history, but that our
22 military is well served by being commanded by

1 civilians. And the role of the civilians within
2 our military, I think, is vital. And I think they
3 need to be involved.

4 I support the underlying provisions in the
5 underlying bill because I helped draft most of
6 them. The reforms that are there are ones that
7 were brought to me by victims, were brought to me
8 by practitioners, were ones that we spent a great
9 deal of time looking at, whether it is making
10 retaliation a crime or dramatically changing
11 Article 60.

12 I will tell you there will be more reforms
13 that I will be advancing in the debate, the
14 specifics of which have not been made public, but
15 they will include Article 32. I do not get Article
16 32. I do not get this weird combination of
17 preliminary hearing, grand jury hearing, and
18 deposition all at once. Those things should not be
19 done at one setting. It is totally inappropriate,
20 in my view, and we are going to change that in an
21 amendment that I will be offering, and particularly
22 when the military victim is treated differently

1 than the civilian victim under the current system.

2 Right now, if you're a civilian victim and
3 the alleged perpetrator is in the military, it is a
4 grand jury in that you can sign a statement, and
5 that suffices as evidence that would support the
6 underlying charge. But if you're a member of the
7 military, because of the ability to compel
8 attendance, you've got to show up and be subjected
9 to deposition-like questioning in a setting that,
10 frankly, I can't imagine very many victims that
11 would ever feel good about the way they were being
12 treated in terms of fairness based on some of the
13 questioning that is allowed to occur. And by the
14 way, this is a shift -- are any of you currently
15 JAGs? Anybody in the audience? Okay, so you know,
16 Lieutenant Colonel, that this is a shift that these
17 32s were not being used this way, except the last
18 five or six years they've kind of shifted to this
19 deposition type, we've got another shot at the
20 apple in terms of, you know, trying to tear apart
21 the victim's statement. That wasn't the way that
22 32s used to go on.

1 And so, we're going to try to address that
2 and see if we can't make that something that is not
3 such a mine field in an unfair way for a victim,
4 not removing their right to confront the witness.
5 Of course we must do that. It's constitutionally
6 required, and I don't want to remove that. But, I
7 mean, it would have been prosecutorial malpractice
8 for me to put my sexual assault victims through a
9 preliminary hearing when I had a grand jury. You
10 just wouldn't do it, and you didn't have to do it,
11 and I wouldn't do it. I mean, it was a grand jury.

12 PROFESSOR CORN: Senator McCaskill, this
13 is Professor Corn. Please forgive me for
14 interrupting, but I believe there are about 15 or
15 17 states in the union that don't use indictment by
16 grand jury, and some states that use grand juries
17 will allow an alternate process of presenting a
18 charged defendant before a preliminary hearing.
19 Wouldn't the same type of confrontation occur with
20 a victim in a civilian process that bound a
21 defendant over for trial to prepare for a hearing?

22 SENATOR MCCASKILL: It certainly would in

1 a preliminary hearing. And if I were in those
2 states, I would be busy in the state legislature
3 getting a grand jury system that was available in
4 these cases. Now, keep in mind that most states
5 where they don't require a preliminary hearing, it
6 doesn't take away the defendant's right to depose
7 the victim. It's not as if we are saying -- and
8 our reforms will not do that either. We are not
9 removing the right of confrontation.

10 The question is must you require that that
11 victim go through that in a setting that is also a
12 binding judicial setting as it relates to probable
13 cause **divined over**? And I come down on the side
14 of, you might not be surprised to know, of the
15 victims in this instance, that I think that often
16 the more times someone is allowed to do that, the
17 more likely it is that they find small, little
18 inconsistencies that they blow up for the jury and
19 try to undermine the credibility of the victim.
20 And as a prosecutor who believes the perpetrator is
21 guilty, I always was interested in making sure her
22 credibility stayed strong.

Comment [E5]: Please review audio.

1 CHAIRWOMAN JONES: Senator, there are a
2 number of provisions, and the bill, such as
3 providing counsel for each sexual assault victim.
4 Does the bill provide any funding for any of these
5 programs? I know you've told us Senator Gillibrand
6 says no funding for hers.

7 SENATOR MCCASKILL: Well, this is an
8 authorization bill, so what this bill does, and
9 this is an age old fight that I'm sure Liz can
10 illuminate you on about the difference between
11 authorizing and appropriating. There's only one
12 way we spend money, and that's appropriating. But
13 what she has done is she has proactively limited
14 the ability to appropriate money for the reforms
15 she wants to enact. We did not do that in the
16 underlying bill, so it will ultimately be up to the
17 appropriators.

18 But I will tell you, I believe that the
19 leadership of the military is full bore on
20 requesting funding and making this a priority to
21 fund these counsel. I do not think we're going to
22 get pushback from either the military or the

1 appropriators even in this sequestration
2 environment when they are going to have to make
3 some amazingly difficult decisions as to how we
4 continue to be ready, and have the military
5 strength that all of us take for granted in America
6 in light of the sequestration that, if I had to
7 guess or die right now, if it gets a -- there might
8 be some alleviation, but probably not as much.

9 So that's what's really interesting is
10 that she is proactively limiting funding here in a
11 sequestration environment, and imagine how
12 difficult that's going to be.

13 CHAIRWOMAN JONES: Well, thank you. I
14 didn't understand the distinction.

15 MS. FROST: I just wanted to --

16 COLONEL GREEN: Senator, you made time in
17 your schedule until 12:00. We're past that by a
18 few minutes. I know from your talking to your
19 staff that you -- =

20 SENATOR MCCASKILL: There's nothing more
21 important than this --

22 COLONEL GREEN: -- that you have to go,

1 so --

2 SENATOR MCCASKILL: I'll stay as long as I
3 need to stay.

4 COLONEL GREEN: Okay. Yes, ma'am.

5 MS. FROST: I want to thank you for your
6 support and I think actual understanding of the
7 issues around sexual assault and victim support.
8 And we talked a little bit earlier about the
9 Special Counsel Program. That's a model that my
10 agency has been trying to push since 2002 that
11 every crime victim deserves their own -- we call
12 them victims' rights enforcement because we
13 actually have codified victims' rights that can be
14 enforced at the Federal and state level.

15 I personally think the Special Counsel
16 Program is going to be the game changer in victims'
17 willingness to report, and I base that on their
18 willingness to report. Victims want to feel safe.
19 They want to be believed. They want information.
20 And they want to be supported. And I truly think
21 that trying to simplify, as you said, this issue to
22 the victim versus the commander could be a real

1 problem for victims, thinking that if you take the
2 commander, you're going to see a great increase in
3 reporting rates.

4 But my concern does relate to the
5 resources. I think as you get more and more
6 victims willing to come forward, we're talking a
7 lot of -- about a lot of special counsel resources
8 for these victims. Have you given that --

9 SENATOR MCCASKILL: Well, I want to be
10 very fair here. Her amendment does not limit that
11 because that reform is in -- our reform is in the
12 underlying bill. The Chairman's mark contains that
13 reform, and we have not limited the resources. Her
14 limitation is on finding all these experienced O-6s
15 that are going to quickly move around the world and
16 set up a duplicate system. And it's going to be
17 even more duplicate now because you're going to
18 have serious crimes investigated by both, you're
19 going to have serious cases tried by both, and
20 you're going to have a weird inability to reconcile
21 those two systems. That's where she's saying we
22 can't spend any money.

1 COLONEL HAM: Anybody else?

2 CHAIRWOMAN JONES: Anyone else? Well,
3 thanks again --

4 VICE ADMIRAL (RET.) HOUCK: This is Jim
5 Houck. May I ask one question?

6 CHAIRWOMAN JONES: Hi, Jim. Yes, go
7 ahead.

8 VICE ADMIRAL (RET.) HOUCK: Senator, thank
9 you so much for your time and your attention to
10 this issue. I'm the most recently retired Navy --
11 Judge Advocate General of the Navy.

12 On the Article 32, issue, and I know it's
13 not the centerpiece of the discussion today. But
14 you've shown great patience and great diligence in
15 looking into the details of the commander issue.
16 And we -- on the Article 32 front we heard a panel
17 last week of defense attorneys, and not always the
18 prosecutors' best friend, but defense attorneys,
19 all people who are really conscientiously trying to
20 do their job in the military under the
21 Constitution, who talked about their concerns with
22 changing the Article 32 in a way that it's woven

1 into the fabric of other advantages that the
2 defense does not have in the military.

3 And I just wanted to just put down a small
4 marker now, if I might, too, as you proceed with
5 your Article 32 review that you might consider that
6 perspective as well. And I just wanted to offer
7 that. Thank you.

8 SENATOR MCCASKILL: Well, I'm glad you
9 did, and you should know that we -- before for
10 embracing these reforms, I spent a significant
11 amount of time with both prosecutors and defense
12 lawyers within the JAG from a variety of different
13 services. And I think what we've done is measured.
14 I think it protects the right of confrontation, and
15 I believe it would pass muster in terms of being
16 fair.

17 But I would certainly welcome the
18 opportunity to share the specifics of it with you,
19 this Panel, anyone else. I am always willing to
20 understand more of the details and the complexities
21 of this. It is my touchstone right now. When it
22 is emotionally a little difficult for me, I find

1 comfort that I have, you know, kind of gotten into
2 the weeds and really tried to understand this. And
3 I'm confident of my knowledge of the subject matter
4 because we've worked very hard at it. And I
5 certainly don't want Article 32 to be any
6 different.

7 VICE ADMIRAL (RET.) HOUCK: Well, thank
8 you. And we are -- and I as a Panel member am very
9 grateful for your willingness to get into the weeds
10 on this. And it's important that people do so. We
11 appreciate that. And I just wanted to make that
12 observation. Thank you.

13 SENATOR MCCASKILL: Thank you.

14 CHAIRWOMAN JONES: Thank you again,
15 Senator. And we would be delighted if you could
16 share the details of the proposed legislation on
17 Article 32.

18 SENATOR MCCASKILL: Absolutely.

19 CHAIRWOMAN JONES: I remember hearing
20 about Article 32 and thinking that's terrible, and
21 then I listened to some Panel presenters talk about
22 the discovery needs that it fulfills within the

1 military. So then I arrived at the posture in my
2 head without any real research, well then,
3 obviously maybe we can do[?] something with Article
4 32, but we have to build something else in. So
5 it's a subject of great interest to us.

6 SENATOR MCCASKILL: And I'd be happy to
7 share it. And obviously I will -- it's going in in
8 the Senate. It wasn't in in the House. We can
9 always exceed the differences if there are
10 adjustments that need to be made on it in terms of
11 any input. We have tried -- you know, I accused
12 some of my staff that I'm going to turn the corner
13 and some of them are going to be in uniform they've
14 spent so much time with uniforms over the last 18
15 months.

16 And I will say this. I think it was very
17 unfortunate because I do think that Senator
18 Gillibrand took a public position telling senators
19 not to talk to the military, quoted in a newspaper
20 article you should not talk to -- were telling
21 senators in their offices not to talk to the
22 military because they're just going to protect what

1 they have. And I think that did a huge disservice
2 to hundreds of lawyers in the military that want
3 nothing more than to get this right for victims.

4 So I do think it's important that we
5 continue to stay in touch and work with the
6 military because you know who's going to fix this?
7 The military.

8 CHAIRWOMAN JONES: Thank you so much.

9 SENATOR MCCASKILL: Thank you.

10 COLONEL GREEN: Members on the phone,
11 we're -- if you have a minute, I'm talking to Judge
12 Jones about if she wants to convene everybody back.
13 If you need to leave, I understand. We're past the
14 time. But if you're able to stick around, we'll
15 come back.

16 CHAIRWOMAN JONES: Why don't you ask who
17 can stay on?

18 COLONEL GREEN: The Judge asked of the
19 four of you on the phone, can each of you stay? Do
20 any of you need to leave?

21 PROFESSOR CORN: This is Professor Corn,
22 Judge. I have a call with the Red Cross in Geneva

1 in about 10 minutes, so I'm going to have to sign
2 off.

3 CHAIRWOMAN JONES: Yeah, understood. I
4 don't think we've built in the time, and I know
5 you've all committed to the time that we did
6 suggest. We're actually --

7 PROFESSOR CORN: But I do want to say I
8 thought that the witnesses today were just
9 phenomenal. Thank you very much.

10 VICE ADMIRAL (RET.) HOUCK: This is Jim.
11 I'm sorry -- this is Jim. I've got an appointment
12 at 12:30.

13 CHAIRWOMAN JONES: Understood.

14 MS. FROST: I'm sorry, I've got an
15 appointment.

16 CHAIRWOMAN JONES: All right. I think --

17 PROFESSOR HILLMAN: I have a 12 --

18 CHAIRWOMAN JONES: Yeah. I think there
19 will come a point where we can discuss a lot of
20 this, and I'm sorry it can't be this morning. But
21 I think we specifically knew this morning --

22 (Whereupon, at 12:17 p.m., the meeting was

1 concluded.)

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